(2012) 09 KAR CK 0293

In the Karnataka High Court

Case No : Criminal Revision Petition No. 2230 of 2012

Ashok APPELLANT

Vs

Vasudev Hanji and Others RESPONDENT

Date of Decision : 28-09-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 207, 224, 227
Penal Code, 1860 (IPC) — Section 34, 418, 464, 465, 471

Citation : (2013) 1 AKR 95

Hon'ble Judges : Jawad Rahim, J

Bench : Single Bench

Advocate : Ravi B. Naik, for V.M. Sheelvant, for the Appellant;

Judgement

Jawad Rahim, J.—Petitioner, who is arraigned for offences punishable under Sections 418, 464, 465 and 471 read with Section 34 of the Indian Penal Code along with others, through a private complaint in Private Complaint No. 344/2005, which is now converted into Criminal Case No. 480/2005, has questioned the order dated 17.09.2012, rejecting his application filed u/s 227 of the Code of Criminal Procedure and certain observations made in the course of the order. Before adverting to the contentions raised by the learned counsel Shri Ravi B. Naik, a reference to factual matrix would show; Vasudev claiming to be an Engineering Graduate in Mechanical Engineering, presented the complaint u/s 200 of the Code of Criminal Procedure against the 1st petitioner - Ashok and two others alleging they were good friends. Being qualified Engineers, they embarked on joint venture befitting specialisation in the year 1973 and established a concern under the name of M/s. Ashok Iron and Steels at Udayam Bhag, Belgaum. It was a partnership promoted by the family of accused No. 1 with 75% of shares. He headed the firm and the family of the complainant was assigned 25% of shares represented by the complainant. In 1976, the complainant and the accused No. 1 ventured into another partnership Firm, M/s. Jai Hind Engineering at Udayam Bhag, Belgaum, with the same percentage of shares of profit. The Firm was later converted into Private Limited Company in the year 1982, allotting the shares in the same proportion and in 1999, the 1st accused gained full control over the management of the said Private Limited Company. Having assumed the charge of the management of the said Company, insisted the complainant for conversion of those three Partnership Firms into three Private Limited Companies and then sought for merger.

2. The complainant alleged that on 24.03.2004, the General Manager of Finance of M/s. Ashok Iron Works Private Limited, forwarded a draft of Memorandum of Understanding drafted by accused No. 3 for approval of the complainant without any consideration. The 1st accused in collusion with accused No. 3 without the knowledge of the complainant had created such a document. When the complainant refused to sign the Memorandum of Understanding, the relationship was strained. To put an end to the dispute, complainant agreed for settlement through arbitration by accused Nos. 2 and 3, who are Chartered Accountant and Legal Advisor respectively. In pursuance to the consent accorded by the complainant to arbitration, agreements were drafted on 18.08.2004 and forwarded it to accused Nos. 2 and 3 duly signed by the complainant and accused No. 1. He has narrated certain circumstances, in which he submitted to arbitration. His main grievance is, accused Nos. 2 and 3 in connivance with accused No. 1 have deliberately manipulated with the date of arbitration proceedings and thereby tampered the records. It is further alleged that accused Nos. 2 and 3 in the guise of arbitrating, favoured only accused No. 1 and conducted proceedings in a biased manner. He expressed displeasure, which was of no avail. The main grievance is that the documents of Memorandum of Understanding, the arbitration agreement and the notices are all tampered, consequent to which, his legitimate right is affected. The manipulation of dates in arbitration agreement and the proceedings is said to be result of criminality in their conduct to cheat him and thus, invoked Sections 464 and 467 read with Section 34 of the Indian Penal Code, also invoked provision of Sections 468 and 471 of the Indian Penal Code against accused Nos. 2 and 3. The complaint was received by the learned Judicial Magistrate and after taking cognizance, sworn statement was recorded and process was issued to the accused. The accused entered appearance and resisted the prosecution.

3. Meanwhile, the parties were in civil action. The orders passed by the arbitrators in Arbitration Case No. 01/2005 was assailed in M.F.A. No. 2395/2009 and it appears Miscellaneous First Appeal is filed by accused Nos. 1 and 2 was disposed of on merits by this Court dismissing it, with liberty to initiate proceedings in an alternate forum. Thus, apart from this parallel proceeding, the accused filed an application u/s 227 of the Code of Criminal Procedure before the learned Judicial Magistrate, seeking discharge. The application is opposed by the complainant resulting in passing of the impugned orders. The learned Trial Judge has dismissed the application being of the opinion that the case was at the stage of recording of evidence, under the provisions of Section 244 of the Code of Criminal Procedure and as the process of completion of the evidence was not over, request for discharge is premature. Secondly, it is held that there is

sufficient material on record to show that the charges are not groundless. Consequently, the application u/s 227 of the Code of Criminal Procedure is rejected, assailing which this revision is filed.

