
(2014) 08 KL CK 0016

In the High Court Of Kerala

Case No : Crl.M.C. Nos. 468 and 473 of 2013

Govindankutty Villakkappily House

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 04-08-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 161, 162(1), 173, 173(2)
Penal Code, 1860 (IPC) — Section 409, 420, 465, 468, 471

Citation : (2014) 08 KL CK 0016

Hon'ble Judges : A. Hariprasad, J

Bench : Single Bench

Advocate : V.C. Madhavankutty, Advocate for the Appellant; Santhosh Poduval, Adv., R. Rajitha, Advocate and N. Suresh, Public Prosecutor, Advocate for the Respondent

Judgement

A. Hariprasad, J.—Petitioner is accused in two cases, viz., C.C. Nos. 219 of 2011 and 220 of 2011 pending before the learned Chief Judicial Magistrate, Thrissur. He challenges Annexure-A5 complaints in both the cases under Section 482 of the Code of Criminal Procedure (in short, "Cr.P.C."). Petitioner is involved in offences punishable under Sections 420, 409, 468, 465 and 471 of the Indian Penal Code (in short, "IPC").

2. Allegations, common to the complaints, in brief, are as follows:

The complainant is a limited company running chit fund business. The chairman of the company is authorised to initiate legal proceedings on behalf of the company. The accused was working as a litigation clerk in the company from 01.04.1979. On 01.09.1979, he was permanently appointed to that post. The duties of the accused, as litigation clerk, were to meet the lawyers of the company for filing suits, to do other matters related to litigations, and further, to receive money recovered through the court proceedings and to entrust the same to the company. While so, the accused committed breach of trust and cheated the company and appropriated about Rs. 17,00,000/-. He created false

documents for committing the cheating and misappropriation of amounts. The accused, therefore, is guilty of the said offences.

3. Heard Shri V.C. Madhavankutty, learned counsel for the petitioner and Shri Santhosh Poduval, learned counsel for the 2nd respondent/complainant. Shri N. Suresh, learned Public Prosecutor is also heard.

4. Learned counsel for the petitioner submitted that Annexure-A6 order in both the cases passed by the learned Magistrate are legally unsustainable for the fact that he has ordered enquiry under Section 202 Cr.P.C. on the protest complaints filed by the 2nd respondent/complainant without passing any order on the final report. The facts show that Annexure-A1 complaints were forwarded by the court under Section 156(3) Cr.P.C. for investigation. Thereafter, Annexure-A3 final reports were filed. In the final reports, it is mentioned that the investigation revealed that the dispute was in the nature of a civil case and a suit, O.S. No. 404 of 2008 is pending before a competent court. And, therefore, the Police was of the view that no offence was made out. It is an admitted case that the complainant received notices after filing the negative reports, which is marked as Annexure-A4 in both cases. After receiving Annexure-A4 notices, the complainant approached the learned Magistrate with protest complaints (Annexure-A5). That is numbered as C.M.P. No. 8232 of 2008 involved in CrI.M.C. No. 468 of 2013 and C.M.P. No. 8532 of 2008 involved in CrI.M.C. No. 473 of 2013. Grievance of the petitioner is that the learned Magistrate instead of proceeding with the original complaints, ordered enquiry under Section 202 Cr.P.C. in the protest complaints and that too, without any reference or order regarding the sustainability or not of the final reports.

5. It is settled law that an order passed by a Magistrate to refer a complaint under Section 156(3) Cr.P.C. for investigation by Police can only be at pre-cognizance stage. In this case, the learned Magistrate forwarded the complaints under Section 156(3) Cr.P.C. for investigation and after investigation, reports revealing no offence was filed by the Investigating Officer. Aggrieved by the reports, the 2nd respondent filed the respective protest complaints. It is equally settled in law that merely by filing a negative report or by filing a protest complaint against the negative report, the original complaint does not get effaced.

6. Regarding the scope and amplitude of the powers exercisable by a Magistrate under Section 190 Cr.P.C., there is no obscurity. The Supreme Court in Tula Ram and Others Vs. Kishore Singh, deals with the proposition as follows:

"Thus on a careful consideration of the facts and circumstances of the case the following legal propositions emerge:

1. That a Magistrate can order investigation under S. 156(3) only at the pre-cognizance stage, that is to say, before taking cognizance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under

Section 156(3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Sec. 202 of the Code.

