A MINU KUMARI AND ANR.

v.

STATE OF BIHAR AND ORS.

APRIL 12, 2006

B [ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Code of Criminal Procedure, 1973—Sections 173(2), 190(1)(b), 362 and 482—Cognizance of offence—Summons issued by Magistrate to persons named in FIR against whom police finding no involvement in crime, did not C *submit charge sheet—On an application of such persons that their names were included in summoning order due to clerical error, Magistrate ordered striking of their names from that order—District and Sessions Judge set aside this order on the ground that Magistrate did not have power to recall or review his order, and High Court upholding this view in a petition under* D *Section 482 of the Code—Correctness of—It was not a case where Magistrate disagreed with view of investigating agency and therefore ordered issuance of summons, but was case of was a mistake—As Magistrate did not proceed against some of the persons named in the FIR, issuance of notice to informant thereof was mandatory, and its non-issuance prejudiced the informant—As* E *correct procedure was not followed, High Court should have allowed the petition under Section 482 of the Code—Issuance of summons to aforementioned persons was bad and their names ordered to be struck from the array of accused persons.*

Code of Criminal Procedure, 1973—Section 482—Inherent power of F *Court—Nature and exercise of Discussed.*

Maxim **quando lex aliquid alicui concedit, concedre videtur et id sine quo res ipsae esse non protest,** *applicability of.*

Words and phrases—'Charge sheet' or 'final report'—Meaning of—In G *the context of Sections 169 and 173 of Code of Criminal Procedure, 1973.*

In an investigation pursuant to a First Information Report (FIR), police found that appellants were not involved in the crime and submitted charge sheet only against other accused. However, Chief Judicial Magistrate (CJM) who took cognizance of offence, directed issuance of summons against

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appellants also. Appellants filed a petition against this before CJM praying that summons were issued to them due to clerical error. On this petition, CJM ordered striking of names of appellants from order whereby summons were issued. However, Additional District and Sessions Judge set aside this order on the ground that CJM did not have any power to recall or review his order. Appellants challenged this in a petition to High Court under Section 482 of Code of Criminal Procedure, 1973 which came to be dismissed on the ground that the subordinate court could not have recalled its own order under Section 362 of the Code on the pretext that there was correction of clerical and arithmetical errors. Hence the present appeal.

Appellant contended that even if it is conceded that the CJM Court could not have recalled or reviewed its order, on the facts of the case the High Court should have exercised power under Section 482 of the Code.

Allowing the appeal, the Court

HELD: 1. When a report forwarded by the police to the Magistrate under Section 169 Cr.P.C. states that no offence has been committed and is placed before the Magistrate, he has option of adopting one of the three courses (1) he may accept the report and drop the proceeding; or (2) he may disagree with report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). [1090-G; 1091-A]

Abhinandan Jha and Anr. v. *Dinesh Mishra,* AIR (1968) SC 117 and *M/s. India Carat Pvt. Ltd. v. State of Karnataka and Anr.,* AIR (1969) 885 referred to.

2. Where the Magistrate takes a view that there is material for proceeding against some and there is insufficient ground in respect of others, the informant would certainly be prejudiced as First Information Report lodged becomes wholly or partially ineffective. In such a case, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory, though there is no provision in the Code for issue of a notice in this regard. [1091-E, F]

Bhagwant Singh v. *Commr. of Police,* [1985] 2 SCC 537, relied on.

3.1. Section 362 of the Code permits correction of clerical or arithmetical errors. But High Court seems to have completely lost sight of

A **the scope and ambit of Section 482 of the Code. [1093-A]**

3.2. High Court was not justified in rejecting the application in terms of Section 482 of the Code. This is a case when the cognizance was taken, summons were issued by mistake and the names of the appellants were also mentioned in the order directing issuance of summons. Since the police have
B **not found any material against the appellants, the CJM without following the procedure as indicated above could not have directed issuance so far as they are concerned. There was no indication that the CJM disagreed with the opinion of the investigation agency and therefore ordered issuance of summons. On the contrary, as noted by CJM, later was a mistake and,**
C **therefore, he had ordered to strike of the names of the appellants. The names of appellants shall be struck off from the array of the accused person.**

[1094-C, D, E]

All India Institute of Medical Science Employees' Union (Reg.) through its President **v.** *Union of India and Ors.,* **[1996] 11 SCC 582;** *Gangadhar Janardhan and Ors.,* **[2004] 7 SCC 768;** *Janata Dal* **v.** *H.S. Chowdhary* **[1992]**
D **4 SCC 305 and** *Raghubir Singh (Dr.)* **v.** *State of Bihar,* **AIR (1964) SC 1, referred to.**

CRIMINAL ORIGINAL JURISDICTION : Criminal Appeal No. 420 of 2006.

