
(2014) 09 BOM CK 0085
In the Bombay High Court
Case No : Writ Petition No. 4300 of 2013

Subhash Kanade

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 02-09-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 200, 202

Citation : (2015) ALLMR(Cri) 2374

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : Yuwraj Dhanraj Patil, Advocate for the Appellant; Milind S. Sawant, S.V. Sonawane, APP and Sandesh Deshpande, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

A.M. Thipsay, J.—Rule. By consent rule is made returnable forthwith. Heard learned Counsel for petitioner, learned Counsel for respondents and the learned APP. By consent heard finally at the stage of admission itself.

2. The petitioner is the original complainant. He filed a complaint/ application before the Metropolitan Magistrate 27th Court at Mulund, alleging the commission of certain cognisable offences by persons named as accused in the said application/ complaint. The prayer of the petitioner before the Magistrate was that the investigation as contemplated u/s 156(3) of the Code of Criminal Procedure (for short "Code") be ordered. On this application/ complaint, the learned Magistrate passed the following order:-

"Read complaint and perused the documents, heard the learned counsel for complainant. It appears that it is necessary to proper investigation u/s 202 here because complaint is given on 13th September 2011 since then not file complaint immediately. So it is apprehension to misuse the provision. Hence prayer 156(3) of Cr.P.C. is rejected. Hence, this adjourned for verification."

3. Aggrieved by the said order, the petitioner approached the Court of Sessions

by filing an application for revision. The grievance of the petitioner was that instead of issuing an order u/s 156(3) of the Code, the Magistrate had proceeded under the provisions of section 200 of the Code. The petitioner wanted an order u/s 156(3) of the Code to be passed by the Magistrate and was apparently not satisfied with the Magistrate proceedings in the manner provided for by Chapter XV of the Code. The learned Sessions Judge who heard the revision application dismissed the same. Being aggrieved thereby the petitioner has approached this Court by filing the present petition.

4. I have carefully gone through the petition and the annexures thereto. I have also heard the learned Counsel for parties and learned APP.

5. Though the challenge to the impugned order has been given on the ground that the Magistrate ought to have passed an order u/s 156(3) of the Code and though the order of the Magistrate is claimed to be bad for that reason, in the view that I am taking it is not necessary to go into the question as to whether the Magistrate was indeed obliged to pass an order as contemplated u/s 156(3) of the Code and whether he was not entitled to proceed with the application/complaint in accordance with the provisions of Chapter XV of the Code. It is because the impugned order suffers from a patent illegality and error, irrespective of this aspect of the matter.

6. A perusal of the impugned order indicates that the learned Magistrate thought it necessary to order investigation into the matter. He observed that "proper investigation u/s 202 of Code was necessary in the matter."

7. Now the question is this:- "Even if the Magistrate did not want to proceed in the matter as contemplated u/s 156(3) of the Code, could he, before examining the complainant on oath, decide the necessity of investigation u/s 202 of the Code?". In my opinion, the answer to this question has to be in negative.

8. Chapter XV of the Code deals with the procedure to be adopted by a Magistrate on receiving a complaint. Section 200 of the Code provides for examination of the complainant and the witnesses present, if any, on oath. Section 202 of the Code speaks of postponement of issue of process.

9. The inquiry or investigation u/s 202 of the Code can be ordered only for the purpose of deciding whether or not there is sufficient ground for proceeding. In my opinion it is only after examination of the complainant on oath (popularly termed as "verification"), the question of deciding whether to issue process or not would arise. There would be three possibilities after the examination of the complainant and the witnesses, if any, on oath, as contemplated u/s 200 of the Code. The first would be that the Magistrate may come to the conclusion about sufficiency of grounds for proceeding against such accused persons (or some of them) and issue process. The second would be that the Magistrate may come to the conclusion that there are no sufficient grounds for proceeding and dismiss the complaint. The third would be that the Magistrate would neither be able to form an opinion about sufficiency of the grounds for proceeding further, nor

would he be able to come to the conclusion that the complaint deserves to be dismissed. It is only in such a case that he would take recourse to the provisions of section 202 of Code and direct investigation and/or inquiry into the matter.

10. In the instant case, without examining the complainant on oath, the Magistrate has already decided to order investigation u/s 202 of the Code. This is absurd inasmuch as, it amounts to his concluding that even after examining the complainant on oath, it was impossible for him either to feel satisfied about sufficiency of the grounds for proceeding or to come to the conclusion that the complaint lacks merits and requires to be dismissed.

11. Considering that the prayer of the petitioner was for ordering an investigation u/s 156(3) of the Code and the fact that the Magistrate himself observed that there was necessity of investigation in the matter but not u/s 156(3) of the Code, it appears that an intention to direct investigation u/s 202 of the Code was declared by the Magistrate only to avoid passing an order u/s 156(3) of the Code. This round about way of turning down the prayer of the complainant was not proper; and if the Magistrate indeed felt that there was no case for ordering investigation u/s 156(3) of the Code, he could not have felt so certain with the necessity of ordering investigation u/s 202 of the Code.

12. The impugned order is neither proper nor legal. It is required to be interfered with in the interest of justice.

13. The petition is partly allowed. The impugned order is set aside.

14. The learned Magistrate shall consider the application/ complaint made by the petitioner afresh and pass appropriate orders in the matter.

It is made clear that this Court has not expressed any opinion as to whether or not there is a necessity of carrying out any investigation in the matter; and much less whether there is any necessity of ordering any investigation as contemplated u/s 156(3) of the Code. This aspect shall be considered by the Magistrate in accordance with law.