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(2014) 09 BOM CK 0004

In the Bombay High Court

Case No : Criminal Writ Petition No. 855 of 2013

Nilesh Daulatrao Lakhani — APPELLANT

Vs

State of Maharashtra — RESPONDENT

Date of Decision : 25-09-2014

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 154, 156, 156(3), 173, 190
Penal Code, 1860 (IPC) — Section 403, 406, 420, 422, 463

Citation : (2014) 4 BomCR(Cri) 757

Hon'ble Judges : Sadhana S. Jadhav, J

Bench : Single Bench

Advocate : Raja Thakre and Shriram Shirsat, Advocate for the Appellant; G.P. Mulekar, A.P.P, Advocate for the Respondent

Judgement

Sadhana S. Jadhav, J.—Rule made returnable forthwith with consent of the parties.

The petitioner herein questions the correctness and validity of the order passed by the Judicial Magistrate, First Class at Shirala in R.C.C. No. 100/2011 dated 20.10.2011, thereby issuing the process against the accused under sections 406, 420, 422, 403 and 464 of Indian Penal Code.

The facts of the case are as follows:-

The complainant Yashwant Sahkari Glucose Karkhana Ltd. (hereinafter referred to as the complainant) filed a complaint before the Judicial Magistrate, First Class at Shirala against the present petitioner on 26.2.2009. The case was registered as Criminal Case No. 15/2009. Upon perusal of the complaint, on 26.2.2009, the learned Magistrate passed the following order:-

"ORDER

The complainant to give his statement on oath & statement of any other witness".

2. On the next scheduled date i.e. 22.7.2010, the learned Magistrate passed the

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following order:-

"ORDER

Considering the nature of offence detailed investigation under section 156(3) of Code of Criminal Procedure, 1973 is necessary. P.I. of Shirala is hereby directed to make detailed investigation of the offence in view of section 156(3) of the Code of Criminal Procedure, 1973 and submit its report."

3. Pursuant to the order passed by the learned Magistrate, on 22.7.2010, Crime No. 4/2010 was registered at Shirala Police Station on 30.7.2010 against the accused for the offence punishable under sections 406, 420, 422, 463 and 464 of IPC. Investigation was set in motion. The accused had approached the Court of Sessions seeing pre-arrest bail. The said application was rejected. Hence, the accused approached the Hon''ble High Court by filing Anticipatory Bail Application No. 564 of 2011 under section 438 of Code of Criminal Procedure, 1973. By an order dated 25.8.2011, the applicant was granted pre-arrest bail. The learned Judge (Coram J.H. Bhatia, J.) had observed as follows:-

"In view of the facts and circumstances, it appears to be pure and simple civil matter for recovery of the balance amount towards the unpaid price."

The applicant was granted pre-arrest bail.

4. After completion of investigation, charge-sheet was field against the accused on 10.10.2011. On 20.10.2011, the learned Judicial Magistrate, First Class, Shirala passed an order as follows:-

"Charge sheet is filed by Shirala Police Station. Case be registered as RCC No. 100/2011. Issue process against accused under section 406, 420, 422, 463, 464 of I.P.C."

The said order is under challenge. It is pertinent to note that on 20.1.2012, the learned Magistrate passed an order "Accused is absent. Issue show cause notice to his surety Suhas Kadam".

5. Being aggrieved by the said order, the petitioner filed Criminal Revision Application No. 36 of 201 before the Addl. Sessions Court, Islampur at Islampur (District Sangli). The learned Addl. Sessions Judge, Sangli, vide judgment and order dated 12.2.2013 was pleased to dismiss the Revision and confirm the order passed by the Judicial Magistrate, First Class, Shirala, below Exhibit 1 dated 20.10.2011. Hence, this writ petition.

6. In the facts of the present case, it is seen that by an order dated 26.2.2009, the learned Magistrate, upon considering the allegations levelled in the complaint, was of the opinion that it was a fit case for taking cognizance and, therefore, had passed an order to the effect that the complainant should give his statement on oath and statement of any other witness. In other words, the next stage in RCC No. 15 of 2009 was for verification. By inference, it can be said that at that stage there was application of mind by the learned Magistrate.

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7. In the case of Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others, , the Hon''ble Apex Court has held:

"Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action if any, taken by the magistrate."

8. In the present case, the very fact that the learned Magistrate had passed an order directing the complainant to give his statement on oath and statement of any other witness, would simply indicate that there had been an application of mind to the allegations levelled against the accused in the complaint and had therefore posted the matter for the purpose of taking cognizance.

9. It is pertinent to note that by an order dated 22.7.2010, the learned Magistrate was of the opinion that considering the nature of offence, detailed investigation under section 156(3) of Cr.P.C. is necessary.

10. Once there has been an application of mind and the learned Magistrate has arrived at a conclusion that it was a fit case for taking cognizance, the learned Magistrate could not have reverted back to the stage of initiation of investigation under section 156(3) of Cr.P.C. The Hon''ble Apex Court in the case of Tula Ram and Others Vs. Kishore Singh, has clearly held as follows:-

"While Chapter 14 (under which section 190 falls) deals with post cognizance stage, Chapter 12 (under which section 156 falls), so far as the Magistrate is concerned, deals with pre-cognizance stage. Sections 190 and 156(3) are mutually exclusive and work in totally different spheres. A Magistrate can order investigation under section 156(3) only at the per-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 section 207 of the Code".