E From the Judgment and Order dated 2.7.2003 of the High Court Judicature at Patna in Cr. Misc. No. 28444 of 2000.

J.N. Dubey, Anurag Dubey, Gaurav Jain, Pramod Kumar and S.R. Setia for the Appellants.

Gopal Singh for the Respondents.

F The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Leave granted.

Challenge in this appeal is to the legality of order passed by a learned Single Judge of the Patna High Court rejecting the petition filed by the
G appellants in terms of Section 482 of the Code of Criminal Procedure, 1973 (in short the 'Code').

Factual position in essence is as follows:

On the written report of informant Dhrup Narain Dubey, father of respondents 2 and 3 case for alleged commission of offences punishable
H under Sections 341, 323 and 435 read with Section 34 of the Indian Penal

Code, 1860 (in short the 'IPC') was registered vide Raghunath Pur P.S. case No.7/99 dated 20.8.1999. It was alleged that accused persons named in the FIR assaulted the informant and others. However, the police after investigation submitted charge sheet wherein three of the ladies accused were found to be not involved in the case. The police submitted charge sheet only against Harendra Dubey and Sheo Kumar Dubey. The charge sheet was placed before the learned Chief Judicial Magistrate (in short the 'CJM') who by his order dated 15.2.1999 took cognizance of the offence and directed issuance of processes against accused Sheo Kumar Dubey, Harendra Dubey, and appellants Minu Kumari and Runjhun Kumari on the ground that there is a prima facie case against them for the offences punishable u/s 341, 323 and 435 read with Section 34 IPC. The learned CJM also ordered for issuance of summons and made over the case to the court of Judicial Magistrate, 1st Class for favour of disposal.

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However, on behalf of appellants Minu Kumari and Runjhun Kumari a petition was filed before the Court of learned CJM praying therein that due to clerical error the names of the appellants have also been mentioned in the order dated 15.2.1999 and cognizance was also taken and issuance of summons was also ordered so far as they are concerned. The learned CJM on the above petition got a miscellaneous case No.37/99 registered and by order dated 5.5.1999 he called for the record from the court of the Magistrate, where the Trial No.795/1999 was pending. The learned CJM heard learned counsel for the appellants and ordered to strike of their names.

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The order passed by learned CJM was assailed before learned First Additional District and Sessions Judge, Siwan who set aside the order holding that the learned CJM did not have any power, muchless inherent power to recall or review his order. With reference to Section 362 of the Code it was held that the Court is not empowered to alter the judgment save as otherwise provided by the Code or by any other law for the time being in force. It was further held that the order passed by learned CJM amounted to review. Accordingly, the order passed by learned CJM was set aside.

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Appellants questioned correctness of the order by filing a petition under Section 482 of the Code which came to be dismissed on the ground that the Subordinate Court could not have recalled its own order under Section 362 of the Code on the pretext that there was correction of clerical and arithmetical errors.

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A In support of the appeal, learned counsel for the appellants submitted that approach of the High Court is clearly erroneous. Even if it is conceded for the sake of argument that the Subordinate Court could not have recalled or review its order, on the facts of the case the High Court should have exercised power under Section 482 of the Code.

B In spite of service of notice respondents 2 and 3 have not entered appearance.

Learned counsel for the State of Bihar submitted that technically the learned 1st Additional District and Sessions Judge was correct. But the High Court should have exercised power under Section 482 of the Code.

