
(2014) 06 KL CK 0013

In the High Court Of Kerala

Case No : Criminal M.C. No. 4021 of 2012

H.G. Mathews Mar Ivaniose

APPELLANT

Vs

Dr. Thomas Mar Athanasious

RESPONDENT

Date of Decision : 12-06-2014

Acts Referred:

Citation : (2014) 4 KHC 343

Hon'ble Judges : Mr. P.D. Rajan, J.

Bench : Single Bench

Advocate : Sri. B. Raman Pillai, Sri. R. Anil, Sri. M. Sunilkumar, Sri. Sujesh Menon V.B, Sri. T. Anil Kumar, Sri. Manu Tom and Sri. Thomas Abraham (Nilackappillil), Advocates, for the Petitioner; Sri. S. Sreekumar, Senior Advocate and Sri. P. Martin Jose, Sri. P. Prijith, Advocates, for the Respondent No. 1; Sri. Justin Jacob, Public Prosecutor, for the Respondent No. 2

Final Decision : Allowed

Judgement

Mr. P.D. Rajan, J. - The petitioner was the former Metropolitan of the Kandanad Diocese, appointed by the Patriarch of Antioch. He has preferred this petition to quash Annexure-I complaint and Annexure-J order in C.M.P. No.4796/2011 in C.C. No. 85/2012, of the Chief Judicial Magistrate Court, Thodupuzha. The 1st respondent, who is the Metropolitan of Kandanad East Diocese filed a complaint in the CJM, Court, Thodupuzha, for the offences u/ss. 423, 465, 468 and 471 r/w.34 IPC and u/s.120B of IPC against the petitioner and two others, which was forwarded to the Police Station Thodupuzha for investigation u/s.156(3) of Cr.P.C. and after investigation the Police referred the case. The petitioner contended that prima facie case is not made out in the complaint and if trial is proceeded, it is a mere abuse of the process of the Court. Hence, the petitioner prays to quash Annexures-I and J by invoking the inherent jurisdiction.

2. The 1st respondent, who is the Metropolitan of Kandanad East Diocese is functioning according to the Constitution framed in the year 1934. There are several churches under the control of this Diocese and St. Mary's Orthodox

Syrian Church, Thodupuzha is one of the churches. Every religious and spiritual functions of the said Church are executed as per the directions of the 1st respondent. The Priest and Assistant Priest were also appointed and transferred by him. The petitioner is a Metropolitan consecrated in the "yakobaya Suriyani Christian Sabha" which was constituted in the year 2002. He is neither a member, priest nor a Metropolitan of the Malankara Orthodox Suriyani sabha and he has declared his non-allegiance to the 1934 constitution of the said Sabha. He does not have any right at all in the properties of St. Mary's church. That being the position, on 7.12.2004, the petitioner and the other accused executed a gift deed of the properties covered by Annexure-B, as 3969/2004 of SRO Thodupuzha and thereby committed the alleged offence. They have no right over the property held by the 1st respondent. In the circumstances, the first respondent filed Annexure-G complaint in the chief Judicial Magistrate Court, Thodupuzha, which was referred by the Thodupuzha Police mentioning it as a civil dispute. Hence the protest complaint.

3. The learned counsel for the petitioner contended that Annexure-E Gift deed was executed on 7.12.2004 in the name of the Trustees with the consent and concurrence of the parishioners of St. Mary's Church. The 1st respondent was metropolitan till 1999 with the Patriarch, subsequently he defected and joined with Orthodox faction. The petitioner was appointed as the Metropolitan in the year 2002 and an election was conducted in the year 2004. Subsequent to that, a resolution was passed by the parish committee and property was transferred by Annexure-E deed. The Police verified the Gift deed and referred the case by Annexure-H refer report. If that be so, prima facie case is not made out and the issuance of process without considering the police report is against law and to be quashed by invoking the inherent jurisdiction. The petitioner relied on the decisions in Parameswaran Nair v. Surendran [2009(1) KLT 794], Chandrika B v. Santhosh and another [2014 (1) KLD 79(SC)] and Kader v. State of Kerala [1999 (3) KLT 262].

4. The learned counsel for the respondents contended that as per the Constitution of 1934, the 2nd respondent is the Metropolitan and is having control over all Churches under his Diocese including St. Mary's Orthodox Syrian Church, Thodupuzha. As per gift deed No.5078/54 of SRO, Thodupuzha an extent of 10 cents of land and buildings of Thodupuzha Village were gifted in the name of the predecessor of the 1st respondent. After that, the 1st respondent was consecrated as the Metropolitan of the said Diocese and is managing the property as the Metropolitan of the Diocese. Thereafter, on 7.12.2004, the petitioner and other accused forged documents and executed a gift deed No.3969/2004 SRO, Thodupuzha and thereby committed the alleged offence. The complaint filed by the 1st respondent was referred by the Police, against that, Annexure-I was filed, which is pending before Chief Judicial Magistrate Court, Thodupuzha, in which complainants and witnesses were examined and process was issued against the accused. Hence, he prays to dismiss the petition. The learned counsel relied on the decisions in P.M.A. Metropolitan v. Moran Mar

Thoma [AIR 1995 SC 2001], Moran Mar Thoma Mathews v. Most. Rev. Thomas Mar De Metropolitan [2002 (1) KLT 125], and P.M.A. Metropolitan v. Moran Mar Marthoma Mathews [AIR 1996 SC 3121].

