SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Tarunkumar Dayalal Doshi and Another Vs. Kishorkumar Dayalal Doshi and Others

Tarunkumar Dayalal Doshi and Another Vs. Kishorkumar Dayalal Doshi and Others

SooperKanoon Citation : sooperkanoon.com/1105138

Court : Mumbai Nagpur

Decided On : Jan-10-2013

Judge : M.L. Tahaliyani

Appeal No. : Criminal Writ Petition No.502 of 2012

Appellant : Tarunkumar Dayalal Doshi and Another

Respondent : Kishorkumar Dayalal Doshi and Others

Judgement :

Oral Judgment:

Heard learned Counsel Mr. A.R. Chavhan for the petitioners, learned Counsel Mr. N.S. Warulkar for respondent No.1 and learned Additional Public Prosecutor Mr. P.V. Bhoyar for respondent No.3/State.

2. Rule. Rule returnable forthwith by consent of learned Counsel for the parties.

3. Petitioner Nos.1 and 2 feel aggrieved by the order passed by the learned Additional Sessions Judge, Yavatmal on 17th September, 2012 dismissing the revision petition filed by the petitioners against the order passed by the learned Chief Judicial Magistrate, Yavatmal on 20th July, 2012. The order of the learned Chief Judicial Magistrate dated 20th July, 2012 directed framing of charges

against the petitioners for the offences punishable under Sections 419, 420, 467, 468 and 471 read with Section 34 of the Indian Penal Code. The said order further directed framing of charges against respondent No.2 Sanjay Devilal Vyas for the offences punishable under Sections 419, 420, 467, 468 and 471 read with Section 109 of the Indian Penal Code.

4. Criminal Complaint Case No.540/2005 was filed in the Court of Chief Judicial Magistrate against the petitioners and respondent No.2 by respondent No.1 Kishorkumar Dayalal Doshi. It was alleged in the said complaint that the petitioners had, in furtherance of their common intention, committed forgery in respect of Will of deceased Dayalal Doshi and had used the said alleged forged Will as a genuine document. As far as respondent No.2 is concerned, it was alleged that he had abetted the commission of crime by the petitioners.

5. It may be noted here that before filing of said Criminal Complaint Case No.540/2005 on 14th November, 2005, a police complaint was filed on 1st August, 2004 at Yavatmal (City) Police Station, which was registered as First Information Report No.461/2004. The allegations in the said complaint were pari materia to the allegations made in Criminal Complaint Case No.540/2005. A report under Section 173 of the Criminal Procedure Code was filed by the police after completion of investigation of the said First Information Report. The report under Section 173 of the Criminal Procedure Code was not a charge-sheet but it indicated that the offences could not be detected. The said report ('B Summary) was filed on 14th November, 2005 in the court. It may be noted here that Criminal Complaint Case No.540/2005 was also filed in the Court on 14th November, 2005. The statement of respondent No.1/complainant on oath was recorded in Criminal Complaint Case No.540/2005 on 12th January, 2006. The matter was sent to police under Section 202 of the Criminal Procedure Code for enquiry and report after completion of statement of respondent No.1 on oath. In the meantime, 'B' Summary (report under Section 173 of Criminal Procedure Code) submitted by the police, after completion of investigation in First Information Report No.461/2004, was kept pending by the learned Chief Judicial Magistrate and no orders were passed thereon. Though a protest petition filed by respondent No.1 was on record, the orders on 'B' Summary were deferred by the learned Chief Judicial Magistrate.

The learned Chief Judicial Magistrate was waiting for the report of police under Section 202 of the Criminal Procedure Code in Criminal Complaint Case No.540/2005. After receipt of the said report, 'B' Summary and Criminal Complaint, both were considered together and a common order was passed on 25th March, 2008, which runs as under:-

"3. I have carefully gone through the report submitted by police as per Section 202 of the Criminal Procedure Code. I have also minutely perused evidence led by complainant on his behalf before issuance of process. I have perused all the documents filed by complainant and collected by I.O. After careful consideration of the report submitted by police under Section 202 of the Criminal Procedure Code and the evidence adduced by complainant on record and after perusal of entire documents filed on record, I am of the view that complainant has brought on record prima facie adequate material showing sufficient ground to proceed against all accused."

"4. In view of that, final report submitted by police for grant of 'B' Summary is hereby rejected."

"5. Issue process against accused No.1 and 2 for the offences punishable under Sections 419, 420, 467, 468, 471 read with 34 of Indian Penal Code, issue process against accused No.3 for the offence punishable under Sections 419, 420, 467, 468, 471 read with 109 of the Indian Penal Code.

sd/-

Chief Judicial Magistrate,

Yavatmal.

Dt. 25.3.2008."

