

(2016) 04 KAR CK 0108

In the Karnataka High Court

Case No : Criminal Petition No. 201225 of 2015.

**Dr. Rajeshwari Ravindra Nesargi - Petitioner @HASH State of Karnataka
and another**

Date of Decision : 22-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 304A

Citation : (2017) 1 AICLR 34 : (2016) 4 AirKarR 429 : (2017) ILRKarnataka
507 : (2016) 3 KCCR 2255

Hon'ble Judges : K.N. Phaneendra, J.

Bench : Single Bench

Advocate : Ishwar Raj S. Chowdapur, Advocate, for the Petitioner; R.S. Patil, HCGP, for the Respondent No. 1; Shivanand Pattanshetty, Advocate, for the Respondent No. 2

Final Decision : Disposed Off

Judgement

K.N. Phaneendra, J. - The present petition is filed seeking quashing of the order passed by the JMFC-II, Raichur, in FIR No.669 of 2010 in taking cognizance for the offence under Section 304 A of IPC and directing to register a Criminal Case against the petitioner and issuance of process thereon and also the order passed by the learned Sessions Judge in Criminal Revision Petition No.87 of 2013 dated 17.10.2015 in confirming the order passed by the learned Magistrate in FIR No.669 of 2010 dated 19.08.2013.

2. It is seen from the records that, one Khaja Anwaruddin has lodged a report before the West Police Station, Raichur, alleging offence under Section 304 A of IPC on the ground of medical negligence on the part of the petitioner herein. The police have registered a case in Crime No. 102 of 2010 and investigated the matter. After investigation, the police submitted ?B? final report on the ground that no such material is available to prosecute the petitioner for the said offence.

3. The learned Magistrate on receipt of ?B? final report has issued notice to the complainant, who has contested the proceedings by filing protest petition. The

learned Magistrate has taken cognizance and proceeded to record sworn statement of the complainant, who reiterated the contents of complaint made by him before the police and produced 11 documents Exs.P1 to P11. After going through the said sworn statement, protest petition and as well as the documents, the learned Magistrate has decided to entertain the complaint and ordered to register a criminal case against the petitioner and issued process.

4. Being aggrieved by the said order, the petitioner approached the Principal Sessions Judge, Raichur, in Criminal Revision Petition No.87 of 2013. Vide order dated 17.10.2015 learned Principal Sessions Judge, Raichur has dismissed the said Revision Petition confirming the order passed by the learned Magistrate registering a case in FIR No.669 of 2010, later culminated into C.C.No.3269 of 2013 and issuing process against the petitioner. Being aggrieved by the above said two orders the petitioner is before this Court.

5. The learned counsel appearing for the petitioner strenuously contends that, when the protest petition is filed it should be like a complaint containing all the ingredients of the offence committed by the petitioner, but no facts have been stated in the protest petition and the same is not in the nature of a complaint before the Court, so that Magistrate can proceed further on the basis of such complaint and therefore, the said order passed by the learned Magistrate is erroneous. It is further submitted that the learned Sessions Judge has also not taken into consideration the vital defects in the order passed by the learned Magistrate. However, he mechanically confirmed the order of learned Magistrate. Therefore, both the orders deserve to be quashed.

6. The learned counsel appearing for the respondent No.2 fairly submitted that the protest petition does not contain the factual aspects and ingredients of Section 304 A of IPC. Therefore, the learned Magistrate could not have taken cognizance. Further he submitted that due to the mistake of the counsel, who drafted the protest petition, the party should not be penalized. The learned Magistrate, after going through the protest petition, ought to have provided an opportunity to the complainant to file additional protest petition describing the offence that has been committed by the accused. In this regard he relied upon the ruling of the Apex Court reported in 2012 AIAR (Criminal) 13 between Shiv Shankar Singh v. State of Bihar & Anr. and prayed before this Court that one more opportunity may be given to the complainant to file additional protest petition before the Magistrate.

