

(2015) 07 BOM CK 0022

In the Bombay High Court

Case No : Criminal Writ Petition No. 980 of 2014

Yogesh Balkrishna Kakade

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 03-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 155, 156, 156 (3), 156(3), 173
Penal Code, 1860 (IPC) — Section 499, 500

Citation : (2015) 3 BomCR(Cri) 643

Hon'ble Judges : S.S. Shinde, J;A.I.S. Cheema, J

Bench : Division Bench

Advocate : Shrikant S. Patil, for the Appellant; S.D. Kaldate, APP, Advocates for the Respondent

Final Decision : Disposed off

Judgement

A.I.S. Cheema, J.—Rule, returnable forthwith. With consent of the learned counsel for the parties, matter has been finally heard.

2. The Petitioner is accused in S.T.C. No. 643 of 2008 pending before J.M.F.C., Sakri, Dist-Dhule, in defamation case filed by Respondent No. 2 (hereafter referred as "Complainant").

3. The present Writ Petition has been filed seeking quashing of order dated 21st November 2008 in S.T.C. No. 279 of 2008 passed under Section 156(3) of the Code of Criminal Procedure, 1973 ("Cr.P.C." in brief) and subsequent charge-sheet filed by police converting the S.T.C. No. 279 of 2008 into S.T.C. No. 643 of 2008 and subsequent recording of plea.

4. A brief reference needs to be made to the manner in which the present proceedings have developed in the trial Court. The Complainant presented private complaint to the J.M.F.C., Sakri under Section 499, 500 of the Indian Penal Code, 1860 ("I.P.C." in brief) claiming that the Petitioner (hereafter referred as "Accused") had demanded Rs. 50,000/- from him and on failure of

the complainant to give the amount, the Accused published defamatory contents against the Complainant in his Weekly Newspaper Editions on 16th September 2008 and 26th September 2008. On receipt of the complaint, the J.M.F.C. passed orders as under:

"Send the matter for investigation u/s. 156(3) of Cr.P.C. and call the report of I.O. at the earliest."

? Consequently the matter was sent to the police and subsequently police presented charge- sheet, which came to be registered as Summary Criminal Case No. 643 of 2008. On the said charge-sheet, there is order dated 8th December 2008 to the effect that:-

"Received Chargesheet with accused alongwith police papers on 08/12/2008. Issue process U/sec.499, 500 I.P.C. against accused."

? It appears that the Accused appeared and was granted bail. His plea was recorded under Section 500 of I.P.C. on 15th November 2010. Although the matter is old, the evidence has yet not been recorded.

5. The learned counsel for the Accused has submitted that Section 500 of I.P.C. is non-cognizable offence and Section 156(3) of Cr.P.C. could have been invoked only in a cognizable offence and thus the order dated 21st November 2008 passed below private complaint No. 279 of 2008 was itself illegal and the subsequent charge-sheet presented, could not have been entertained and the whole proceeding is vitiated. The counsel referred to the case of Shatrughna Prasad Sinha Vs. Rajbhau Surajmal Rathi and Others, (1996) 7 AD 25 : (1997) CriLJ 212 : (1996) 4 Crimes 27 : (1997) 10 JT 469 : (1996) 6 SCALE 769 : (1996) 6 SCC 263 : (1996) 5 SCR 771 Supp , to submit that it was necessary for the J.M.F.C. that on receipt of the complaint, to read the complaint as a whole and find out whether allegations disclosed constitute an offence under Section 499 triable by the Magistrate. Thus, according to the counsel, there was no case made out for taking cognizance and the procedure adopted was illegal and the concerned orders passed by the J.M.F.C. need to be quashed and set aside. The counsel submitted that the matter needs to be relegated back to the J.M.F.C. to the stage of Section 200 of Cr.P.C.

6. Against this, the learned counsel for Respondent No. 2 - original complainant submitted that even if the J.M.F.C. committed some error in passing order under Section 156 (3) of Cr.P.C., the proceeding should not be set aside in view of Section 460 of Cr.P.C. The counsel further placed reliance on the case of Purshottam Jethanand Vs. The State of Kutch, AIR 1954 SC 700 , which was decided under similar provisions of the Criminal Procedure Code, 1898. Relying on the case, referred to above, the counsel submitted that if the J.M.F.C. acted in good faith and took cognizance, in absence of the prejudice the defect should be treated as cured. Learned counsel also relied on the case of Frank Dalton Larkins and etc. Vs. State (Delhi Administration) and referred to Para 15 of the said Judgment and submitted that in the said matter it was observed that failure to

examine complainant under Section 200 of Cr.P.C. while issuing process, would not vitiate the taking of cognizance of the complaint. Learned counsel submitted that in view of this Judgment of the Delhi High Court, even if cognizance has been taken in the matter without examining the complainant, the defect would not vitiate the proceedings. Reliance was also placed on the case of Abdul Ameer Khan vs. State and another, reported in 1979 Cri. L.J. NOC 182 (Karnataka), to submit that if cognizance is taken erroneously and in good faith, the proceedings would not get vitiated.

7. We have heard the counsel for both sides. We have perused the rulings referred which have their own facts. In the present matter, admittedly, proceeding brought was under Section 500 of I.P.C. The First Schedule of Cr.P.C. provides that offence under Section 500 of I.P.C. is non-cognizable case. Section 156 of Cr.P.C. reads as under:-

"156. Police officer's power to investigate cognizable case.- (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned."