6. It appears from the record that after issuance of process as stated hereinabove, the learned Chief Judicial Magistrate proceeded to record evidence of two witnesses of the complainant before charge. After completion of evidence of two witnesses, an order was passed on 20th July, 2012, which directed framing of

charges against the petitioners and respondent No.2. The operative part of the said order runs as under:-

"Prima facie considering above circumstances coupled with evidence of P.W.2 and complainant in my view that there is material to frame charge against accused Nos.1 and 2 for the offences punishable under Sections 419, 420, 467, 468 and 471 read with 34 of Indian Penal Code and against accused No.3 for offences under Sections 419, 420, 467, 468 and 471 read with 109 of Indian Penal Code. Hence, I proceed to frame charge accordingly against accused Nos.1 to 3."

7. This order was challenged before the Sessions Court in Criminal Revision No.44/2012 on the ground that there was no sufficient material to direct framing of charges against the petitioners. It appears that learned Additional Sessions Judge concurred with a view expressed by the learned Chief Judicial Magistrate and therefore, he has dismissed the revision petition by his order dated 17th September, 2012. What is pertinent to note here is that the issue regarding faulty procedure adopted by the learned Chief Judicial Magistrate was neither raised before the learned Magistrate nor it was raised before the learned Additional Sessions Judge during the course of Criminal Revision No.44/2012. That issue was not raised by the learned Counsel during the course of present writ petition also. However, while going through the record and proceedings, it was found that the procedure adopted by the learned Chief Judicial Magistrate was wrong inasmuch as he has not followed the procedure laid down in Section 210 of the Criminal Procedure Code, which runs as under:

"210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence -

(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case) it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

8. In the present case, it can be seen that initially there was a police report, which was registered by the police and investigation of cognizable offences was carried out. After completion of investigation, 'B' Summary was submitted under Section 173 of the Criminal Procedure Code, which was not accepted by the learned Chief Judicial Magistrate and was kept pending. The private complaint filed by respondent No.1 was heard and was referred to police for enquiry and report under Section 202 of the Criminal Procedure Code. The learned Chief Judicial Magistrate, after receipt of police report under Section 202 of the Criminal Procedure Code, considered the complaint as well as 'B' Summary simultaneously and passed the order dated 25th March, 2008 directing issuance of process against the petitioners and respondent No.2. In the said order, it is specifically stated by the learned Chief Judicial Magistrate that 'B' Summary had been rejected. It, therefore, follows that the learned Chief Judicial Magistrate did not agree with the report submitted by the police after investigation of First Information Report No.461/2004. As such the learned Chief Judicial Magistrate had taken cognizance of the offences for which the investigation was carried out by the police.

It is also abundantly clear that the police report submitted under Section 173 of the Criminal Procedure Code and enquiry report submitted by the police under Section 202 of the Criminal Procedure Code were simultaneously considered and process was issued. The allegations in the police complaint and the private complaint were in respect of the same offences. As such once the learned Chief Judicial

Magistrate had taken cognizance of the offences on the basis of report submitted under Section 173 of the Criminal Procedure Code and there is a private complaint against the same persons, the learned Chief Judicial Magistrate was under obligation to enquire into and try both the cases together and they were to be tried as if they had arisen out of the police report instituted under Section 173 of the Criminal Procedure Code. This being the legal position, the learned Magistrate could not have recorded evidence before charge in the present case. After passing the order dated 25th March, 2008 issuing the process, the learned Chief Judicial Magistrate had to follow the procedure laid down for trial of warrant cases instituted upon a police report.

9. The learned Sessions Court, therefore, should not have approved the order passed by the learned Chief Judicial Magistrate. In fact, it should have struck down the order on the ground that the procedure adopted by the learned Chief Judicial Magistrate was not in accordance with law. It is thus clear that the order dated 20th July, 2012 passed by the learned Chief Judicial Magistrate directing the framing of charges against the petitioners and respondent No.2 and the order dated 17th September, 2012 passed by the learned Additional Session Judge dismissing the revision petition suffer from serious infirmities. Both the orders cannot be sustained and continuation of such orders amount to abuse of process of law and there is likelihood of miscarriage of justice. In view thereof, it is not necessary to go into the merits of the case as to whether the evidence of P.W. Nos.1 and 2 recorded before charge was sufficient to frame charges against the petitioners and respondent No.2. Since the procedure, in accordance with law, has not been adopted by the learned Chief Judicial Magistrate, I pass the following order.

The order passed by the learned Chief Judicial Magistrate directing the framing of charges against the petitioners and respondent No.2 dated 20th July, 2012 and the order passed by the learned Additional Sessions Judge dated 17th September, 2012 are quashed and set aside.

The learned Chief Judicial Magistrate is directed to hear the matter from the stage of Section 238 of the Criminal Procedure Code.

The stay, if any, stands vacated.

Rule is made absolute in above terms.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com