5. The power of the Police for conducting investigation in to a cognisable offence is mentioned under Section 156 of the Code of Criminal Procedure in Chapter-XII. Section 156 Cr.P.C explains the power of police officers to investigate cognisable case and sub section (1) provides that any officer in charge of a police station may, without the order of a Magistrate, investigate any cognisable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII. Sub Section (2) provides that no proceedings of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate and sub section (3) provides that any Magistrate empowered under section 190 may order such an investigation as above mentioned. Therefore, Section 156(1) Cr.P.C. provides that any officer in charge of a police station may, without the order of a Magistrate, investigate any cognisable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII. The ground for commencing an investigation under 156 of the Code of Criminal Procedure is not pointed out in this Section. But Section 157(1) says, if, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 shall investigate such offences.

6. In a case where the police has already started investigation, there is no provision in the Code of Criminal Procedure to give again any direction for investigation. If, during investigation, it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond with or without sureties, as such officer may direct him to appear before a Magistrate empowered to take cognizance if and when so required on a police report. But if upon investigation, it appears to the officer in charge of the Police station that there is adequate evidence or reasonable ground, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial or if the offence is bailable and the accused is able to give security shall take security from him for his appearance before such Magistrate on a day fixed for his attendance. After completing investigation, the concerned Investigating Officer shall submit a report to a Magistrate empowered. Section 173(2) says, as soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on the basis of a police report, a report in the form prescribed by the State Government. Therefore, any magistrate empowered u/s.190 of Cr.P.C. can order a police officer in charge of a

police station to investigate a cognisable case u/s.156(3) of the Code. Therefore, a magistrate can order investigation under Section 156(3) only at a pre cognizance stage.

7. The taking cognizance of offences by Magistrate is mentioned u/s.190 in Chapter XIV of the Code. I may extract the Section which reads as follows:

"(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2) may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. "

Therefore, the Magistrate may take cognizance of the offence (a) upon receiving of a complaint (b) upon a police report (c) upon information received from any person other than a police officer or up on his knowledge. It is clear from Section 190 that the method by which cognizance of offence can be taken by a Magistrate is subject to the limitation provided under Chapter XIV. Taking cognizance does not involve any formal action but, the Magistrate has to apply his mind to the suspected commission of the offence for the purpose of taking subsequent action for an enquiry and trial. It is pertinent to note that the word cognizance has not been defined anywhere in the Code or in criminal law. Therefore cognizance includes intention of the Magistrate for initiating judicial proceedings against an offender in respect of an offence.

8. The first step for taking cognizance of an offence by a Magistrate u/s.200 of the Code on a complaint filed before him is examination of the complainant and witnesses present, if any. On such examination, the substance of the examination shall be reduced into writing and shall be signed by the complainant and the witnesses and also by the Magistrate. Proviso to Section 200 says that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses, if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint.

9. Section 202 provides that any Magistrate, on receipt of a complaint of an offence, if he thinks fit, may postpone the issue of process against the accused and either enquire into the case himself or direct an investigation to be made by a police officer or by such other person for the purpose of deciding whether there is any ground for proceeding. The words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" was inserted in the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f 23rd of June, 2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at

far off places in order to harass them. After 2005 Amendment by Act 25, if the accused is residing beyond the jurisdiction of a Magistrate, he shall postpone the issue of process against the accused which is a mandatory provision.

10. The commencement of proceedings before Magistrate is provided under Chapter XVI, which is followed by issue of process. Section 204 empowers the Magistrate to issue summons or a warrant for the appearance of the accused, if the Magistrate decides to take cognizance of the offence and there is sufficient ground for proceeding.

11. Apex Court in *H.S. Bains v. The State (Union Territory of Chandigarh)* [AIR 1980 SCC 1883] held as follows: (para 6)

"6. The mere fact that he had earlier ordered an investigation under Section 156(3) and received a report under Section 173 will not have the effect of total effacement of the complaint and therefore the Magistrate will not be barred from proceeding under Sections 200, 203 and 204. Thus, a Magistrate who on receipt of a complaint orders an investigation under Section 156(3) and receives a police report under Section 173(1), may, thereafter do one of three things: (1) he may decide that there is no sufficient ground for proceeding further and drop action: (2) he may take cognizance of the offence under Section 190 (1) (b) on the basis of the police report and issue process: this he may do without being bound in any manner by the conclusion arrived at by the police in their report: (3) he may take cognizance of the offence under Section 190 (1) (a) on the basis of the original complaint and proceed to examine upon oath the complaint and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be."

