

(2012) 01 KL CK 0076

In the High Court Of Kerala

Case No : Criminal M.C. No. 1118 of 2005

V.P. Shyad, Sathick, M/s. National Timbers, Kathrakadavu,
Kochi, Benazir, M/s. National Timbers, Kathrakadavu, Kochi
and Sheriff, Driver, M/s. National Timbers Kathrakadavu, Kochi

APPELLANT

Vs

V.P. Rasheed and State of Kerala

RESPONDENT

Date of Decision : 20-01-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3)
Penal Code, 1860 (IPC) — Section 34, 392, 447, 506

Citation : (2012) 01 KL CK 0076

Hon'ble Judges : N.K. Balakrishnan, J

Bench : Single Bench

Advocate : Shaji P. Chaly, for the Appellant; Shaijan C. George, Sri. John Vipin, Smt. S. Rekha Kumari, Smt. Sajitha George, for R, R1 and Smt. Jasmine V.H., Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

N.K. Balakrishnan, J.—Petitioners are A1 to A4 in C.C.No.1174/2004 of J.F.C.M.-II, Aluva. Cognizance was taken based on the private complaint filed by the first respondent under Secs. 447, 392 and 506(ii) r/w 34 IPC. First petitioner is the brother of the first respondent/complainant. Other petitioners are brother-in-law and near relatives of the first petitioner. It is alleged that formerly there was a partnership business under the name Oriental Timbers, conducted by the petitioners and the first respondent. That partnership business was stated to have been dissolved and thereafter a new partnership was constituted in which the first respondent and his wife were the partners. The petitioners are stated to be not the partners of that firm.

2. It was alleged that on 28.5.2004 at about midnight the petitioners with the intention of committing robbery of the vehicles trespassed into the compound of the first respondent firm and robbed one Crain, One Tata Pick-up Van, Tiota Car, Kinetic Scooter etc. The vehicles were taken away by threatening the Watcher. It

was alleged that the first respondent filed a complaint before the police on 29.5.2004 and since no crime was registered he filed another complaint before the learned Magistrate on 1.6.2004. That complaint was forwarded to the police for investigation under Sec. 156(3) Cr.P.C. After questioning so many witnesses and after completing the investigation the police filed a report before the learned Magistrate referring the case as false. Thereupon the first respondent filed a protest complaint before the learned Magistrate. There, the sworn statement of the complainant/first respondent was recorded by the learned Magistrate. After considering the complaint, sworn statement etc. the learned Magistrate took cognizance of the offences as mentioned above and issued process to the petitioners.

3. Learned counsel for the petitioners would submit that the first petitioner had filed a suit before the Sub Court, Ernakulam as O.S.No.288/2004 against the first respondent and others. That suit was withdrawn by the first petitioner and his wife on 28.3.2007. Another suit was also filed by the first petitioner and his wife as O.S.No.308/2004 against the first respondent and others. It is argued by the learned counsel for the petitioners that the dispute is purely civil in nature and on that ground itself the cognizance taken by the court below has to be set aside. It was pointed out by the learned Public Prosecutor that the registration certificates of the vehicles which were alleged to have been taken away by the petitioners stood in the name of first respondent. Learned counsel for the petitioners would also submit that the vehicles alleged to have been robbed or stolen by the petitioners were in fact the properties shown in the schedule 'C' to the plaint in O.S.No.308/2004. Since a specific contention was raised by the first petitioner and his wife in O.S.No.308/2004 that those vehicles are the properties of the firm or of the first petitioner and his wife, unless and until the right over the properties mentioned in the plaint is decided/declared by the competent civil court, it cannot be said that those properties actually belonged to the first respondent.

4. Learned counsel for the petitioners would submit that after the refer/final report was filed by the police, the sworn statement of the complainant alone was recorded. No other witness was examined. The learned counsel for the first respondent/complainant would submit that the learned Magistrate has gone through the averments raised by the petitioners in the two suits which itself according to the learned counsel would prove that the allegations made in the complaint are true. The order taking cognizance has not been produced here. It seems no detailed order was passed by the learned Magistrate considering the effect of the final/refer report filed by the police and as to why or how the learned Magistrate rejected the report filed by the police and what was the material placed before the court to take cognizance. Learned counsel for the first respondent is perfectly justified in his submission that simply because the police has referred the case as false, the learned Magistrate cannot reject the protest complaint. The learned Magistrate can certainly take cognizance based on the protest complaint but the learned Magistrate has to peruse the refer report filed

by the police and all materials placed before it to find whether the cognizance is to be taken and process issued to the accused.

5. Learned counsel for the petitioners has relied upon the decision in Mahesh Chand Vs. B. Janardhan Reddy and Another, in support of his submission that in a case where a private complaint was dismissed without assailing any reason the learned Magistrate can take cognizance of an offence and issue process if there are sufficient grounds to proceed. Here the earlier complaint filed by the first respondent was not dismissed. The dictum laid down in H.S. Bains, Director, Small Saving-Cum-Deputy Secretary Finance, Punjab, Chandigarh Vs. State (Union Territory of Chandigarh), is also on the point that even if the police files a report stating that no case was made out still the learned Magistrate can take cognizance and issue process. In Mahesh Chand's case cited above it was also held that merely because the learned Magistrate has accepted the final report the same by itself would not stand in his way to take cognizance of the offence on a protest complaint. As has been noticed earlier it seems the Watchman who was the main witness to the occurrence was not examined before the learned Magistrate; his sworn statement was not recorded. When a negative report has been filed by the police, if the learned Magistrate proceeds to take cognizance based on the materials collected by the police certainly the learned Magistrate has to consider the statements and find whether in respect of the negative report the learned Magistrate is justified in taking cognizance, as has been held in India Carat Pvt. Ltd. Vs. State of Karnataka and Another, . Here, no order taking cognizance has been placed before me. In these circumstances, the following directions are issued :-The order taking cognizance and the process issued by the learned Magistrate in C.C.No.1174/2004 of J.F.C.M.-II, Aluva is set aside. The learned Magistrate will consider the refer report filed by the police and also the sworn statement and other materials placed before that court by the complainant. If the complainant chooses to examine any other witnesses, sworn statements of those witnesses also can be recorded by the learned Magistrate. The learned Magistrate will pass appropriate orders giving reasons for the same. The complainant will appear before the learned Magistrate on 17.2.2012.