

(2019) 01 GAU CK 0017
In the Gauhati High Court
Case No : Criminal Petition No. 2 Of 2019

Subir Kr. Das

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 04-01-2019

Acts Referred:

Indian Penal Code, 1860 — Section 323, 352, 366, 379, 385

Code Of Criminal Procedure, 1973 — Section 173(2), 190, 190(1)(b), 200, 202, 482

Citation : (2019) 01 GAU CK 0017

Hon'ble Judges : Manash Ranjan Pathak, J

Bench : Single Bench

Advocate : Abhishek Kundu, R.J. Baruah

Final Decision : Dismissed

Judgement

MANASH RANJAN PATHAK

1. Heard Mr. Abhishek Kundu, learned counsel for the petitioner and Mr. R.J. Baruah, learned Additional Public Prosecutor, Assam for the respondent No. 1, State.

2. Being aggrieved with the action of the learned SDJM (M), Bijni in taking cognizance of the offence under Section 366 of the IPC against the petitioner in GR Case No. 405/18 arising out of Bijni P.S. Case No. 287/18, inspite of submitting of final report by the I.O. of said Bijni P.S. Case No. 287/18 vide FR No. 144/2018 dated 09.09.2018, the petitioner has preferred this criminal petition under Section 482 Cr.P.C. for quashing the proceeding of said G.R. Case No. 405/18, wherein the learned Magistrate has already issued processes against the petitioner for his appearance in the said case.

3. According to the petitioner in the final report dated 09.09.2018 pertaining to said Bijni P.S. Case No. 287/18, the concerned I.O. after completion of the investigation of said Bijni P.S. Case, have already come to the conclusion that the informant/respondent No. 2 took a loan of Rs. 3,00,000/- (Rupees Three Lakhs)

from the petitioner to do a business of thermokol dish and that the informant repaid certain amount in parts and he is yet to repay the complete loan amount. For such non-payment money by the informant, the petitioner was very annoyed with the informant and on the date of the incident on 09.09.2018 while travelling in his bolero car, when he saw the informant sitting in Sri Krishna Pharmacy near UCO Bank at Bijni, he called the informant through his driver and demanded his money and during the said process a heated argument between the petitioner and the informant took place, in which there was a push and pull between them and when the informant was medically examined, no injury were found in his person. Moreover, there was no such evidence of snatching of Rs. 1500/- from the pocket of the informant by the petitioner.

4. Considering that the offence under Section 352 IPC being non cognizable offence accordingly, the police filed a final report being FR No. 144/2018 dated 30.09.2018 in the said Bijni P.S. Case No. 287/18 intimating the informant about the same. The FIR filed by the informant/respondent No. 2 pertaining to said Bijni P.S. Case No. 287/18 on 08.09.2018 reveals that the informant/respondent No.2 lodged the same on 09.09.2018 stating that on the evening of 08.09.2018 around 7:30 P.M. when he was sitting in Sri Krishna Pharmacy at Bijni on instruction of the petitioner his driver, one Sri Madan Das came to the said Pharmacy and called him outside and when he came out of the said Pharmacy, the petitioner demanded money from him and started threatening him and since the informant/respondent No. 2 failed to pay any such money as demanded by the accused petitioner, he assaulted the petitioner by using force and also snatched away Rs. 1500/- forcefully from his pocket and when nearby people gathered in the place of the incident, the accused petitioner fled away from the said place threatening the informant that he shall take away his life and on the basis of such FIR of the informant/respondent No. 2, Bijni P.S. Case No. 287/18 was registered under Sections 385/323/379/506 IPC against the accused petitioner and his driver one Sri Madan Das.

5. In Tula Ram Vs. Kishore Singh, reported in (1977) 4 SCC 459, the Hon'ble Supreme Court have held that if the police, after making an investigation, send a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of a case under Section 190(1)(b) and issue process or in the alternative he can take cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he is of opinion that the case should be proceeded with.

6. It is also settled by the Hon'ble Supreme Court in the case of Minu Kumari Vs. State reported in (2006) 4 SCC 359 that the learned Magistrate is not bound to accept the final report (closure report).

7. It is settled by the Hon'ble Apex Court in the case of Popular Mutthiah Vs. State, reported in (2006) 7 SCC 296 that in the event a report in final form is filed, the learned Magistrate can proceed in any of the following ways:- (i) to

accept a final report; (ii) in case a protest petition is filed cognizance can be taken and process may be issued and (iii) to take cognizance of the offence without a protest petition.

8. In *India Carat (P) Ltd. Vs. State of Karnataka*, reported in (1989) 2 SCC 132, a three Judges Bench of the Hon'ble Apex Court have held that it is 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. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against 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 under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code (CrPC) for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also.

9. In *Union of India Vs. Prakash P. Hinduja*, reported in (2003) 6 SCC 195, the Hon'ble Supreme Court have held that the Magistrate is no doubt not bound to accept the final report (sometimes called as closure report) submitted by the police and if he feels that the evidence and material collected during investigation justify prosecution of the accused, he may not accept the final report and take cognizance of the offence and summon the accused but this does not mean that he would be interfering with the investigation as such. He would be doing so in exercise of powers conferred by Section 190 CrPC. The statutory provisions are, therefore, absolutely clear that the court cannot interfere with the investigation.

10. In the present case it is seen that police after investigation of the case submitted the final report in the said Bijni PS Case and the learned SDJM(M) Bijni, on perusal of said final report as well as the materials in the case diary and other materials available with it, being prima facie satisfied by order dated 08.10.2018 passed in GR Case No. 405/18 took cognizance of the offence under Section 352 IPC against the petitioner and other accused of the case namely, Sri Madan Das and issued summons to them for their appearance in the said GR Case.

The essential ingredients of the offence under Section 352 IPC are that (i) the accused made a gesture or preparation to use Criminal force; (ii) the accused knew that it was likely that such gesture or preparation to use Criminal force would cause apprehension that criminal force would be used by him against the

victim and (iii) there is no grave or sudden provocation from the side of the victim.

11. From the perusal of the FIR lodged by the informant/respondent No. 2 on 09.09.2018 and the contents of the final report dated 30.09.2018 submitted in the said Bijni P.S. Case No. 287/18 as well as the ingredients of Section 352 IPC and the decisions of the Hon'ble Supreme Court noted above, it is seen that the learned Magistrate in the present case after considering the evidence and material collected during investigation by police, being *prima facie* satisfied that there are materials to prosecute the accused persons of the case and therefore, he did not accept the said final report submitted by police and took cognizance of the offence under and accordingly issued summons to the accused persons of the case including the petitioner.

12. Considering the above, this Court is of the view that it is not a fit case to exercise the power conferred under Section 482 CrPC and to set aside the proceeding of said GR Case No. 405/2018 arising out of Bijni Police Station Case No. 287/2018, presently pending before the learned Sub-Divisional Judicial Magistrate, Bijni against the petitioner and others.

13. Accordingly, this Criminal petition, being devoid of merit stands dismissed.