12. Three Judge Bench of the Apex Court in *M/s. India Carat Pvt. Ltd. v. State of Karnataka* (AIR 1989 SC 885), held as follows:

"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.

13. In *Jagdish Ram v. State of Rajasthan* [1989 CrL.J. 745 (Raj)] it is held that a Magistrate issuing process on the basis of a complaint, when the police report on the earlier complaint to them was received, was not proper. He ought to consider the police report as well. In *Chandrika B. v. Santhosh and another* [2014 (1) KLD 79 (SC)] Apex Court held that Magistrate has to exercise judicial discretion and apply his mind to the contents of the petition before deciding to issue summons. In this case, after refer report, complainant and witnesses were examined and the Magistrate passed a cryptic order, which reads as follows:

"Complainant absent, applied. Heard. A prima facie case is made out. Hence the complaint is taken as CC 35/12 for the offences u/ss.423, 465, 468 and 471 r/w Section 34 IPC and Section 120B IPC against the accused persons."

14. In this case, petitioner contended that the 1st respondent was a Metropolitan till 1999 and subsequently he defected and joined with Orthodox faction. After this, the petitioner was appointed as the metropolitan and an election was conducted in the year 2004. As per the resolution passed by the parish committee, the disputed property was transferred by a gift deed. At the same time the 1st respondent also challenged the gift deed and contended that there are two factions in the Jacobite Churches in India, one faction is Catholics (Orthodox) and other is Patriarch. The petitioner belongs to Patriarch faction and the 1st respondent belongs to Orthodox faction. According to the 1st respondent, an extent of 9 cents of land comprised in Survey No.306/6/2, 312/2/2, 308/8/4, 08/8/3, 308/12, 308/10/1 and 308/10/2 of Thodupuzha Village and its adjoining buildings and an extent of 1 cent of land comprised in Survey No.272/19/3 Thodupuzha Village were gifted in the name of the predecessor of the 1st respondent by Gift deed No.5078/54 of Thodupuzha Sub Registry. After that, the predecessor of the 1st respondent, Metropolitan Poulose Mar Phelexinose consecrated as Catholicose, the 1st respondent was consecrated as the Metropolitan of the said Diocese. He is managing the property as the Metropolitan of the Diocese. Thereafter, on 7.12.2004, the petitioner and other accused forged documents and executed a gift deed No.3969/2004 SRO, Thodupuzha and thereby committed the alleged offence. It is true that validity of the two gift deeds are not finally decided by the civil court and the matter is pending before civil court, hence the present complaint was referred by the Police.

15. The police had submitted a report that no case had been made out against the accused. In Annexure-H final report, it is held as follows:

"VERNACULAR MATTER"

The position is that upon receipt of a police report under Section 173(2) a Magistrate is entitled to consider the report of an offence under Section 190(1) (b) of the Code. If the report is that no case is made out against the accused, the Magistrate shall take into account the statements of the witnesses examined during the investigation and apply his mind and thereafter exercise his judicial discretion in taking cognizance of the offence and issue of process to 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. In this case, the Investigating Officer reported that no case is made out against the accused. Since it is a matter of civil nature, the Chief Judicial Magistrate disagree with the police report. But nothing has been mentioned about the prima facie case by applying his mind.

16. Therefore, a Magistrate, on receipt of a complaint, orders an investigation under Section 156(3) and receives a police report under Section 173(2), thereafter, may decide that there is no sufficient ground for proceeding further and drop action 2) he may take cognizance of the offence u/s.190 (1) (b) on the basis of the police report and issue process. 3) he may take cognizance of the offence u/s.190(1) (a) on the basis of original complaint or a protest complaint and proceed to examine upon oath the complainant and his witnesses u/s.200. Therefore, if he adopts third alternative, he may either dismiss the complaint or issue process after considering the report filed by the Police. The consideration of materials at that stage is not an empty formality and it cannot be done in mechanically by adopting a superficial approach. The Chief Judicial Magistrate has to exercise his judicial discretion and apply his mind to the averments made in the complaint, as well as the ingredients of the offences, including the observation in the refer report of the investigating officer, "since no offence has been made out in the complaint in the light of the civil suits." In view of the above observation, I quash Annexure-J order of Chief Judicial Magistrate, Thodupuzha by invoking the inherent jurisdiction u/s.482 of Cr.P.C. I am not deciding on the merits of the case since it is a matter within the jurisdiction of the Chief Judicial Magistrate. The matter is remitted to the learned Chief Judicial Magistrate, Thodupuzha for proper disposal according to law. However, I make it clear that it is unnecessary to pass an elaborate order after considering the evidence by the Chief Judicial Magistrate.

This petition is allowed as above.