
(2011) 10 BOM CK 0133

In the Bombay High Court

Case No : Criminal Writ Petition No. 473 of 2011

Syed Muzaffaruddin Khan Mohd. Abdul Qayyum Petitioner	APPELLANT
Vs	
Mohd.Abdul Qadir Mohd. Abdul Mabood Deceased	RESPONDENT

Date of Decision : 14-10-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 190, 195, 195(1), 340
Penal Code, 1860 (IPC) — Section 419, 420, 467, 468

Citation : (2012) BomCR(Cri) 375

Hon'ble Judges : A.V. Potdar, J

Bench : Single Bench

Advocate : S.V. Natu, for the petitioner, for the Appellant; S.G. Nandedkar, APP for respondent State, Mr. Jyodeep Chatterji, Advocate for Respondents No.2 to 4, for the Respondent

Judgement

A.V. Potdar, J.—Rule. Rule made returnable forthwith. Heard finally by consent.

2. This criminal writ petition, under Articles 226 and 227 of the Constitution of India, is directed against the judgment and order dated 07.05.2011 passed by Additional Sessions Judge7, Aurangabad in Criminal Revision No.227/2010 thereby setting aside the order dated 05.03.2009 passed by CJM, Aurangabad in RCC No.2264/2008.

3. Heard learned counsel for the parties.

4. Such of the facts, as are necessary for the decision of this petition, may briefly be stated thus

The petitioner is the original complainant, who had lodged a report in the month of October 2008 in CIDCO police station, Aurangabad in respect of the incidents of cheating by respondents No.1 to 4 during the proceedings pending on the file of CJJD, Aurangabad i.e. MARJI (Miscellaneous Application Requiring Judicial Inquiry) No.663/2002. It appears that though the report was lodged with the

police, no action was taken by the police. Thereafter, it appears, on 17.11.2008 communications were sent by the petitioner to the concerned CJJD, Aurangabad so also to the Registrar of this Court informing the instances, which took place in MARJI No.663/2002. Deputy Registrar of this Court had replied the petitioner vide communication dated 10.12.2008, directing the petitioner to file complaint before the competent criminal court, as permissible in law. It appears that accordingly, a report was lodged by the petitioner before CJM, Aurangabad, which is numbered as RCC No.2264/2008. Thereafter, learned CJM, Aurangabad passed an order on 05.03.2009 directing Kranti Chowk police station, to carry out the investigation in the said application under the provisions of section 156(3) of the Criminal Procedure Code. It appears pursuant to the said directions, an offence at Crime No. 10/2009 came to be registered against the accused. It appears that the order of CJM, Aurangabad directing the police to carry out investigation u/s 156(3) of the Criminal Procedure Code, was challenged by respondents No.1 to 4 before Sessions Judge, Aurangabad in Criminal Revision Application No.227/2010, which came to be allowed on 07.05.2011 by quashing and set aside the order passed by CJM, Aurangabad, which order is impugned in the present petition.

5. In this background, heard Mr.S.V.Natu, learned counsel for the petitioner followed by Mr.Chatterji, learned counsel for respondents No.2 to 4 and learned APP Mr. Nandedkar, for respondent State.

6. Learned counsel for the petitioner has urged that it is a settled legal position, as observed by this Court in "Blue Dart Express Ltd., V/s The State of Maharashtra" 2011 (2) Bom. C.R. (Cri.) 5, that there is clear distinction between the order directing investigation u/s 156(3) of the Criminal Procedure Code and issuance of process u/s 200/202 of the Criminal Procedure Code. It is observed by this Court that to direct investigation u/s 156(3) of the Criminal Procedure Code is recognizance stage and issuance of process u/s 200/202 is the stage after taking cognizance by the Court. It is urged that the learned CJM has not taken cognizance of the complaint of the petitioner, however simply directions to carry out the investigation u/s 156(3) of the Criminal Procedure Code have been given and hence there shall not be an embargo to take cognizance about the incidents which took place in the judicial proceedings, as there is no bar u/s 195 of the Criminal Procedure Code. It is also urged that the Revisional Court has committed an error in observing that the by directing investigation u/s 156(3) of the Criminal Procedure Code, CJM has taken cognizance of the complaint lodged by the petitioner. Thus, it is urged that there is error apparent on the face of record in the judgment impugned and hence requested to quash and set aside the same.

7. Mr.Chatterji, learned counsel for respondents No.2 to 4, supported the impugned order and vehemently urged that no interference is warranted by this Court in the impugned order.

8. Learned APP left the matter to the discretion of the Court.

9. Considering the submissions and as is observed by this Court in "Blue Dart" case, referred supra, that the order directing investigation u/s 156(3) of the Criminal Procedure Code is a pre cognizance stage while order issuance of process u/s 202 of the Criminal Procedure is a post cognizance stage, it appears that this aspect has not be brought to the notice of the revisional Court.

