

(2012) 08 BOM CK 0208

In the Bombay High Court

Case No : Criminal Writ Petition No. 610 of 2010

Dattaprabhu Joshi

APPELLANT

Vs

The State of Maharashtra and Ramdas Raut

RESPONDENT

Date of Decision : 21-08-2012

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 156(1), 169, 170, 173, 173(2)
Penal Code, 1860 (IPC) — Section 294, 509
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(1)(x), 3(1)(xi)

Citation : (2013) BomCR(Cri) 37

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : V.M. Deshpande, for the Appellant; S.S. Doifode, APP and Mr. A. Sambre, Advocate, for the Respondent

Judgement

T.V. Nalawade, J.—Heard. Rule. By consent of the parties, the matter is heard for final disposal. Such order was made in the past. This petition is filed under Article 227 of the Constitution of India and also u/s 482 of Cr.P.C.. The proceeding is filed for the relief of quashing and setting aside the order made by the Judicial Magistrate, First Class, Yavatmal in Criminal Case No. 564/2007. The Judicial Magistrate, First Class, Yavatmal has taken cognizance of the offences punishable u/s 294 of the Indian Penal Code and Section 3(1) (x) and 3(1) (xi) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The order made by the Magistrate is confirmed by the Sessions Court in Revision No. 92/2007.

2. The respondent No. 2 is an Advocate. His cousin sister Smt. Madhuri Walke has been working as Jr. Clerk in the Office of the Deputy Conservator of Forest, Yavatmal. She was transferred from one section to other section on 27.11.2006. She approached to the superior officer like Conservator of Forest and also the Minister of the Department for getting cancelled the order. The order was,

however, not cancelled. One Shri Uttam Rathod was her superior officer having power to make such transfer order. The present petitioner was working as accountant in the section of Smt. Walke. On the basis of the recommendations made by the petitioner, she was transferred from one section to other. There was allegation of misconduct, suppression of file with an ulterior motive.

3. The allegations are made in the complaint that on 29.12.2006 after 7.00 p.m. near the house of the complainant the incident took place. There was vegetable market near the house of the complainant. The allegations are made that the petitioner came there and he gave abuses by taking the name of the caste of the complainant which is Scheduled Caste. The allegations are made that the abuses were also given in filthy language. This incident was allegedly witnessed by three persons like Suresh, Subhash and Vikas, the neighbours of the complainant. A Crime No. 3009 / 2007 was registered in Vadgaon Road Police Station, Yavatmal for the aforesaid offences. One Sub Divisional Officer made investigation of the case and he filed "B Summary" report, report to the effect that false complaint was made by respondent No. 2 and there was no case to proceed against the petitioner and also aforesaid Mr. Rathod. The Judicial Magistrate, First Class, Yavatmal did not accept this report and issued process against both the petitioner and said Mr. Rathod for the aforesaid offences after taking cognizance of the offences. In the Revision, the order made as against Shri Rathod came to be set aside.

4. In the present proceedings, both sides are heard.

5. It was submitted for the petitioner that no reasons are given by the Judicial Magistrate, First Class, Yavatmal for not accepting the report submitted by the superior officer like Sub Divisional Officer and material collected by the Investigating Officer, which supports the opinion formed by the Investigating Officer.

6. The other side submitted that the Judicial Magistrate, First Class has power not to accept the opinion and the Judicial Magistrate, First Class can take cognizance of the offences on the basis of the material collected by the Investigating Officer.

