

(2017) 02 KAR CK 0037

In the Karnataka High Court

Case No : Criminal Petition No. 200281 of 2017

Mallinath Maharaj Alias Mallayya Shankr-Ayya Hiremath

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 27-02-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), Section 190, Section 200, Section 204, Section 482, Section 482

Penal Code, 1860 (IPC) — Section 323, Section 324, Section 406, Section 420, Section 506(2)

Citation : (2017) 2 AirKarR 323

Hon'ble Judges : B. A. Patil, J.

Bench : Single Bench

Advocate : Sri R.S. Legali, Advocate, for the Petitioner; Sri Maqbool Ahemed HCGP, for the Respondents No. 1

Final Decision : Dismissed

Judgement

B. A. Patil, J.—This petition is filed by the Petitioner's-accused No.1 praying this Court to set aside the judgment and order dated 22.11.2016 passed by the II Additional Sessions Judge, Vijayapur in Criminal Revision Petition No.76/2015 and to quash the order of taking cognizance and issuance of process dated 31.8.2012 in C.C.No.1867/2012 arising out of Crime No.161/2008 of Vijayapur Rural Police Station for the offences punishable under Sections 323, 324, 406, 506(2) and 420 of IPC.

2. The brief facts of the case are that the Petitioner's is a religious Pontiff. Complainant is working as a Teacher since 1985 in Primary School of Jai Hanuman Vidyavardhaka Society. One Sharanappa s/o Sangappa Kumbar was also working in the said institution. In the year 1997, said Sharanappa introduced the complainant to the Petitioner's at Shraddalingra-meshwar Muth in Tidagundi. The Petitioner's was Pontiff in the said Muth. Since the complainant and the Petitioner's used to meet often, they became close. Thereafter, the Petitioner's took the complainant to his several such Muths in Karnataka and

Maharashtra States. In the year 2003-04, the complainant started D-Ed College in Kannada Medium in Kannal Village. Thereafter, the Petitioner's suggested the complainant to start D-Ed College in Marathi Medium also. In the year 2006-07, the Petitioner's started D-Ed College in Marathi Medium. The Petitioner's got as many as 40 students admitted to the said college in the management quota and has collected Rs.1,25,000/- from the said students as donation for admission and has not given the said amount to the complainant and thereby misappropriated the said sum. It is further alleged that the Petitioner's had introduced accused Nos.2 and 3 to the complainant. The Petitioner's has taken a sum of Rs.3,00,000/- from the complainant on the pretext that he would be made as the President of the Karnataka Homeguards Welfare Society which is a prestigious post and there is lot of competition for the said post. Further, the complainant was also given red becon to his car since he would be the President of such society. Further, the complainant found that the said assurances were all false and in this manner he was cheated. On the basis of the complainant, a case has been registered and thereafter the matter was referred for investigation. After completion of investigation, police submitted B-false report on 13.3.2009 and thereafter Court issued notice to the complainant and after examining him and his witnesses, has taken the cognizance and issued process against the Petitioner's- accused on 31.8.2012. Aggrieved by the same, the Petitioner's is before this Court in this petition filed under Section 482 of Cr.P.C. with the aforesaid prayer.

3. Heard the learned counsel for the Petitioner's and the learned HCGP for the respondent-State.

4. The main ground urged by the learned counsel for the Petitioner's is that the order of taking cognizance and issuance of process against the Petitioner's is against the principles of natural justice and the Court has committed a grave error. He would contend that the learned Magistrate has not applied his mind and has not taken into consideration the B-report filed by the police after completion of investigation. By relying on a decision of this Court in Criminal Petition 200925/2014, which is marked for reporting, he would contend that if the Magistrate has not considered the B-report submitted by the police and has taken the independent view while taking the cognizance, then the same goes to the root of the case and it is liable to be quashed. He would also contend that the complainant has not filed any affidavit along with the complaint to verify the said facts. If that is not done, then under such circumstances, filing of the complaint itself is not in accordance with law and taking of cognizance on such complaint is unwarranted. He would further rely upon a decision of the Apex Court in the case of Priyanka Srivastava & another v. State of Uttar Pradesh & others, reported in (2015) 6 SCC 287 : (AIR 2015 SC 1758). He has further contended that the Petitioner's is the Pontiff and preaching the message of peace and love and he has got wide reputation across the Karnataka and Maharashtra States and has no attachments to the materialistic things and as such he has been falsely implicated in this case. Further, he has contended that even if the materials are

considered, no case has been made out on the face of it. On these grounds, he prayed for allowing the petition.

