
(2001) 02 BOM CK 0005

In the Bombay High Court

Case No : Criminal Rev. Application No. 109 of 1998

Vasant Laxman Ruikar

APPELLANT

Vs

S.Y. Khaire and others

RESPONDENT

Date of Decision : 02-02-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 210, 245(2), 397, 397(2)
Penal Code, 1860 (IPC) — Section 147, 148, 149, 380, 427

Citation : (2001) 02 BOM CK 0005

Hon'ble Judges : R.K. Batta, J

Bench : Single Bench

Advocate : M.L. Somalwar, for the Appellant; Aniruddha Choube for Respondents Nos. 1 to 7 and S.S. Doifode, Assistant Public Prosecutor for State, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Batta, J.—In this revision, the applicant challenges order dated 12-5-1998 passed by the 3rd Additional Sessions Judge, Yavatmal in Criminal Revision No. 107 of 1997 vide which order dated 19-9-1997 of the Judicial Magistrate, First Class, Kalamb for recalling process issued against the Respondents No. 1 to 7 was quashed and order of issue of process was ordered to be recalled. Consequently, learned Additional Sessions Judge remanded the matter to the Magistrate to call for and consider the report of investigation and then to decide whether cognizance should be taken.

2. The background in which this order was passed, is required to be seen first in order to appreciate the arguments advanced by learned Advocates for parties.

3. In respect of an incident alleged to have taken place on 4th October, 1996, a complaint was lodged by one Janardhan with the police. In respect of the same incident dated 4th October, 1996. the present applicant filed a complaint before the judicial Magistrate, First Class, Kalamb in respect of offences under Sections 147, 148, 149, 427, 448, 445 and 380 of the Indian Penal Code. In this

complaint, it is stated that the accused on 4th October 1996 at 1.00 p.m. formed an unlawful assembly with the common object of committing mischief and house trespass by house breaking and all accused were armed with deadly weapon like axes. As I have already pointed out, in respect of the same incident, earlier a report had been filed on 4-10-1996 by Janardhan Waikar who is stated to be "Diwan" (Manager) of the present applicant. In the complaint filed by the present applicant, applicant had prayed that the Court may be pleased to send complaint to Police Station Officer, Kalamb u/s 156(3), Code of Criminal Procedure ordering full, proper and prompt investigation. The complainant craved leave to be heard in case Police Station Officer filed any kind of summary for closure of investigation without filing charge-sheet. By order dated 29-10-1996, that is to say, the date on which the complaint had been filed, the magistrate passed an order directing investigation by police u/s 156(3), Code of Criminal Procedure and report within one month. The report was not submitted and further extension of one month was granted and it appears that report was not submitted thereafter and the case was fixed for 21-12-1996. On 21-12-1996, also report was not filed and, therefore, the applicant filed application praying that the complaint be proceeded with by the Court. On this application, the Magistrate passed order on 21-2-1997 to proceed with the complaint since even till then the police report called u/s 156(3), Code of Criminal Procedure had not been received. The Magistrate thereafter examined complainant and witnesses and by order dated 20-3-1997 ordered process against Respondents 1 to 7 for offences under Sections 147, 148, 448, 427 and 380 read with Section 149 of the Indian Penal Code.

3. It is interesting to note that even before the Magistrate had passed order dated 21-2-1997 to proceed with the complaint filed by the applicant on 29-10-1996 that the police had submitted "B" summary report on 15-2-1997 on the report filed by Diwan (Manager) of the present applicant on 5-10-1996 in respect of the same incident. The Respondents 1 to 7 filed an application for discharge and dismissal of the complaint vide application dated 3-9-1997 and by order dated 19-9-1997 the said application recalling the process was rejected. This order was challenged by Respondents 1 to 7 before the Court of Session and learned Additional Sessions Judge, Yavatmal passed order dated 12-5-1998 to which I have already referred, which is subject matter of challenge in this revision by the present applicant.

4. Learned Advocate for the applicant basically urged before me that the revision before the Sessions Court against the order of Magistrate refusing to recall the process or discharge the accused, was an interlocutory order and as such, revision was not maintainable in support of this contention, he has placed reliance on the principles laid down by the Apex Court in para 33 in the case of V.C. Shukla Vs. State through C.B.I., . He has also relied upon the judgment of the learned Single Judge of this Court in Anil Shet Gaonkar Vs. Abdulla Khan Karol and Another, . In respect of this ruling, it has been urged that the Trial Court has misunderstood the proposition led in this ruling as, in fact, this ruling

helped the applicant in support of his submission that the order passed by the Magistrate refusing to recall the process or discharge the accused, was interlocutory order.

5. On merits, it has been urged by learned Advocate for the applicant that the Magistrate was well within his right to proceed with the complaint lodged by the applicant in view of the delay in submission of the investigation report as directed u/s 156(3), Criminal Procedure Code. In support of this submission reliance has been placed on Dr. Kumudini Padhi Vs. Prasanta Kumar Mandal, .

