

(2013) 06 JH CK 0051

In the Jharkhand High Court

Case No : Writ Petition (Cr.) No. 55 Of 2004

Qayamuddin Khan

APPELLANT

Vs

The State of Jharkhand and Ekbal Ahmad Siddique

RESPONDENT

Date of Decision : 21-06-2013

Acts Referred:

Constitution of India, 1950 — Article 20, 20(2), 20(2)

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 190, 190(1), 190(1)(a)

Penal Code, 1860 (IPC) — Section 420

Citation : (2013) 3 JLJR 568

Hon'ble Judges : Prashant Kumar, J

Bench : Single Bench

Advocate : V.P. Singh and Ashok Kumar, for the Appellant; R.P. Singh and Dr. H. Waris, for the Respondent

Final Decision : Allowed

Judgement

Prashant Kumar, J.—This application has been filed for quashing the order dated 20.01.2004 passed by Sessions Judge, Garhwa in Criminal Revision No. 32 of 2003, whereby and where under, he dismissed the said criminal revision and upheld the order dated 21.04.2003 passed by learned Sub-divisional Judicial Magistrate, Garhwa in Complaint Case no. 492/2002, whereby and where under he took cognizance against the petitioner u/s 420 of the Indian Penal Code. It appears that respondent no. 2 (complainant) has filed a complaint case in the court of Chief Judicial Magistrate, Garhwa on 10.9.2002, alleging therein that he purchased 14.11 decimals of land (alongwith building standing on it), pertaining to plot no. 598 khata no. 23 of village unchari P.S. and district Garhwa by two sale deeds. It is further alleged that same land was also purchased by the petitioner. Thereafter, a panchayati took place to resolve the dispute and during said panchayati, it was decided that petitioner will get the house standing on the land in question and shall pay Rs. 1,15,000/0 to complainant in lieu of that. It was also decided that the vacant land will be retained by the complainant/respondent no. 2. It is stated that in view of the aforesaid decision of panchayat,

petitioner gave a cheque of Rs. 1,15,000/- to respondent no. 2. Thereafter, possession of the house given to him. It is further alleged that said cheque deposited in Canara Bank, Nanded (Maharashtra) on 11.02.2002 for encashment.. But the same has been dishonored and returned to the respondent no. 2. Thereafter, on 03.09.2002 respondent no. 2 gave legal notice to the petitioner. Thereafter present complaint case filed.

2. It appears that learned Chief Judicial Magistrate, Garhwa transferred the said complaint case in the court of learned Sub-divisional Judicial Magistrate, Garhwa u/s 192(1) of the Cr.P.C.. It then appears that learned Sub-divisional Judicial Magistrate, Garhwa made inquiry as envisaged u/s 202 of the Cr.P.C. and then, by order dated 21.04.2003 issued summons against the petitioner.

3. Against the aforesaid order a Criminal Revision vide Cr. Revision no. 32 of 2003 filed in the court of Sessions Judge, Garhwa. It appears that Sessions Judge, Garhwa by his order dated 20.01.2004 dismissed the criminal revision and upheld the order dated 21.04.2003 passed by Sub-divisional Judicial Magistrate, Garhwa. Aforesaid two orders challenged in this application.

4. Sri V.P. Singh, learned senior counsel appearing for the petitioner has submitted that learned Sessions Judge has committed gross illegality while dismissing the criminal revision. It is submitted that prior to filing of present complaint petition, the power of attorney holder of respondent no. 2, namely, Mazid Ahmad Siddique, had filed a case bearing Complaint Case no. 387/2002 against the petitioner, on similar allegation. He further submits that learned Chief Judicial Magistrate, Garhwa, after taking cognizance on the said complaint, transferred the record in the court of Judicial Magistrate, Garhwa for inquiry and disposal u/s 192(1) of the Cr.P.C. He then submits that learned Judicial Magistrate, Garhwa after making inquiry dismissed the complaint case by his order dated 14.08.2002, holding that no case made out against the accused person (petitioner). It is submitted that by suppressing the aforesaid fact, present complaint case filed by respondent no. 2. He further submits that as per Article 20(2) of the Constitution of India, no person can be prosecuted and punished for the same offence more than once. He submits that petitioner has been prosecuted earlier for the same offence, therefore, second complaint petition is violative of Article 20 of the Constitution of India. Sri Singh submits that learned Sessions Judge, Garhwa dismissed the complaint petition by saying that second complaint petition is maintainable in exceptional circumstance, if the offence is a continuing offence. He submits that in the instant case, there is no exceptional circumstance available to the petitioner. He then submits that offence u/s 420 of the Indian Penal Code is not a continuing offence. Thus, finding of learned Sessions Judge, Garhwa is wholly erroneous and illegal, therefore, cannot be sustained in this writ application.