2. Where a Magistrate chooses to take cognisance he can adopt any of the following alternatives:

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

3. In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

4. Where a Magistrate orders investigation by the police before taking cognizance under S. 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 as described above."

This decision was later followed by a three Judges Bench of the Apex Court in *India Carat Pvt. Ltd. Vs. State of Karnataka and Another*, . Learned counsel for the petitioner drew my attention to paragraphs 13 and 16 of the said decision. The relevant portion reads as follows:

"13. From the provisions referred to above, it may be seen that on receipt of a complaint a Magistrate has several courses open to him. The Magistrate may take cognizance of the offence at once and proceed to record statements of the complainant and the witnesses present under Section 200. After recording those statements, if in the opinion of the Magistrate there is no sufficient ground for proceeding, he may dismiss the complaint under Section 203. On the other hand if in his opinion there is sufficient ground for proceeding he may issue process under Section 204. If, however, the Magistrate thinks fit, he may postpone the issue of process and either inquire into the case himself or direct an investigation to be made by the police officer or such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. Yet another course open to the Magistrate is that instead of taking cognizance of the offence and following the procedure laid down under Section 200 or Section 202,

he may order an investigation to be made by the police under Section 156(3). When such an order is made, the police will have to investigate the matter and submit a report under Section 173(2). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and issue process straightway to the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the police report under Section 173(2) will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom. If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act under Section 200 by taking cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath of the complainant and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued.

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16. 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, in 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. The High Court was therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him."

7. Learned counsel for the petitioner contended that after filing a final report, the option available to the Magistrate is only to consider whether to take cognizance on the basis of the final report under Section 190(1)(b) Cr.P.C. It is also

contended that at that stage the court is not competent to invoke Section 190(1) (a) Cr.P.C. In M/s. India Carat Pvt. Ltd.'s case (supra), it has been held by the Supreme Court in unequivocal terms that even in a case where the Magistrate thinks it fit to take cognizance under Section 190(1)(b) Cr.P.C. and to direct issue of process to the accused, he is not bound to follow the procedure laid down in Sections 200 and 202 Cr.P.C., for taking cognizance of a case, though it is open to him to act under Section 200 or under Section 202 Cr.P.C. It fortifies the view that the original complaint does not get effaced.

8. Learned counsel for the 2nd respondent relied on the decision of a learned Single Judge of this Court in Ravi Vs. Jovatte Francis, to strengthen his submissions. That was a case wherein a private complaint was filed alleging offences under Sections 420 and 506(i) IPC. The complaint was forwarded for investigation to Police under Section 156(3) Cr.P.C. Thereafter, a final report was filed stating that the dispute is in the nature of a civil dispute. The complainant along with the copy of the refer report filed a protest complaint. At that time, the final report actually was not filed before the court, though a notice was issued to the de facto complainant. Learned Magistrate thereafter directed that the complaint be put up after receipt of the final report. After receipt of the final report, learned Magistrate clubbed the complaint with the refer report and recorded the sworn statement of the complainant and the witnesses and directed to issue summons to the accused. That order was challenged before this Court. Considering the legal positions, learned Single Judge held as follows:

"..... When the original complaint was received the learned Magistrate ordered investigation as provided under S. 156(3) of Cr.P.C. After investigation, Police submitted a refer report under S. 173(2). Though learned Magistrate did not issue a notice to the informant, the informant on his own appeared and contended that the final report may not be accepted and cognizance of the offence may be taken. The learned Magistrate clubbed the said complaint along with the final report and after recording the sworn statement of the complainant and his witness took cognizance of the offences. The Magistrate has taken cognizance not on the report submitted by the Police but on the complaint. Though it is not specifically recorded that the refer report was not accepted, when the complaint and the refer report were considered together and cognizance was taken on the complaint, it is implied. Failure to pass a specific order to that effect is not fatal when order shows that cognizance was taken on the complaint. It is clear that refer report was not accepted. The Magistrate is competent to take cognizance on the original complaint even at that stage. Even if Magistrate had accepted the report, which is not the case herein, it will not prohibit the Magistrate from taking cognizance of the offence on a complaint filed and is satisfied on the materials produced that cognizance of the offence has to be taken..... "

