

Bata Alias Batakrushna Behera and ors. Vs. Anama Behera

Bata Alias Batakrushna Behera and ors. Vs. Anama Behera

SooperKanoon Citation : sooperkanoon.com/531047

Court : Orissa

Decided On : Nov-30-1989

Reported in : 1990CriLJ1110

Judge : J. Das, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 202, 202(2), 292 and 482;
;Indian Penal Code (IPC) - Sections 436

Appeal No. : Criminal Misc. Case No. 96 of 1989

Appellant : Bata Alias Batakrushna Behera and ors.

Respondent : Anama Behera

Advocate for Pet/Ap. : R. Biswal, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

J. Das, J.

1. This is a petition under Section 482, Cr. P. C.

2. It appears that after examining the witnesses under Section 292, Cr. P.C. Sri G. N. Patra, Judicial Magistrate First Class (R), Cuttack passed the impugned order

on 15-7-1987 taking cognizance under Section 436, IPC against the petitioners. In order to quash this order, the present petition under Section 482, Cr. P.C. has been filed.

3. The opposite party Anama Behera filed a complaint petition on 24-5-1986. The lower Court directed the complainant to produce his witnesses for enquiry under Section 202 Cr. P.C. In an enquiry under Section 202 Cr. P.C. the complainant examined himself and he also examined two witnesses namely, Kailash Behera and Pari Behera, who are named in the complaint petition as witnesses. One Jogi Behera, who is also named as eye witness in the complaint petition was not examined. On perusal of the complaint petition and the statements of the witnesses the lower Court was satisfied that there is a prima facie case under Section 436, IPC and hence it took cognizance under Section 436, IPC against the petitioners on 15-7-87. The accused persons appeared on 8-12-87 and they were remanded to jail custody as their bail petition was rejected. Subsequently, they were released on bail on the strength of the order passed by the Sessions Judge. The lower Court took steps to commit the case to the Court of Sessions. It is found that on each date the accused persons remained absent and they were represented through their lawyer. The lower court directed again and again to produce the accused persons, but the accused persons did not appear and they were represented through their advocate and hence there was delay in commitment. On 15-12-88, the lower Court passed an order directing the representing lawyer to produce the accused persons on the next date and it was also made clear that in case of absence of the accused persons their representation would not be allowed. In spite of such a direction, the accused persons did not remain present on 23-12-88 and the representing lawyer again filed a petition for representation of the accused person. The lower Court gave a time as last chance to produce the accused persons and adjourned the case to 4-1-89. On 4-1-89 also the accused persons did not appear and taking into consideration the past conduct of the accused persons the lower Court passed order to issue N. B. against the accused persons. After this order was passed the petition under Section 482 Cr. P.C. was filed on 1-2-89.

4. The learned advocate for the petitioners Mr. Biswal argued that the order dated 15-7-87 taking cognizance under Section 436 IPC is vitiated, as the offence is triable exclusively by the Court of Sessions and the lower Court has not examined all the witnesses named in the complaint petition.

5. The proviso to Sub-section (2) of Section 202 Cr. P.C. obligates the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session.

There is a conflict of judicial opinion as regards the proviso to Sub-section (2) of Section 202, Cr. P.C. One view is that the proviso to Sub-section (2) has to be read as a proviso to the whole of Section 202 and accordingly the proviso mandatorily enjoins that a Magistrate taking cognizance will inquire into the case and while doing so must call upon the complainant to produce all his witnesses and examine them on oath. This is the majority view, as most of the High Courts have taken this view. The Orissa High Court has also taken this view in various decisions. As this is an established principle of law as per the various decisions of the Orissa High Court, I do not think it necessary to discuss the other view which is the minority view.

6. Although in various decisions, the Orissa High Court has taken a view that as per proviso to Sub-section (2), it is obligatory for the Magistrate to call upon the complainant to produce all his witnesses and examine them on oath here it appears to the Magistrate that the offence complained of is exclusively triable by the Court of Sessions there is nothing in the decisions of the Orissa High Court to support the contention advanced by Mr. Biswal that the Magistrate must examine all the witnesses named in the complaint petition.

All that the Magistrate is required to do as per the proviso to Sub-section (2) of Section 202 is to call upon the complainant to produce all his witnesses and examine them on oath. There is nothing in the proviso to the effect that if the complainant does not choose to examine some witnesses named in the complaint petition, the Magistrate will himself summon those witnesses and examine them on oath.

7. In a decision reported in 1981 Cri LJ 838 (Vijay Kumar v. State of Haryana), it has been observed by the Punjab High Court that when the complainant is satisfied with the examination of some of the witnesses, it is not incumbent on the committing Magistrate, to record the evidence of remaining witnesses. In a decision reported in 1977 Cri LJ 1473 (Musara Narayana Reddy v. Kanakanti Mal Reddy), it has been observed by the High Court of Andhra Pradesh that if. the complainant fails to produce some of the witnesses, it will not vitiate the order of the Magistrate taking cognizance of the offence.

In view of the above decisions, it is clear that is some of the witnesses named in the complaint petition are not examined and cognizance is taken of the offence on the basis of the statements of the witnesses produced by the complainant and examined by the Court, the order of the Magistrate taking cognizance of the offence is not vitiated. Hence, the contention of Mr. Biswal cannot be sustained.

8. The cognizance was taken on 15-7-87. Soon after taking cognizance the order dated 15-7-87 taking cognizance was not challenged. The application under Section 482, Cr. P.C. was filed on 1-2-89 i.e. after about one year and six months after the impugned order was passed. It is found from the L.C.R. that the accused persons played hide and seek with the court and they did not appear in the court in spite of clear direction of the lower Court. Thus, the accused persons have challenged the impugned order at a very belated stage and only after creating a lot of impediments in the progress of the case.

Of course for an application under Section 482 Cr. P.C. there is no limitation. I am of the view that when there is no limitation for filing an application, the application should be filed within a reasonable time. A revision petition challenging an order can be filed within 90 days from the date of the order. An application under Section 482, Cr. P.C. should also be filed within a reasonable time, so that the progress of the case is not disturbed at a belated stage. I am of the view that period of 90 days which is at par with a revision petition should be treated as reasonable and if any application under Section 482, Cr. P.C. is filed beyond the period of 90 days, the petitioner should explain the cause of the delay.

9. In the circumstances discussed above, there is no merit in the Criminal Misc. case and the same is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com