5. Per contra, the learned HCGP would contend that the learned Magistrate after perusing the investigation record and after considering the sworn statement has rightly took cognizance of the case and has issued the warrant against the accused-Petitioner's. There is no irregularity or illegality in taking the cognizance. As such the petition is not liable to be maintained. He would also contend that the Court cannot entertain the petition under Section 482 of Cr.P.C. as the grounds urged by the Petitioner's are question of facts and not question of law. He would further contend that no doubt the Apex Court has come to the conclusion that the complaint must be supported by an affidavit, but that particular aspect has been laid down in the year 2015. But the instant complaint is of the year 2008. As such, the ratio laid down by the Apex Court is not applicable retrospectively to the complaint which is filed in the year 2008. On these grounds, he prayed for dismissal of the petition.

6. The main grounds urged by the learned counsel for the Petitioner's-accused is that the investigating authority has submitted the B-report after verifying all the records. The learned Magistrate without considering the said B-report has taken the cognizance and has issued the process which is not contemplated under law. No doubt, the Co-ordinate Judge of this Court has taken the view in the above mentioned decision in Criminal Petition No.200925/2014. The learned Magistrate not only should go through the contents of the complaint, but also should go through the contents of the B-summary report filed by the police, but the said proposition of law has not been brought to the notice of the said Court while laying down the said law. What is the procedure to be followed by the Magistrate as per the Code of Criminal Procedure has been elaborately discussed in a decision of the Apex Court in the case of M/s. India Carat Private Limited v. State of Karnataka & another, reported in (1989) 2 SCC 132 : (AIR 1989 SC 885). It is relevant to extract paragraphs-9 to 12 which are as under:

"9. Before we examine the contentions of the learned counsel for the appellant and the second respondent, we may briefly refer to some of the provisions in Chapter XII, XIV, XV and XVI of the Code. Section 155 in Chapter XII pertains to information laid to the police regarding non-cognisable cases and sub- section (2) lays down that no police officer shall investigate a non-cognisable case without the order of a Magistrate having power to try such case or commit the case for trial. Section 156(1) confers power on an officer in charge of a police station to investigate any cognisable case without the order of a Magistrate. Section 156(3) authorises a Magistrate, empowered under Section 190 to order the police to make an investigation as provided for in Section 156(1). The other provisions in the chapter from Section 157 onwards set out the powers of investigation of the police and the procedure to be followed. Section 169 prescribes the procedure to be followed by an officer in charge of a police station if it appears to him upon investigation of a case that there is no sufficient

evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate. Section 170 prescribes the procedure to be followed by the officer in charge of police station if it appears to him upon investigation that there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate. Section 173(1) enjoins a police officer to complete the investigation without unnecessary delay. Section 173(2) lays down that as soon as the investigation is completed the officer-in-charge of a police station should forward to a Magistrate empowered to take cognizance of an offence on a police report, a report in the prescribed form stating the various particulars mentioned in that sub-section.

10. Chapter XIV deal with the conditions requisite for initiation of proceedings and as to the powers of cognizance of a Magistrate. For our purpose it is enough if we extract Section 190(1) alone.

190(1) Cognizance of Offence by Magistrate.-Subject to the provisions of this Chapter, 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.

11. Chapter XV which contains Sections 200 to 203 deals with "Complaints to Magistrates". A Magistrate taking cognizance of an offence on complaint is required by Section 200 to examine the complainant and the witnesses present, if any. Section 202 provides that a Magistrate taking cognizance of a case, upon complaint, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. Section 203 empowers the Magistrate to dismiss the complaint, if after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under Section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding.

12. Chapter XVI deals with "Commencement of Proceedings before Magistrates" and Section 204 empowers a Magistrate to issue summons or a warrant as the case may be, to secure the attendance of the accused if in the opinion of the Magistrate taking cognizance of the offence there is sufficient ground for proceeding."

7. On going through the above proposition of law, the learned Magistrate is not bound by the conclusions arrived at by the police even as arrived at by the complainant in the complaint. If a complainant states the facts in his complaint