(underline supplied)

9. In Parameswaran Nair Vs. Surendran Panicker and Another, , the learned

Single Judge had occasion to consider almost an identical question. After referring to various precedents including Tula Ram's and M/s. India Carat Pvt. Ltd.'s cases (supra) on the point, the law laid down is as follows:

"When the Magistrate issue notice to the complainant on receipt of the final report and grants opportunity to the complainant to show why cognizance of the offence is to be taken and the complainant files a protest complaint, it is to be treated only as his objections to the final report, stating his reasons why the report cannot be accepted. If the Magistrate records his statement and that of the witnesses and decides to take cognizance of the offence, after considering all the materials including the final report made by the police under sub-s. (2) of S. 173, it is advisable for the Magistrate to record that the final report is not accepted and on the entire materials he is of the opinion that there is ground to proceed and issue summons under S. 204 of Code of Criminal Procedure. But the fact that no specific order was recorded that final report is not accepted or fact that the decision to take cognizance of the offence and issue process was recorded in the protest complaint, by themselves are not fatal, if the records show that Magistrate has considered all the relevant materials and applied his mind. If after complying these procedures, an order not to take cognizance is passed by the Magistrate, then a second complaint will lie, only if there was any manifest error or manifest miscarriage of justice in the previous order or the complainant relies on new facts or materials which was not to his knowledge or with reasonable diligence could not have brought forward in the previous proceedings."

In that particular case, it was not discernible from the order passed by the learned Magistrate as to whether he decided to issue process on the materials available along with the final report or on the materials made available by the complainant in an enquiry under Section 200 Cr.P.C. Therefore, this Court held that the order was incorrect.

10. Learned counsel for the 2nd respondent/complainant submitted that there is no confusion in this matter except the wrong showing of the C.M.P. numbers in Annexure-A6 orders. Annexure-A6 orders should have been under the captions of the C.M.P. numbers of original complaints. Instead, the C.M.P. numbers assigned to the protest complaints are quoted in Annexure-A6 orders, contended the learned counsel for the 2nd respondent/complainant.

11. Per contra, learned counsel for the petitioners would contend that there is no indication in Annexure-A6 orders as to what has been done with the final reports or the original complaints when the learned Magistrate ordered an enquiry under Section 202 Cr.P.C. on the protest complaints. In Ravi's and Parameswaran Nair's cases (supra), it has been held that if the Magistrate decides to conduct enquiry under Section 200 or under Section 202 Cr.P.C. after filing a final report, it is implied that the court has not accepted the final report. It has been observed in those decisions that a failure to pass a specific order by the Magistrate to the effect that he is not accepting the final report is not fatal to the

order passed by the Magistrate, if he decides to proceed under Sections 200 and 202 Cr.P.C. Therefore, I am unable to accept the arguments of the learned counsel for the petitioner that non-speaking orders (Annexure-A6 in both the cases) are legally unsustainable. Of course, it would have been better for the Magistrate, in the fitness of things, to make a mention as to how he dealt with the final report.

12. Learned counsel for the petitioner submitted that an advocate was appointed by the learned Magistrate to conduct enquiry under Section 202 Cr.P.C. The advocate authorised to conduct enquiry has obtained signed statements of witnesses in the course of enquiry. It is true that the statements recorded by the person authorised under Section 202 Cr.P.C. can only be treated as a statement under Section 161 Cr.P.C., even if he obtained signatures of the witnesses to the statement. The statement recorded by a person authorised by the court under Section 202 Cr.P.C. can only have the status of a statement under Section 161 Cr.P.C. The law in Section 162(1) Cr.P.C. says that no statement made by any person to a Police Officer (in this case, the advocate who conducts the investigation) in the course of an investigation under this Chapter shall, if reduced to writing, be signed by the person making it. Therefore, even if the statements of the witnesses were taken as signed statements, it will be hit by the bar under Section 162(1) Cr.P.C. I do not find any basis for the apprehension of the petitioner in that regard.

In the result, I find that both the petitions are devoid of any merit. Hence, they are dismissed.

All pending interlocutory applications will stand dismissed.