6. On the other hand, the learned Advocate for Respondents 1 to 7 has relied upon the judgment of the Apex Court in K. K. Patel and Anr. v. State of Gujarat and Anr. 2000 CH.L.J. 4592, and the judgment of the learned Single Judge of this Court in Dashrath Pralhad Chawhan v. State of Maharashtra and Anr. 2000 (4) Mh.L.J. 573. He also pointed out that once the Magistrate had ordered investigation u/s 156(3), Criminal Procedure Code, it was not permissible for the Magistrate to have taken cognizance of the matter by examining the applicant without waiting for report of investigation. On merits of the order of learned Additional Sessions Judge, Yavatmal, it is submitted that the order in question does not suffer from any infirmity and it does not call for any interference whatsoever.

7. Learned Additional Public Prosecutor supported the order of learned Additional Sessions Judge, Yavatmal and submitted that the said order does not suffer from any illegality, irregularity and there is no justification whatsoever to interfere with the same.

8. I shall first deal with the argument advanced by learned Advocate for the applicant that the order passed by the Magistrate being interlocutory order, no revision was maintainable before the Sessions Court. His contention is that if the proceedings had culminated finally by the impugned order passed by the Magistrate, revision was permissible, but in the absence of the same, no revision could be entertained since the impugned order in question was an interlocutory order as it did not culminate in the proceedings.

9. Respondents No. 1 to 7 had filed an application for discharge after issue of the process. This application was filed u/s 245(2), Criminal Procedure Code. By order dated 19-9-1997, the Magistrate rejected the said application for discharge and recalling the process. The Respondents challenged the said order before the Sessions Court which passed the impugned order. On the question as to whether an order challenged in revision before the Sessions Court is interlocutory order or not in terms of Section 397(2), Criminal Procedure Code. Learned Advocate for Respondents No. 1 to 7 relied on in K. K. Patel and Anr. v. State of Gujarat and Anr. (supra). In this case after the process was issued, the accused sought discharge on the ground that sanction was not obtained. The Magistrate dismissed the plea for discharge. The Sessions Court in revision accepted the plea and discharged the accused. The High Court set aside the order of Sessions

Court mainly on the ground that Sessions Court should not have entertained the revision as the order challenged was interlocutory. The order of the High Court was set aside by the Apex Court holding that revision u/s 397(2), Code of Criminal Procedure was maintainable. While considering a number of judgments of the Apex Court including V.C. Shukla v. State through CBI, (supra). Madhu Limaye Vs. The State of Maharashtra, and Amar Nath and Others Vs. State of Haryana and Another, , it has been laid down that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage but the feasible test is whether by upholding the objections raised by a party, would it result in culminating the proceedings and if so any order passed on such objections-would not be merely interlocutory in nature as envisaged in Section 397(2), Criminal Procedure Code. It was further pointed out that if the objections raised by the Appellants were upheld by the Court, the entire proceedings would have been terminated. Hence as per the said standard, the order was revisable. Emphasized portion would go to show that any order on such objection, whether in the affirmative or in the negative, would not be merely interlocutory in nature.

10. Besides this, the Apex Court in Amur Nath v. State of Haryana, (supra) has laid down as under:

Any order which substantially affects the right of the accused or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section 397. Thus, for instance, orders summoning witnesses, adjourning cases passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie u/s 397(2). But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court.

From the above passage, it follows that any order which substantially affects the rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order. As I have already pointed out, an accused can move for discharge u/s 245(2), Criminal Procedure Code. Any order passed on such application decides substantially the rights of the parties. Therefore, in my opinion, the order dated 19th September, 1997 passed by the Magistrate dismissing the application filed by the accused u/s 245(2), Code of Criminal Procedure cannot be said to be an interlocutory order. In view of this position, the proposition laid para 8 by the learned Single Judge in Anil Shet Gaonkar v. Abdulla Khan (supra), that if the Magistrate had accepted the plea of the Petitioner therein for discharge, the entire proceedings against the Petitioner would have been closed and the order would become final as for that Court is concerned, but order of rejection of the Petitioner's plea by the Magistrate

cannot be treated as interlocutory, is no longer good law. It may also be pointed out that the Apex Court has earlier held in *Rajendra Kumar Sitaram Pande and Etc. Vs. Uttam and Another*, that the order directing issue of process is not a purely interlocutory order and revision against order of issue of process is maintainable.

11. Coming to be merits of the impugned order passed by the Additional Sessions Judge, Yavatmal, I do not find any merit in the submissions advanced by the learned Advocate for the applicant for the reasons hereinafter recorded.