7. Before adverting to the above ruling cited by the learned counsel in this regard, it is just and necessary for this Court to look into the protest petition filed by the complainant. It is statutorily permissible to the learned Magistrate that, whenever ?B? final report is filed before the Court, he should go through the contents of the same. If the Magistrate is of the opinion that the contents of the ? B? final report are sufficient to constitute any offence against the accused, he can take cognizance and issue summons to the accused. If for any reason, the learned Magistrate comes to the conclusion that, the ?B? final report submitted

by the police has to be accepted, in such an eventuality, the Magistrate has to provide an opportunity to the complainant to contest ?B? final report by filing a protest petition. In this context, the learned Magistrate should bear-in-mind that, the said protest petition cannot be read as a first information report to the police, but the said protest petition shall contain all the ingredients basing on the factual aspects for the offence alleged against the accused. Section 190 of Cr. P.C mandates the learned Magistrate to take cognizance only when the ingredients of any offence for the time being is in force are made-out in the protest petition, otherwise the Magistrate has no jurisdiction to take cognizance, where there are no factual aspects constituting any offence in the protest petition. In this background, the protest petition has to be looked into.

8. On careful perusal of the protest petition by the complainant on 08.05.2012, there is no detailed description with regard to factual aspects of the case as to how the offence under Section 304 A of IPC has been committed by the accused and what are the necessary facts that constitute offence under Section 304 A of IPC. The entire protest petition contains the allegations against the police that, the police have filed ?B? final report without recording the evidence of the necessary witnesses and not examining the documents etc. Therefore, in the absence of any ingredients of the offences on facts alleged against the petitioner in the protest petition, the learned Magistrate ought not to have taken cognizance for any of the alleged offences. It has to be borne in mind by the learned Magistrate that, he is not taking cognizance against the accused, but he is taking cognizance only against the offence at that particular point of time. If there are no facts constituting any offence, learned Magistrate does not get any jurisdiction to take cognizance. If he has no jurisdiction, without there being any factual matrix, he cannot permit the complainant to proceed to furnish the sworn statement before the Court and proceed to issue summons to the accused. These basic principles have not been adhered to by the learned Magistrate and it appears he has not meticulously looked into the protest petition, but, he was fully persuaded by the contents of the ?B? final report. It appears, he read the first information report lodged before the police and the investigation made by the police into the protest petition so as to fill-up the gap in the protest petition, which is not permissible under law. The learned Sessions Judge has also not bestowed his attention so far as this legal lapse committed by the learned Magistrate is concerned and he also did not look into the protest petition in a proper perspective so as to ascertain whether the learned Magistrate has committed any legal error in taking cognizance and issuing process against the petitioner. Therefore, in my opinion the order passed by the learned Magistrate as well the Sessions Judge are not sustainable under law and the same are liable to be quashed. Having come to such conclusion, it is duty of the Court to see whether the Court can permit the complainant to file second protest petition or additional protest petition or a private complaint once again on the same factual aspects. In this regard, it is worth to mention here the decision in Shiv Shankar Singh?s case, referred to supra, wherein the Apex Court has in detail discussed

with regard to the second protest petition or the complaint filed by the complainant.

9. After culling out various decisions on this point, the Hon^{ble} Apex Court has observed at paragraphs 13 and 14 in the following manner, which are extracted hereunder:

13. Thus, it is evident that the law does not prohibit filing or entertaining of the second complaint even on the same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit.

14. The Protest Petition can always be treated as a complaint and proceeded with in terms of Chapter XV of Cr. P.C. Therefore, in case there is no bar to entertain a second complaint on the same facts, in exceptional circumstances, the second Protest Petition can also similarly be entertained only under exceptional circumstances. In case the first Protest Petition has been filed without furnishing the full facts/particulars necessary to decide the case, and prior to its entertainment by the court, a fresh Protest Petition is filed giving full details, we fail to understand as to why it should not be maintainable.

10. On going through the above said observation made by the Hon^{ble} Apex Court, it is clear that the law does not prohibit filing or entertaining the second complaint or even second protest petition before the Court in order to administer complete justice between the parties and opportunity to be given to the complainant to file necessary additional protest petition or by means of private complaint to bring the factual aspects before the Court in order to enable the Court whether it can proceed against the accused or not.