7. In view of the points involved in the present matter, it is desirable to go through some relevant provisions of the Code of Criminal Procedure. The provisions of section 156(1) and (2) of Cr.P.C. show that the statutory power is given to the Officer Incharge of the Police Station to investigate cognizable case. The said power is there to empower Officer under the provisions of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act and for the purpose of this Act, the Sub Divisional Officer is appointed as the Officer competent to make investigation. Sections 169, 170, 173 of Cr.P.C. need to be read together. Section 169 read with 173 of Cr.P.C. shows that if upon investigation done under the provisions of Chapter XII of Cr.P.C., it appears to the Officer Incharge of Police Station that there is no sufficient evidence or

reasonable ground of suspicion to justify the forwarding of the accused to the Magistrate, he can release such person after taking bond for his appearance before the Magistrate, if in future said appearance becomes necessary. The report as described in Section 173 (2) of Cr. P.C. is required to be submitted after completion of the investigation and even when the officer forms aforesaid opinion. The provision of Section 173 (2)(d) shows that in the report, specific opinion formed in this regard is required to be mentioned by the Police Officer. The provision of section 173(4) shows that the Magistrate can either accept or reject said report. These provisions support the contention that the Magistrate is not bound to accept such report.

8. Sections 170 read with 173 of Cr.P.C. show that if the Investigating Officer forms opinion that there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to the Magistrate, such Officer shall forward the accused under custody to the Magistrate empowered to take cognizance on Police report and to try the accused or to commit him for trial. Section 173 (2)(d) shows it needs to be specifically mentioned in the report filed under the section by the Investigating Officer that the offence has been committed and if it has been committed, the name of the accused, who is being forwarded to the Magistrate for commission of the offence. Section 173(2)(g) of Cr.P.C. shows that it needs to be informed to the Magistrate that the accused has been forwarded to the Magistrate after forming opinion as required u/s 170 of Cr.P.C..

9. Section 190(1)(b) of Cr.P.C. shows that when the report u/s 173 (2) of Cr.P.C. is received, the Magistrate may take cognizance of the offence upon such report. The definition of Police Report is given in section 2(r) of Cr.P.C.. Section 173 of Cr.P.C. shows that in aforesaid both the cases viz. i) when the opinion is formed that it is not a fit case for forwarding the accused u/s 170 and case falls u/s 169 of Cr.P.C., or ii) when the opinion is formed that it is a fit case to forward the accused u/s 170 of Cr.P.C., the report is required to be prepared as per the provisions of Section 173 of Cr.P.C.. The provisions of Section 173 and 190(1)(b) of Cr.P.C. together show that when such report is submitted, there is discretionary power to the Magistrate either to take cognizance of the offence or to refuse to take cognizance.

10. The aforesaid provisions show that the discretion is vested in the Magistrate but such discretion needs to be used judiciously. There must be application of mind. When the Magistrate refuses to accept the report which is submitted either u/s 169 r/w 173 of Cr.P.C. or u/s 170 r/w 173 of Cr.P.C., the order must show that the facts discovered or unearthed by the Investigating Officer as well as the conclusion drawn by the Police Officer from said facts is duly considered by the Magistrate. Unless such exercise is undertaken, it cannot be said that there was an application of judicial mind.

11. The opinion formed by the Investigating Officer is not binding on the Magistrate but the Magistrate needs to keep in mind that the legislature has

given power to investigating Officer to decide whether the case falls u/s 169 or 170 of Cr.P.C.. If due weightage is not given to the record collected and the report filed u/s 169 read with section 173(2) of Cr. P.C., the purpose of Section 169 of Cr.P.C. will be defeated. If the record collected shows that allegations are apparently false, the case of the complainant and so called eye witness that the accused was present on the spot at the time of the offence is false, such record cannot be ignored. When there is such report, it needs to be kept in mind that the material needs to be considered to see whether prima facie case is made out but the entire material needs to be considered by the Magistrate. Consideration of the aforesaid material does not amount to consideration of the defence of the accused. At this stage, the question is whether opinion given by the Investigating Agency needs to be accepted and whether the material collected by the Investigating Agency can form the basis for the opinion formed by the Investigating Officer. It also needs to be kept in mind by the Magistrate that innocent persons should not be put to trial only because some allegations are made against them. The mala fides also needs to be ascertained. If the material as it is shows that the case is bound to end in acquittal, it is not desirable for the Magistrate to reject the report given by the Investigating Officer. If the Magistrate fails to undertake such exercise and does not give reason for not believing the material collected by the Investigating Officer and for rejecting the report, such order cannot sustain in law. To prevent abuse of process of law, the Magistrate is bound to consider the entire material, mala fides, if any, and then the Magistrate should exercise the judicial discretion.

