

The State Vs. Kastu Behera

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Court : Orissa

Decided On : Mar-06-1975

Reported in : 1975CriLJ1178

Judge : R.N. Misra, J.

Appellant : The State

Respondent : Kastu Behera

Judgement :

ORDER

R.N. Misra, J.

1. This is a reference made by the learned Sessions Judge of Cuttack for quashing the order of commitment dated 17-9-1974 passed by the learned Sub-divisional Judicial Magistrate, Talcher and for a direction to the learned Magistrate to comply with the requirements of the proviso to Sub-section (2) of Section 202 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code').

2. On 18-5-1974, one Sudam Behera filed a complaint before the learned Sub-Divisional Judicial Magistrate at Talcher. The learned Magistrate proceeded to examine the complainant and was satisfied that the allegations revealed a case punishable under Section 436 of the Indian Penal Code which was triable exclusively by the court of session. He directed notice to issue to the accused and

required the police to produce the F. I. R. given at the police station. On 17-9-1974, he recorded the following order:

Complainant is present, Accused appears. He files Vakalatnama in favour of Shri D. P. Rath, Advocate. Petition filed by the defence Counsel regarding bail is heard. Let him be released on bail of Rs. 2,000/- with a surety for the like amount. Call on 8-10-1974 for appearance in the court of session as it is exclusively triable by that court....

On 4-10-1974, the commitment proceedings were received by the learned Sessions Judge. On 8-10-1974, the accused appeared. On 16-10-1974, the order of commitment was challenged on the ground that the proviso to Section 202(2) of the Code had not been complied with by the committing Magistrate. The matter was further argued and ultimately has resulted in this reference.

3. Section 202 of the Code, as far as material, provides:

Postponement of issue of process:

(1) Any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognisance or which has been made over to him under Section, 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,-

(a) where it 'appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

(2) In an inquiry under Sub-section (1), the Magistrate may, if he, thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.(3)

Under Chapter XV of the Code, complaints to Magistrate are dealt with Section 200 deals with examination of the complainant. After the complainant and his witnesses if any, are examined, four courses are open to the Magistrate:

(i) If he finds that he is not competent to take cognisance of the offence which in his opinion has been made out, he will take action under Section 201 of the Code returning the written complaint for presentation in the proper court or if it is an oral complaint direct the complainant to the proper court;

(ii) He may postpone the issue of process and decide whether or not there is sufficient ground for proceeding as provided under Section 202 of the Code:

(iii) He may dismiss the complaint of after considering the statements on oath of the complainant and his witnesses is also the result of inquiry or investigation he is of the view that there is no sufficient ground for proceeding as provided under Section 203 of the Code; or

(iv) He may direct issue of process where he is of the opinion that cognizance should be taken of the offence as there is sufficient ground for proceeding as provided under Section 204 of the Code.

Under Section 202 of the Code, the Magistrate can postpone the issue of process and direct an inquiry or an investigation. When it is an inquiry, it is by himself and when it is an investigation, it is either by a police officer or such other person as he thinks fit. The first part of the proviso to Sub-section (1) forbids the Magistrate not to direct any investigation when the offence complained against appears to him to be triable exclusively by the Court of Session. Under Sub-section (2), in an inquiry, he is entitled to record evidence of witnesses on oath if he thinks fit. The proviso under Sub-section (2) requires the Magistrate to call upon the complainant to produce his witnesses and examine them on oath where it appears to him that the offence complained is triable exclusively by the Court of Session. The first part of

the proviso to Sub-section (1) of Section 202 makes it clear, therefore, that once it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he is not required to direct investigation. But when it appears to him in an inquiry under Sub-section (1) that the case is exclusively triable by the Court of Session, he is required to examine the evidence of the complainant on oath. The proviso is pitted against the parent provision in Sub-section (2). The option of examining the witnesses on oath which the statute confers under the parent Sub-section (2) in the case of an inquiry is taken away when the offence appears to be exclusively triable by the Court of Session.

4. Under Section 209 of the Code, the procedure for commitment when the offence is triable exclusively by the Court of Session has been provided. NO mandate is given to the Magistrate to examine the prosecution witnesses at that stage. In fact, the existing procedure under the old code has been done away with and committal inquiry has now been omitted. Section 209 covers cases instituted on a police report as also otherwise. Therefore, it could not have been the intention of Parliament to require the entire prosecution evidence to be examined by the Magistrate in an inquiry under Section 202(1) of the Code, when under Section 209, an order of commitment is required to be made without such evidence being examined. The true purpose of the proviso to Section 202(2) of the Code, therefore, seems to be that where the Magistrate directs an inquiry to be made under Sub-section (1) thereof and in the inquiry it appears to him that the offence complained of is triable exclusively by the Court of Session, he will examine the witnesses for the complainant on oath. Undoubtedly, the language of the proviso creates some amount of difficulty, but keeping the purpose of Section 202 of the Code in view and juxtaposing the provisions contained in this proviso with Section 209 of the Code which deals with commitment, a different view cannot be taken.

5. In the instant case, the learned Magistrate never required an inquiry to be made. Therefore, the question of complying with the proviso to Sub-section (2) of Section 202 of the Code never arose. This aspect of the matter seems to have been lost sight of while making this reference. I would accordingly discharge the reference. The records be returned.

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