12. We have to bear in mind that the applicant had filed complaint on 29-10-1996 in respect of the incident which took place on 4-10-1996 wherein he had himself sought directions from the Magistrate to order investigation u/s 156(3), Code of Criminal Procedure and it is further pertinent to note that the applicant had also craved leave to be heard in case the Police Station Officer, Kalamb filed any kind of summary for closure of investigation without filing charge-sheet. It is also pertinent to note that in respect of the same incident, a complaint had been filed on 5-10-1996 by Janardhan, "Diwan" of the applicant with the police and on 15-2-1997 the police had submitted "B" summary to the Court. In spite of this, the Magistrate on 21-2-1997 decided to proceed to take cognizance of the complaint filed by the applicant and even ordered issue of process on 20-3-1997. It is no doubt true that the police had not submitted investigation report in spite of directions to investigate u/s 156(3), Criminal Procedure Code. The Magistrate could have taken steps to ensure that the report of the investigation was made available by the police and it is interesting to note that on the application subsequently filed by the applicant on 7-1-1999 for contempt against the investigating Officer for not submitting the report, the Magistrate issued show-cause notice. The Magistrate was not helpless and he could have, as I have already stated, ensured that the Police Officer had complied with his direction of investigation u/s 156(3), Criminal Procedure Code. Moreover, on the complaint at the instance of "Diwan" of the applicant "B" summary had been filed. In these circumstances, the action of the Magistrate to proceed with the complaint and then issue process is nothing but abuse of process of law. Learned Additional Sessions Judge had rightly observed, after placing reliance on the Apex Court decision in the case of *S.N. Sharma Vs. Bipen Kumar Tiwari and Others*, that there is no power to stop investigation by police once investigation is ordered by a Magistrate u/s 156(3) Criminal Procedure Code. Learned Additional Sessions Judge, therefore, held that in the circumstances, the order of issuance of process without waiting for investigation report u/s 156(3), Code of Criminal Procedure was not proper. It was contended before learned Additional Sessions Judge that the police had already submitted final report i.e. "B" summary u/s 156(3), Criminal Procedure Code, but still the Additional Sessions Judge directed the Lower Court to call for report of the investigation and consider the said report and then to decide whether cognizance should be taken. It appears that the report of investigation, as ordered u/s 156(3), Code of Criminal Procedure has also been received.

13. Reliance placed by learned Advocate for the applicant on the judgment of Orissa High Court in the case of Dr. Kumudini Padhi v. Prasanta Kumar (supra), does not in any manner help the case of the applicant since the position in the said case was entirely different. In that case, complaint was filed on 7-5-1985 and on 8-5-1985 statement of the complainant was recorded. It appears that the matter had also been reported to the police and it was under investigation. In the set of facts, the Magistrate passed an order staying the case u/s 210, Code of Criminal Procedure awaiting report from the police. It was a case relating to kidnapping wherein minor girl was working in the house of Petitioner therein as a maid-servant and it was alleged that on 24-3-1985 the Petitioner had kidnapped her and sent her to serve as a maid-servant in the house of her sisters husband. It is in these circumstances that after waiting for a long time the stay was vacated and the Magistrate took cognizance of the matter. It was in the peculiar facts and circumstances of the case that the said course was adopted. In fact, the learned single judge of this Court in the case of Dashrath Chawhan v. State of Maharashtra and Anr. (supra) has held that once the investigation is ordered by the Magistrate u/s 156(3), Criminal Procedure Code, the Magistrate cannot interfere in investigation in progress by recalling his order. This case may not be strictly applicable to the facts of this case, yet when the Magistrate orders investigation u/s 156(3), Code of Criminal Procedure he has power and jurisdiction to ensure that the order of investigation is complied with and the report of investigation is submitted.

14. In the case under consideration, I have absolutely no hesitation in saying that the Magistrate had acted hastily in deciding to proceed with the complaint vide his order dated 21-2-1997 especially in view of the fact that in respect of the same incident, on a report filed by Janardhan, Diwan (Manager) of the applicant on 5-10-1996 the police had already filed "B" summary on 15-2-1997. The Magistrate was, therefore, bound to wait in such circumstances for report of investigation ordered by him u/s 156(3), Code of Criminal Procedure and as I have already stated, the Magistrate should have ensured that the investigation report was submitted by the police. If in the circumstances, report of investigation u/s 156(3), Code of Criminal Procedure was not necessary, the Magistrate should have specifically recorded such findings before proceeding ahead in the matter. The course adopted by the Magistrate was thus at all not justified nor does it have sanction of law behind it and as such, learned Additional Sessions Judge had very rightly set aside the impugned order passed by the Magistrate and remanded the matter with direction to consider the report of investigation and then decide whether cognizance should be taken. The impugned order of the learned Additional Sessions Judge does not suffer from any illegality, irregularity nor could it be said by any stretch of imagination, to be perverse so as to interfere within the revisional jurisdiction of this Court.

15. For the reasons stated above, revision is hereby dismissed.