12. The record of the present matter which is mostly not considered by the Magistrate shows that show cause notice of misconduct was given to the cousin sister of the complainant by the Department. After taking explanation, she was transferred from one section to other section by her superior officer on 27.11.2006. When she gave the reply to the first show cause notice dated 4.12.2006, she admitted that there was a fault and she undertook to improve her conduct. In the first explanation, she did not make any allegations at all against the Superior Officer Shri Rathod. She made representation also to the Conservator of Forest on 8.12.2006 and in that representation also no allegations were made against Mr. Rathod. The record shows that she avoided to hand over the charge of her post and she proceeded on leave. For that also show cause notice was given. She then approached the Minister of her Department to influence the Superior Officer. This time, she made allegations against the Superior Officer Shri Rathod that she was being sexually harassed. It is the contention of the complainant that the Minister sent a letter to the Office to see that such transfer orders are not made but the transfer order was not cancelled. The report of the Investigating Officer and the statements recorded show that right from the beginning, first show cause notice, cousin sister of the complainant was trying to see that her table is not changed. The record shows that the complainant used to visit the office with his cousin sister. The cousin sister started making allegations when she realized that the superiors were not

succumbing to the pressure. This material is sufficient to infer the mala fides.

13. The statements of many employees of the Office are recorded by the Investigating Officer. They include the Superior Officers of the petitioner. They show that on the date of the incident, the petitioner was present in the office and he was discharging duty till 8.30 p.m.. As against this material, there is allegation that at about 7.00 p.m. near the house of the complainant, the incident took place. There is no material to have circumstantial check to the allegations made against the petitioner. The record shows that the transfer of cousin sister of the complainant was made due to recommendation made by the petitioner. Thus, there was a reason for the complainant to falsely implicate the petitioner in such a case. In view of this circumstance, there was no reason to disbelieve the Investigating Officer who decided to file report u/s 169 of Cr.P.C.. It is already observed that during the investigation, the allegations were made against Mr. Rathod also who had issued transfer order and so he was also shown as accused. The Magistrate issued process against Mr. Rathod also and that order is fortunately set aside by the Sessions Court. In view of the aforesaid record, it can be said that the Magistrate had not applied mind while issuing process against both Mr. Rathod and the present petitioner. Such order cannot sustain in law. If the petitioner is compelled to face trial, in view of the aforesaid circumstance it would amount to abuse of process of law.

14. For the petitioner, a strange submission was made. It was submitted that the Magistrate ought to have forwarded "B Summary" report to the Special Court constituted under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act. If the provisions of Section 190, 193 and 209 are considered together, it can be said that the Special Court or the Sessions Court gets the matter only after its committal by the Magistrate. The order of committal can be made only after taking cognizance of the offence by the Magistrate. For taking cognizance, it becomes necessary to reject the report filed u/s 169 of Cr.P.C.. Thus, there is no force in the aforesaid submissions made by the petitioner. On this point, reliance was placed on the case of Arun s/o Balwantrao Mahurkar vs. State of Maharashtra and others, reported in 2003(1) Mh. L.J., 927. Bombay High Court. This Court has carefully gone through the observations made by the Apex Court in the case of Gangula Ashok and another vs. State of Andhra Pradesh reported in (2000)2 Supreme Court Cases, 504. In view of the observations made by the Apex Court, there is no need to discuss this point more. So, the order. The Writ Petition is allowed. The order dated 2.11.2007 passed by the Judicial Magistrate, First Class, Yavatmal in Criminal Case No. 564/2007 for taking cognizance of the offences in Crime No. 3009/2007 and issuing process for offences punishable u/s 3(1) (x) and 3(1) (xi) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and under Sections 294, 509 of the Indian Penal Code is set aside. The order of the Revisional Court dated 16.10.2010 is also set aside.

Rule is made absolute in the aforesaid terms.