11. In view of the above said rulings in my opinion the proceedings before the learned Magistrate cannot be in to quashed, though this Court is of the opinion that the order taking cognizance and the order passed by the learned Sessions. Judge are bad in law. It should also be borne in mind that, in almost all the cases where ^B final report is filed by the police, the learned counsels appearing for the complainant would prepare the protest petition, for that reason only the parties would go to advocates for their legal advice and if any serious mistake is committed by the counsels in preparing protest petition, the parties should not be penalised for the same. The party may not be knowing what is meant by protest petition and what should be the contents of the protest petition. Therefore, it is the fundamental duty of the counsel appearing for the parties to examine legal consequences of filing of the protest petition and how the protest petition should be, and that is why he is called as Legal Luminary, who can assist

the parties.

12. In this background, relying upon the above said decisions, in my opinion one more opportunity should be given to the complainant to rectify his mistake and file additional protest petition or second protest petition before the Court, in accordance with law.

13. The learned counsel appearing for the petitioner has also drawn my attention submitting that, whenever a case is filed against a Doctor the court should not mechanically deal with the matter. It should apply its judicious mind before calling upon the Doctor before the Court, for the reason that, the Doctor should not be harassed. In day-to-day affairs, they may commit certain mistakes, but every mistake of the Doctor cannot be called as negligence, which will fall under Section 304-A of IPC. There should be some high standard of allegations based on factual aspects, on which the court can call upon the Doctor to explain by taking cognizance and issuing summons. In this regard, it is worth to mention here a decision of the Hon^{ble} Apex Court reported in AIR 2009 SC 2049 between Martin F.D ^{Souza} v. Mohd. Ishfaq, wherein the Hon^{ble} Apex Court has observed that,-

"A medical practitioner is not liable to be held as negligent, simply because, things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below the standards of a reasonably competent practitioner in his field."

It is also observed by the Hon^{ble} Apex Court at Para 117, in the following manner.

"117. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialised in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew's case (AIR 2005 SC 3180) (supra), otherwise, the policemen will themselves have to face legal action."

14. From the above observations of the Hon^{ble} Apex Court it is abundantly crystal clear that the court should not mechanically or casually take cognizance or issue summons against the Doctors, but it should take utmost care before passing any order in this regard. Therefore, it is incumbent upon the courts to examine and enquire into the documents produced by the complainant and the

averments made in the protest petition or the complaint, and find out those documents are sufficient to take cognizance and issue summons against the Doctors. Otherwise it is the duty of the Courts that it should get the opinion of the Doctor to satisfy itself whether the allegations made against the Doctors fall within the category of cases wherein the conduct of the Doctors fell below that standards of reasonable competent practitioner in the field. Therefore, the learned Magistrates have to bear in mind the above said rulings of the Hon?ble Apex Court and then the factual aspects have to be very carefully dealt with, in such matters.

15. With the above said observation, I am of the opinion that both the orders passed by the learned Magistrate as well as the Sessions Judge deserve to be quashed. However, the matter requires to be remitted to the Judicial Magistrate for further proceedings. Hence, I Proceed to pass the following:

ORDER

1. The order passed by the learned Magistrate in C.C. No.3269 of 2013 (FIR No.669 of 2010) in taking cognizance and issuing process against the petitioner and as well as the order passed by the learned Sessions Judge, Raichur, in Criminal Rev. P. No.87 of 2013 dated 17.10.2015 are hereby quashed. The matter stands remitted to the court of Prl. JMFC-II, Raichur, with a direction to provide an opportunity to the complainant, if he wants to file any additional or fresh protest petition and thereafter considering the guidelines as noted in the body of this order and after following the principles laid down in the decisions of the Hon?ble Apex Court noted in this case. The learned Magistrate is at liberty to proceed with the case in accordance with law.

2. With the above observations, the petition stands disposed of.