and accused is found guilty of offence as alleged in the complaint and after perusal of the material, if the learned Magistrate is of the opinion that there is a material to take cognizance, he may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and on the said aspect of the case can take the cognizance upon the facts stated by the complainant in the complaint. Even on going through the basic principles of the Criminal law, it indicates that if the B-report is considered to be beyond of the case and if it the final verdict, then under such circumstances, the Legislature should not have incorporated Sections 173, 190, 200, 202, 204 of Cr.P.C. separately empowering the Magistrate taking cognizance and proceed in the matter. Thereby it is clear that it is open to the Magistrate to agree or disagree with the police report. If he agrees with the report that there was no case made out for issue of process to the accused, he may accept the report and close the proceedings otherwise, Magistrate may go for alternate procedure as contemplated under the law. Be that as it may, the learned Magistrate after filing the B-report has applied his mind and thereafter the complainant has been summoned by issuing a notice on 3.8.2009. He filed a protest petition and after recording his sworn statement and one witness, the learned Magistrate has taken the cognizance and issued the process that itself indicates that the learned Magistrate has not mechanically issued the summons or warrant against the accused, but it also indicates that he has fully applied his mind and thereafter that he has taken the cognizance. The order of the learned Magistrate summoning the accused itself reflects that he has applied his mind to the facts of the case and the law applicable thereto. It would also further indicate that the Magistrate has carefully scrutinized the evidence brought on and after finding out the truthfulness and otherwise of the case after satisfying the prima facie material he has taken the cognizance. In that light, the contention of the learned counsel for the Petitioner's- accused does not appear to be tenable in law and even the decisions which are relied upon by him are also not applicable to the facts on hand. In the absence of non- application of mind, the said proposition of law will be made applicable. Hence, the contentions of the Petitioner's counsel cannot be acceptable.

8. In so far as the contention of the learned counsel for the Petitioner's that the complaint must be supported by an affidavit whether the complaint has been filed and referred under Section 156(3) or Section 200, Cr.P.C. is concerned, it is true that the Apex Court has made the said observation and laid down the ratio.

But as could be seen from the records, the complaint came to be filed in the year 2008 and till then, on one or the other pretexts, the matters are pending between the parties and as such now the complainant cannot be requested to apply the said ratio retrospectively and file his affidavit. Anyhow the complainant has been examined before the Court on oath and thereafter the Court has taken the cognizance. The only purpose for which the Apex Court directed that the complaint must be supported by an affidavit is that in the event of falsity of the complaint, the complainant would be held responsible. In order to hold him liable for prosecution in accordance with law, the affidavit is required. That is what the

Apex Court has observed. But even otherwise, if a sworn statement has been recorded subsequently, if it is proved falsity of the complaint, the same may be proceeded against the complainant and the persons who have sworn the statement in accordance with law. In that light, the said contention of the learned counsel for the Petitioner's cannot be sustainable in law.

The law on this point is that so far there was no need for the complainant to file affidavit along with complaint. Now to make it compulsory so as to give deterrent effect to those who causally invoke the jurisdiction of the Court under Section 156(3) and to make him liable for prosecution, filing of such affidavit has been made compulsory by the Apex Court. If that has to be made compulsory, then, matters requires to be referred to Law Commission to make a suitable amendments to the said provision of law. In that light, Registry is directed to send the copy of the judgment of Apex Court reported in (2015)6 SCC 287 : (AIR 2015 SC 1758) in the case of Priyanka Srivastava & another v. State of Uttar Pradesh & others along with this judgment for taking suitable steps to suggest the amendment to the Legislature.

9. Apart from this, the allegations and the other aspects, which are taken into consideration, they are all mixed question of fact which has to be adjudicated upon and determined only at the time of trial. In the instant case on hand, parties are fighting this litigation since 2008, even the Petitioner's-accused knowing fully well has kept quite for long period and now he wants to get the proceedings quashed. Under Section 482 of Cr.P.C., this Court will not have any power to ascertain as to the facts of a particular case and come to the conclusion whether any material is there or not. Under what circumstances inherent power vested with this Court under Section 482 of Cr.P.C. has to be exercised has been elaborately discussed in the case of State of Orissa and another v. Saroj Kumar Sahoo, reported in 2005(13) SCC 540 at para Nos.9 and 10, which reads as follows:

"9. In R. P. Kapur v. State of Punjab this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings.

(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

(ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

10. In dealing with the last category, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support

the accusations. When exercising jurisdiction under Section 482 of the Cr.P.C., the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or, needless harassment. The Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The scope of exercise of power under Section 482 of the Cr.P.C. and the categories of cases where the High Court may exercise its power under it relating to cognisable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in *State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335: 1992 SCC (Cri) 426 : (AIR 1992 SC 604). A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows:

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognisable offence, justifying an investigation by police officers under Section 156(1) of Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognisable offence but constitute only a non-cognisable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

Keeping in view the dictum laid down in the aforesaid decision, this Court cannot exercise the power as contemplated under Section 482 of Cr.P.C. Hence, the petition is liable to be dismissed, as it is not maintainable.

Accordingly, the petition fails and the same stands dismissed.