8. It is quite apparent that the Section can be invoked only when the Court is dealing with investigation into cognizable case. Section 500 of I.P.C. relates to non-cognizable case. Section 155 of Cr.P.C. relates to matters where there is information as to non-cognizable case and investigation of such non-cognizable case. Sub-section (2) of Section 155 of Cr.P.C. lays down that no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. The police on their own cannot investigate into a non-cognizable without the order of the Magistrate having power to try such case. In the present matter, the J.M.F.C. had power to try the non-cognizable case. The J.M.F.C., after receiving the private complaint, did not examine the complainant under Section 200 of Cr.P.C. The Magistrate could have postponed issue of process and either inquired into the case himself or could have directed an investigation to be made by the police officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. Such steps could have been taken invoking Section 202 of Cr.P.C. But the J.M.F.C. could not have resorted to Section 156(3) of Cr.P.C. which does not deal with non-cognizable case.

9. Learned counsel for the complainant has relied on Section 460 of Cr.P.C. The relevant part of Section to consider present matter needs to be reproduced:-

"460. Irregularities which do not vitiate proceedings.- If any Magistrate not empowered by law to do any of the following things, namely:-

(a)..... (b)..... (c)..... (d).....

(e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of section 190;

(f)..... (g)..... (h)..... (i).....

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered."

10. It is quite clear from above that Section saves proceedings where Magistrate who was not empowered by law to take cognizance under clause (a) or clause (b) of sub-section (1) of Section 190 of Cr.P.C. erroneously in good faith takes the cognizance. In the present matter, it is not the case that the J.M.F.C. was not empowered by law to take cognizance on the private complaint.

11. The Judgment in the matter of Purushottam Jethanand, cited supra relied on by the learned counsel for complainant dealt with different case, which would be clear from following extracts from Para 2 of the Judgment:

"It may be recalled that the complaint in this case was in fact filed on the 26th August 1950. The powers of Shri Kansara to take cognizance as Sub-Divisional Magistrate ceased from the 19th August, 1950 and it does not appear that in his capacity as an ordinary First Class Magistrate any fresh powers were conferred on him under Section 190(2), Cr.P.C. at any period of time relevant for this case. It follows, therefore, that Shri Kansara had no power to take cognizance of this case under Section 190(a) and (b)....."

"We think it clear that without a fresh order under Section 190(2), Cr.P.C. Shri Kansara had no power to take cognizance subsequent to the 19th August, 1950. Notwithstanding this conclusion, we are of the opinion that the defect is cured by Section 529, Cr.P.C. It is admitted that Shri Kansara had no knowledge at all of the notification dated the 19th August, 1950, by the date he took cognizance of the case on the filing of the complaint on the 26th August, 1950. His taking cognizance of this case was therefore "bona fide" and no prejudice has been shown....."

? As we have just mentioned, present matter is not a case that the Magistrate was not empowered by law to take cognizance.

12. In the present matter, there is another difficulty. Record shows that earlier the J.M.F.C. passed wrong order on 21st November 2008 sending the matter for investigation invoking Section 156(3) of Cr.P.C. Thereafter when the charge-sheet was filed, the J.M.F.C. issued process on the police report and further passed orders on the same day below the private complaint to the effect that, orders had been passed under Section 156(3) of Cr.P.C. and charge-sheet has been received and thus the private complaint was being merged into S.T.C. No.

643 of 2008, which had been filed by the police. Accordingly, the private complaint came to be treated as disposed. Thus, the private complaint lost its identity and the result is that the present criminal case is a criminal case on the basis of police report for defamation of the complainant. The present situation would attract provisions of Section 199 of Cr.P.C. Sub-section (1) of Section 199 of Cr.P.C. provides that:-

"No Court shall take cognizance of an offence punishable under Chapter XXI of the Indian Penal Code (45 of 1860), except upon a complaint made by some person aggrieved by the offence."

? Chapter XXI of I.P.C. deals with defamation. Clearly, taking of cognizance itself on the police report under Section 173 of Cr.P.C. was prohibited by Section 199 of Cr.P.C. as the matter related to defamation.

13. We find that the procedures adopted by the J.M.F.C. are totally illegal and cannot be maintained. However, looking to the particulars of the complaint, and the fact that it was not the fault of the complainant if the J.M.F.C. resorted to wrong procedures, it would not be appropriate to quash the entire proceedings. The learned counsel for the Accused himself has submitted that the matter needs to be relegated back to the stage of Section 200 of the Code of Criminal Procedure.

14. For the above reasons, we pass following order:

ORDER

(A) The order dated 21st November 2008 passed by the J.M.F.C. below Criminal Application S.T.C. No. 279 2008 directing investigation under Section 156(3) of Cr.P.C. is quashed and set aside.

(B) The subsequently presented charge-sheet under Section 173 of Cr.P.C. by the police which was registered as Summary Criminal Case S.T.C. No. 643 of 2008 and the cognizance taken of the same vide order dated 8th December 2008, are also quashed and set aside.

(C) The order dated 8th December 2008 merging Criminal Misc. Application bearing S.T.C. No. 279 of 2008 into S.T.C. No. 643 of 2008 is also quashed and set aside.

(D) The Criminal Misc. Application bearing S.T.C. No. 279 of 2008 is restored to its original number and to the stage of Section 200 of Cr.P.C.

(E) The Magistrate shall consider the said private complaint in the light of Section 200, 202 and other relevant provisions of Cr.P.C. and take suitable further steps in the matter as per law, keeping above observations in view.

(F) As the matter is quite old, the hearing of the same is expedited.

? Rule made partly absolute on the terms indicated above. Writ Petition stands disposed of, accordingly.