While considering the question as to what is meant by taking cognizance, the Hon''ble Apex Court in the case of R.R. Chari Vs. The State of Uttar Pradesh, has held as follows:-

"Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence."

In the present case, the very fact that he has posted the matter for recording of verification on oath, is sufficient to infer that the Magistrate was inclined to take cognizance of the complaint. In these circumstances, the learned Magistrate would not be entitled to pass an order under section 156(3) of Cr.P.C. There was no occasion for the Magistrate to refer the matter for investigation once the case

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was posted for recording of evidence. It is in these circumstances that the complainant is seeking quashing of the proceedings by way of RCC No. 15/2009.

11. In the case of Suresh Chand Jain Vs. State of Madhya Pradesh and Another, has held as follows:-

"The position is thus clear. Any Judicial Magistrate, before taking cognizance of the offence, can order investigation under section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer incharge of the police station as indicated I section 154 of the Code."

Similarly in the case of Gopal Das Sindhi and Others Vs. The State of Assam and Another , the Hon''ble Apex Court has held that as follows:

"If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of the filing of the complaint. We cannot read the provisions of section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word ''may'' in section 190 to mean ''must''." The very action of the learned Magistrate to have posted the matter for verification of the complaint and recording statement of the witnesses, if any, would indicate that he had taken steps to take cognizance and, therefore, he could not have reverted back to the stage of section 156(3) of Cr.P.C."

12. In the present case, after completion of investigation, the Investigating agency had filed charge-sheet on 30.7.2011 and the case was registered as RCC No. 100 of 2011. The learned Judicial Magistrate has then issued process against the accused under sections 406, 420, 422, 463 and 464 of IPC. Hence, the process was issued after completion of investigation. After filing of charge-sheet, the next stage would be section 239 of Cr.P.C. i.e. to consider whether the charge against the accused could be taken to its logical end or would be groundless and in the eventuality that the Magistrate found the charge to be groundless, he shall discharge the accused and record his reason for doing so. The Code of Criminal Procedure does not contemplate issuance of process after filing of the charge sheet. Hence, the accused-applicant ought to have filed an application seeking discharge on the ground that the conclusion drawn by the investigating agency could not be taken to its logical end i.e. no case for conviction could be made out on the basis of the papers of investigation. The applicant-accused had instead challenged the order of issuance of process simplicitor without filing an application seeking discharge.

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13. In the present case, on 20.1.2012, the learned Magistrate had passed an order as follows:-

"Accused is absent. Issue show cause notice to his surety"

In fact, this order has no foundation in the present case since there was noncompliance of section 204(4) of Cr.P.C. section 204(4) of Cr.P.C. contemplates as follows:-

"When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint."

In the present case, charge-sheet was filed against the accused under section 173 of Cr.P.C. The State is not expected to pay process fees. Section 204 applies to private complaints. When a private complaint had culminated into a charge sheet pursuant to the order passed under section 156(3) of Cr.P.C. The matter would be prosecuted by the State and payment of process fees would recede into insignificant. The real question was whether after filing charge-sheet the applicant had furnished bail. The learned Magistrate had issued process after filing of charge-sheet. Basically, in the present case, an order under section 156(3) itself was not maintainable since the Magistrate had applied his mind and had taken steps to take cognizance of the complaint. It is not the case that RCC No. 100 of 2011 has culminated into regular criminal case No. 15 of 2009. An order under section 156(3) of Cr.P.C. is only directory in nature and at that stage, it is not necessary to enquire as to whether a cognizable offence has been made out, but once the Magistrate has arrived at a conclusion that the complainant has made out a case for proceeding, then it would go without saying that an order under section 156(3) would not be maintainable. Needless to say that a Magistrate would not be empowered to issue process on the basis of private complaint that has resulted in submission of a report under section 173, as a consequence of a direction passed under section 156(3) of Cr.P.C.

14. Coming to the facts of the case, the complaint would indicate that the complainant had prayed for an action under section 156(3) of Cr.P.C. However, on the date of filing of the complaint, the learned Magistrate had directed verification of the complaint and recording of statement of witnesses. Since this Court has already held that the Magistrate cannot take cognizance under section 204 of Cr.P.C. after filing of charge-sheet the order of issuance of process deserves to be quashed and set aside. Hence, writ petition is allowed in terms of prayer Clauses (a) and (b). The order passed by the Revisional Court in Revision Application No. 36 of 2012 is hereby quashed and set aside. Consequently, the impugned order of issuance of process dated 20.10.2011 passed by the Judicial Magistrate, First Class dated 20.10.2011 is quashed and set aside. Rule is made absolute in the above terms. The prosecution is at liberty to prosecute the report filed by the I.O. under section 173 of Cr.P.C. It is made clear that this Court has only quashed the order of "Issue Process" after filing of charge-sheet. The

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applicant is at liberty to file an application seeking discharge. The concerned Court shall not be influenced by the observations made hereinabove as they are restricted to the challenge of issuance of process.

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