10. In this respect, it may be useful to refer the observations of the Division Bench of this Court in the matter of "B.S. Khatri V.s State of Maharashtra" 2004 (1) B.C.R 424, wherein the Division Bench had an occasion to deal with the matter in respect of status of persons who are arrayed as accused in the complaint where directions to investigate u/s 156(3) of the Criminal Procedure Code were issued. It is observed by the Division Bench of this Court that after the report is submitted by the Investigating officer and cognizance is taken by the competent court basing on the said report and process is issued then only the accused have the locus standi to challenge the issuance of process. The Division Bench, in the said judgment, has observed thus

Direction to investigate complaint u/s 120B, 420, 464, 465, 467 and 471 of the IPC, Issuance of investigation order and complaint sought to be quashed whether such quashing permissible - Held stage of cognizance arises after investigation report is filed and bar u/s 195 of Code regarding taking of cognizance would be applicable thereafter. Provisions of section 195 of Code bar taking cognizance and not investigation prior thereto. Interference prior to cognizance on possibility of operation of bar u/s 195 of the Code is impermissible.

11. It may also be useful to refer the observations of the Apex Court in M. Narayandas Vs. State of Karnataka and Others, . The Apex Court, in the said judgment has observed thus

8. We are unable to accept the submissions made on behalf of the Respondents. Firstly it is to be seen that the High Court does not quash the complaint on the ground that Section 195 applied and that the procedure under Chapter XXVI had not been followed. Thus such a ground could not be used to sustain the impugned judgment. Even otherwise there is no substance in the submission. The question whether Sections 195 and 340 of the Criminal Procedure Code affect the power of the police to investigate into a cognizable offence has already been considered by this Court in the case of State of Punjab Vs. Raj Singh and Another, . In this case it has been that as follows:

2. We are unable to sustain the impugned order of the High Court quashing the FIR lodged against the respondents alleging commission of offences under Sections 419, 420, 467, and 468 IPC by them in course of the proceeding of a civil suit, on the ground that Section 195(1)(b)(ii) CrPC prohibited entertainment of and investigation into the same by the police. From a plain reading of Section 195 CrPC it is manifest that it comes into operation at the stage when the court intends to take cognizance of an offence u/s 190(1) Cr. PC; and it has nothing to do with the statutory power of the police to investigate into an FIR which

discloses a cognizable offence, in accordance with Chapter XII of the Code even if the offence is alleged to have been committed in, or in relation to, any proceedings in court. In other words, the statutory power of the police to investigate under the Code is not in any way controlled or circumscribed by Section 195 Cr.PC. It is of course true that upon the chargesheet (challan), if any, filed on completion of the investigation into such an offence the court would not be competent to take cognizance thereof in view of the embargo of Section 195(1)(b) CrPC, but nothing therein deters the court from filing a complaint for the offence on the basis of the FIR (filed by the aggrieved private party) and the materials collected during investigation, provided it forms the requisite opinion and follows the procedure laid down in Section 340 CrPC. The judgment of this Court in *Gopalakrishna Menon and Another Vs. D. Raja Reddy and Another*, on which the High Court relied, has no manners of application to the facts of the instant case for there cognizance was taken on a private complaint even though the offence of forgery was committed in respect of a money receipt produced in the civil court and hence it was held that the court could not take cognizance on such a complaint in view of Section 195 Cr.PC."

Not only are we bound by this judgment but we are also in complete agreement with the same. Sections 195 and 340 do not control or circumscribe the power of the police to investigate under the Criminal procedure Code. Once investigation is completed then the embargo in Section 195 would come into play and the Court would not be competent to take cognizance. However, that Court could then file a complaint for the offence on the basis of the FIR and the material collected during investigation provided that procedure laid down in Section 340 Criminal Procedure Code is followed. Thus no right of the Respondents, much less the right to file an appeal u/s 341, is affected.

12. The issue involved in this petition is required to be tested in the light of the observations quoted above. It is clear that the CJM, Aurangabad has not taken cognizance of the complaint lodged by the petitioner, however he had only issued directions to carry out investigation u/s 156(3) of the Code. It is also clear that on the basis of said directions though the police had registered crime No.10/2009, yet the police has not submitted any report of investigation before the CJM. Thus, it is amply clear that the CJM has not taken cognizance of the complaint filed by the petitioner, by issuing process against respondents No.1 to 4. As observed by the Apex Court, in "*M Narayandas*"s Case that the stage of issuing directions to carry out investigation u/s 156(3) is a recognizance stage and it can be said that the Court has taken cognizance of the complaint, only when process is issued against the accused. This legal provision is misconstrued by the revisional court while passing the order impugned. In the light of the above stated settled legal position, the impugned order requires to be quashed and set aside.

13. In the result, the petition succeeds. The impugned order dated 07.05.2011 passed by the Additional Sessions Judge7, Aurangabad in Criminal Revision

No.227/2010 is hereby quashed and set aside. The order dated 05.03.2009 passed by the CJM, Aurangabad in RCC No.2264/2008 is hereby restored. Rule is made absolute as indicated above.