4. At the outset, it needs to be observed that initiation of prosecution being u/s 200 of the Code of Criminal Procedure for offences triable exclusively by the Judicial Magistrate First Class, the provision of Section 227 of the Code of Criminal Procedure, which is applicable before a Sessions Court, was not applicable. The accused had invoked incorrect provision to seek discharge. Second thing undisputedly on record is that after summoning of the accused, the Magistrate has undoubtedly followed the procedure prescribed u/s 244 of the Code of Criminal Procedure and called upon the prosecution (complainant) to produce "all evidence" and recorded the same. By this exercise the Magistrate is required under law to summon witnesses, if such request is made and secure documents as if it is requested. Upon recording of such evidence, the Magistrate would have to resort to provision of Section 245 of the Code of Criminal Procedure. This is because offences alleged are all triable like warrant case and summary trial was not applicable. The accused have made an application at a stage when the process of recording evidence before charge u/s 244 of the Code of Criminal Procedure is in progress. The learned Magistrate has noticed this fact and has observed that process of recording evidence is not complete.

5. So to this extent, findings of the learned Magistrate cannot be faulted with nor the observation that the request was premature, but the grievance of petitioner is that while referring to such fact situation, the learned Magistrate observed thus:--

The accused can also be discharged at prior stage if the Court considers that charge is groundless. However, for the reasons stated above it cannot be said that a groundless charge has been made out by the complainant and as already stated above there are sufficient materials on record proceeded against them at this stage.

6. They submit it indicates the Magistrate has formed an opinion that there is sufficiency of material that the charge raised is not groundless and the material placed is sufficient. The accused justifiably feels aggrieved by observation, as it would show the learned. Magistrate has already formed an opinion about the material being sufficient to proceed to frame charge or it may show prejudging of the issue before the entire evidence is complete.

7. The second aspect is whether provision of Section 239 of the Code of Criminal Procedure is applicable. Provision of Section 239 of the Code of Criminal Procedure is not applicable, as it applies to cases instituted on a police report and not on Private Complaint.

8. In the circumstances, while I find no ground in this petition to quash the proceedings, I am satisfied that the request made by the accused u/s 227 of the Code of Criminal Procedure seeking discharge was not a right course and the

request of the accused for seeking discharge at a stage when the recording of evidence before the charge was in progress, is premature.

9. As we could see from the conspectus of the provision of Sections 244, 245, 246 and Sections 207 and 173 of the Code of Criminal Procedure, if it is a prosecution based on the Police report, the investigation which has commenced on a report submitted u/s 154 of the Code of Criminal Procedure may result in filing of the final report u/s 173 of the Code of Criminal Procedure.

10. During this period, no interference of any Court is called for. Investigating Officer has full power for investigation. Only when he files the report u/s 173 of the Code of Criminal Procedure, the Court would take cognizance, but the accused has to be furnished the entire materials so compiled u/s 207 of the Code of Criminal Procedure. This is lacking when the prosecution is initiated on a private complaint. This is because the complaint filed u/s 200 of the Code of Criminal Procedure may be in writing or oral. If it is an oral complaint, the Magistrate would reduce it in writing and take cognizance and follow the next stages prescribed under Sections 201, 203, 204. If the Magistrate refers it for investigation to the Jurisdictional Police Officer u/s 202 of the Code of Criminal Procedure, he will await the report and examine it in the light of sworn statement of the complainant and then form an opinion whether the material is insufficient, dismiss the complaint. In case otherwise, if he is satisfied that material is sufficient, issues process u/s 204 of the Code of Criminal Procedure. During all these stages, securing presence of the accused is not compulsory. But after issuance of process u/s 204 of the Code of Criminal Procedure, when the accused appears compulsorily or mandatorily, the Magistrate is required to call upon the complainant to produce all the evidence and record the same as per Section 244 of the Code of Criminal Procedure. This process is similar to the process of investigation. The complaint to Police is covered by Sections 154 to 173 what the Magistrate would do is conduct "inquiry" to ascertain what the material the complainant has.

11. It is for this reason Section 244 of the Code of Criminal Procedure requires the prosecution (complainant) to produce all evidence. Even after recording such evidence, Magistrate would not frame charge unless he is of the opinion that the material if remains unrebutted would lead to conviction. Therefore, during recording of evidence u/s 244 of the Code of Criminal Procedure, the accused has no role to play. The accused is not obliged to cross-examine the witnesses, because that stage is covered by Section 246. In this view, all that could be said is, the request made by the petitioner - accused seeking discharge, may be by invoking wrong provision of Sections 227 and 239 of the Code of Criminal Procedure or even otherwise was premature. He will certainly have a right to seek discharge when the Magistrate completes recording the evidence and proceeds to next stage i.e., Section 245 of the Code of Criminal Procedure.

12. In the circumstances, all that could be said is, though the learned Trial Judge has rejected the application on the basis that recording evidence u/s 244 of the

Code of Criminal Procedure is in progress, the observation of the learned Trial Judge that there is sufficient material, is incorrect. To that extent the observation in order is set aside. Liberty is reserved to the accused to seek discharge at an appropriate stage.