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In *Abhinandan Jha and Anr.* v. *Dinesh Mishra,* AIR (1968) SC 117, this Court while considering the provisions of Sections 156(3), 169, 178 and 190 of the Code held that there is no power, expressly or impliedly conferred, under the Code, on a Magistrate to call upon the police to submit a charge D sheet, when they have sent a report under Section 169 of the Code, that there is no case made out for sending up an accused for trial. The functions of the Magistracy and the police are entirely different, and the Magistrate cannot impinge upon the jurisdiction of the police, by compelling them to change their opinion so as to accord with his view. However, he is not deprived of the power to proceed with the matter. There is no obligation on the Magistrate E to accept the report if he does not agree with the opinion formed by the police. The power to take cognizance notwithstanding formation of the opinion by the police which is the final stage in the investigation has been provided for in Section 190(1)(c).

When a report forwarded by the police to the Magistrate under Section F 173(2)(i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation G under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he has again option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for

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further proceeding, take congnizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well-settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. [See *M/s. India Carat Pvt. Ltd.* v. *State of Karnataka and Anr.*, AIR (1989) SC 885].

The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceeding or takes the view that there is material for proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the First Information Report lodged becomes wholly or partially ineffective. This Court in *Bhagwant Singh* v. *Commnr. of Police,* [1985] 2 SCC 537 held that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. As indicated above, there is no provision in the Code for issue of a notice in that regard.

We may add here that the expressions 'charge-sheet' or 'final report' are not used in the Code, but it is understood in Police Manuals of several States containing the Rules and the Regulations to be a report by the police filed under Section 170 of the Code, described as a "charge-sheet". In case of reports sent under Section 169, i.e., where there is no sufficiency of

A evidence to justify forwarding of a case to a Magistrate, it is termed variously i.e., referred charge, final report or summary. Section 173 in terms does not refer to any notice to be given to raise any protest to the report submitted by the police. Though the notice issued under some of the Police Manuals states it to be a notice under Section 173 of the Code, though there is nothing in Section 173 specifically providing for such a notice.

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As decided by this Court in *Bhagwant Singh's* case (supra), the Magistrate has to give the notice to the informant and provide an opportunity to be heard at the time of consideration of the report. It was noted as follows:-

> "....the Magistrate must give notice to the informant and provide
C him an opportunity to be heard at the time of consideration of the report..."

Therefore, the stress is on the issue of notice by the Magistrate at the time of consideration of the report. If the informant is not aware as to when the matter is to be considered, obviously, he cannot be faulted, even if protest
D petition in reply to the notice issued by the police has been filed belatedly. But as indicated in *Bhagwant Singh's* case (supra) the right is conferred on the informant and none else.

When the information is laid with the Police, but no action in that behalf is taken, the complainant is given power under Section 190 read with Section
E 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a *prima facie* case, instead of issuing process to the accused, he is empowered to direct the police concerned
F to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded *prima facie* discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted
G by this Court in *All India Institute of Medical Sciences Employees' Union (Reg.) through its President* v. *Union of India and Ors.*, [1996] 11 SCC 582. It was specifically observed that a writ petition in such cases is not to be entertained.

The above position was highlighted in *Gangadhar Janardan Mhatre*
H v. *State of Maharashtra and Ors.*, (2004) 7 SC 768.

Section 362 of the Code, as noted above, permits correctness of clerical or arithmetical errors. There is no quarrel with that proposition. But the High Court seems to have completely lost sight of the scope and ambit of Section 482 of the Code.

The Section does not confer any new power on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "*quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest*" (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice.

As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in

A exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a *prima facie* decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and B cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. (See: *Janata Dal* v. *H. S. Chowdhary,* [1992] 4 SCC 305, and *Raghubir Saran (Dr.)* v. *State of Bihar,* AIR (1964) SC 1).

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When the factual scenario is considered in the background of legal principle set out above, the inevitable conclusion is that the High Court was not justified in rejecting the application in terms of Section 482 of the Code. This is a case when the cognizance was taken, summons were issued by mistake and the names of the appellants were also mentioned in the order D dated 15.2.1999. Since the police have not found any material against the appellants, the learned CJM without following the procedure as indicated above could not have directed issuance of summons so far as they are concerned. There was no indication that learned CJM disagreed with the opinion of the investigating agency and therefore ordered issuance of summons. E On the contrary, as noted by learned CJM later that was a mistake and, therefore, he had ordered to strike of the names of the appellants. The High Court's order is set aside. The names of the appellants shall be struck of from the array of accused persons.

The appeal is allowed.

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V.S. Appeal allowed.