5. On the other hand, Sri R.P. Singh JC to GP II and Sri H. Waris, learned counsel appearing for respondent no. 2 submits that since earlier complaint petition dismissed u/s 203 of the Cr.P.C., thus, it cannot be argued that petitioner has

been prosecuted earlier on same allegation. They further submit that in fact, in the earlier complaint case court has not taken cognizance of the offence, as the same was dismissed u/s 203 of the Cr.P.C. Accordingly, they submit that in the instant case Article 20 (2) of the Constitution of India has no application.

They further submit that offence u/s 420 of the Indian Penal Code is a continuing offence, therefore, a subsequent complaint is maintainable. Accordingly, it is submitted that there is no merit in this case.

6. Having heard the submissions, I have gone through the record of the case and the certified copy of order-sheet of complaint petition no. 387 of 2002 produced by Sri V.P. Singh.

7. From perusal of order sheet of complaint case no. 387 of 2002, I find that the same has been filed by one Mazid Ahmad Siddique, who claimed himself to be the power of attorney holder of respondent no. 2. In the aforesaid complaint case, similar allegations, as of present case, has been made against the petitioner. From perusal of complaint petition of present case (Annexure-1), I find that respondent no. 2 has suppressed the fact that his power of attorney holder has filed a complaint case against the petitioner on the same facts, which was dismissed earlier. A bare perusal of order-sheet of complaint case no. 387 of 2002, shows that on 22.7.2002 learned Chief Judicial Magistrate, Garhwa after hearing the counsel for the complainant and perusing the complaint case, transferred the same in the court of Judicial Magistrate, Garhwa for inquiry and disposal u/s 192(1) of the Cr.P.C. Section 192(1) of the Cr.P.C. reads as under:

Making over of cases to Magistrates - (1) Any Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to any competent Magistrate subordinate to him.

8. From plain reading of aforesaid provision, it is clear that Chief Judicial Magistrate, can make over a case for inquiry or trial to any competent court subordinate to him after taking cognizance of the offence. Thus, as per the aforesaid provision, it is incumbent upon the Chief Judicial Magistrate to take cognizance, before making over the case for inquiry or trial to any other competent court. Now, the question arose as to whether Chief Judicial Magistrate while passing the order dated 22.7.2002 in Complaint case no. 387/2002 took cognizance in the case or not. As noticed above, learned Chief Judicial Magistrate, Garhwa before making over the case in the file of Judicial Magistrate, Garhwa had heard counsel for complainant and perused the complaint petition.

9. It has been held by their Lordships of Supreme Court in Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others, at para 14 that

This raises the incidental question: What is meant by "taking cognizance of an offence" by the Magistrate within the contemplation of Section 190 ? This expression has not been defined in the Code. But from the scheme of the Code,

the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in clauses (a), (b) and (c) of Section 190(1). 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. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding u/s 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If, instead of proceeding under Chapter XV, he has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police u/s 156(3), he can not be said to have taken cognizance of any offence.

(emphasis added)

10. Thus, as per the aforesaid law laid down by their Lordships of Hon''ble Supreme Court, if a Magistrate after receiving a complaint applies his mind for the purpose of proceeding u/s 200 and succeeding sections in Chapter XV of the Code, he is said to have taken cognizance of the offence within the meaning of Section 190(1) (a) of the Code.

11. In the instant case, as noticed above, after perusing and hearing the learned counsel for the complainant, learned Chief Judicial Magistrate made over the case in the file of Judicial Magistrate, Garhwa for inquiry u/s 192(1) of the Cr.P.C. Thus, in my view he made over the said case after taking cognizance of the case. In the aforesaid paragraph, their Lordships further held that from the scheme of the Code, it is clear that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein. In view of the aforesaid observation of Hon''ble Supreme Court, since in the, learned Chief Judicial Magistrate, Garhwa passed order dated 22.7.2002 in Complaint Case no. 387/2002 after applying his mind, in my view, he took cognizance in the case, thus, case has already been instituted against the petitioner.

12. In Union of India Vs. K.V. Jankiraman, etc. etc., , it has been held that criminal proceeding can be said to have been commenced when a charge-sheet in a criminal prosecution, filed. Section 190 of the Cr.P.C. provides that Chief Judicial Magistrate can take cognizance:-

(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.

Thus, submission of charge-sheet by police and receiving of complaint in the court is sufficient for taking cognizance. Under the said circumstance, if a complaint petition filed in court, then also it can be said that a criminal proceeding commenced against the accused person.

13. In the complaint case no. 387/2002, as discussed above, learned Chief Judicial Magistrate, Garhwa took cognizance of the offence. Thus, criminal case instituted against the petitioner, therefore, in view of law laid down in K.V. Jankiraman case (Supra) he has been prosecuted.

14. Article 20(2) of the Constitution of India reads as follows:

20. Protection in respect of conviction of offences-

(1)....

(2) No person shall be prosecuted and punished for the same offence more than once."

(3)....

15. According to aforesaid provision, it is clear that a person cannot be vexed twice for the same offence.

16. In the instant case, the power of attorney holder of respondent no. 2 had filed a complaint against petitioner on similar allegation which was dismissed by a Competent Court holding that no case is made out against him u/s 420 of I.P.C. That order has become final, as no revision and/or application u/s 482 of the Cr.P.C. filed against it. Thus, in my view, second complaint for the same offence is not permissible, unless there is some exceptional circumstance as per the law laid down by their Lordships of Hon'ble Supreme Court in Pramatha Nath Taluqdar Vs. Saroj Ranjan Sarkar, .

The said exceptional circumstances are:

(i) When the previous order of dismissal was passed on incomplete record; or

(ii) the complaint was dismissed due to the misunderstanding of the nature of the complaint; or

(iii) the previous order was manifestly absurd or unjust; or

(iv) some new facts have subsequently come to light which, on due diligence, could not be known.

17. From perusal of the present case, I find that none of the aforesaid exceptional circumstances available. Respondent no. 2 has not stated why he is filing second complaint. Rather as noticed above, he suppressed the fact that his power attorney holder had filed complaint on the same allegation, which was dismissed. Under the said circumstance, second complaint is barred by provision of Article 20(2) of the Constitution of India.

18. Learned court below had further held that second complaint is maintainable even if the same does not come under the exceptional circumstance, if offence is a continuing offence. In the instant case, cognizance has been taken u/s 420 of the Indian Penal Code. In my view, offence u/s 420 is not a continuing offence. It has been held by their Lordships of Hon"ble the Supreme Court in Bhagirath Kanoria and Others Vs. State of M. P., that continuing offence is one which continues and non-continuing offence is one which is committed once.

19. In the instant case, as alleged by respondent no. 2 that petitioner cheated him in the year 2001. There is nothing to show that petitioner continued to cheat him again and again. Thus, in my view, offence of cheating completed in the year 2001. Thus, I find that learned Sessions Judge, Garhwa had committed gross illegality by holding that offence u/s 420 is a continuing offence, therefore, second complaint can be filed.

20. In view of discussions made above, I find that second complaint filed by respondent no. 2 is violative of Article 20(2) of the Constitution of India, and, therefore, the same is not maintainable. In view of aforesaid discussions, I conclude that impugned orders dated 20.01.2004 passed by Sessions Judge, Garhwa in Criminal Revision no. 32 of 2003 and the order dated 21.04.2003 passed by learned Sub-divisional Judicial Magistrate, Garhwa in complaint case no. 492 of 2003 suffers from gross illegalities and irregularities, therefore, I herewith quash them. This writ application is, accordingly, allowed.