

Arun and Another Vs. Venkatrao and Another

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Court : Mumbai Aurangabad

Decided On : Mar-02-2016

Judge : V.K. Jadhav

Appeal No. : Criminal Application No. 6965 of 2015

Appellant : Arun and Another

Respondent : Venkatrao and Another

Judgement :

1. Rule. Rule returnable forthwith. By consent of parties, heard finally at admission stage.

2. The applicants are the original accused in R.C.C. No.17 of 2011. By the impugned order dated 27.3.2014, learned Magistrate has issued process against the applicants-accused for the offences punishable under Sections 420, 467, 468, 471 r.w. 34 of I.P.C. The applicants-original accused had challenged the said order by filing Criminal Revision No.62 of 2014 before the Sessions Court at Latur. The learned Additional Sessions Judge No.3, Latur, by judgment and order dated 23.11.2015, dismissed the revision with costs. Hence, this criminal application.

3. Brief facts giving rise to the present Criminal Application, are as follows:-

a) Respondent No.1-original complaint has filed complaint before learned J.M.F.C. Renapur against the applicants-original accused for having committed offences

punishable under Sections 420, 467, 468, 471 r.w. 34 of I.P.C. The learned J.M.F.C. had directed investigation under Section 156(3) of the Code of Criminal Procedure by the police. Learned Magistrate, thereafter, by order dated 14.9.2011, directed respondent No.1-complainant to file certified copy of document before issuing process against the accused. It is observed in the said order that xerox copy of document is on record and the complainant is therefore, directed to file certified copy of the document.

b) By order dated 5.10.2011, learned Magistrate has observed that, after reading the complaint, the report of police and the statements, there is no prima facie evidence substantiating the allegations of preparation of false and forged documents and use of the same as genuine documents in the official working and further directed respondent No.1-original complainant to lead additional evidence before issuing process. Accordingly, statement of the complainant-respondent No.1. came to be recorded.

c) Thereafter, learned Magistrate, by order dated 27.3.2014, after considering the verification of witnesses under Section 202 of the Code of Criminal Procedure and the documents placed on record, issued process against the applicants-original accused for the offences punishable under Sections 420, 467, 468, 471 r.w. 34 of I.P.C.

d) The applicants-original accused therefore, had challenged the said order by filing Criminal Revision No.62 of 2014 as aforesaid, before Sessions Court at Latur and the learned Additional Sessions Judge-3, Latur by order dated 23.11.2015 has dismissed the said revision with costs.

4. Learned counsel for the applicants submits that instead of taking cognizance of the complaint filed by respondent No.1-original complainant, learned Magistrate had directed investigation under Section 156(3) of the Code of Criminal Procedure. Learned counsel submits that once investigation under Section 156(3) is directed, the proceedings pursuant to the notice terminates/transforms in the F.I.R. Learned counsel submits that once order is passed directing investigation under Section 156(3) of Cr.P.C., the police authorities are supposed to submit report as contemplated under Section 173 of Cr.P.C. Learned counsel further

submits that the Magistrate can take cognizance only in respect of report under Section 173 of Cr.P.C. and till that time the learned Magistrate ceases to have any jurisdiction and control over the proceedings. Learned counsel submits that the procedure being adopted by the Magistrate is illegal and contrary to the provisions of Cr.P.C.

Learned counsel for the applicants-accused in order to substantiate his contentions, places reliance on the judgments in the following cases:-

- i) Mohd. Yousuf vs. Afaq Jahan (Smt.) and Another, reported in (2006) 1 SCC 627;
- ii) Priyanka Srivastava and Others vs. State of U.P. and Others, reported in 2015 (4) SCALE 120;
- iii) Madhu Bala vs. Suresh Kumar and others, reported in AIR 1997 SC 3104 (1); and
- iv) Judgment dated 10.02.2016 delivered by the Supreme court in the case of Hemant Yashwant Dhage vs. State of Maharashtra and others, in Criminal appeal No.110 of 2016.

5. Learned counsel for respondent No.1-original complainant submits that when a Magistrate orders investigation by the police before taking cognizance under Section 156(3) of Cr.P.C. and receives the final report from the police, the Magistrate has power to issue notice to the complainant and record his statement and the statements of other witnesses and issue process under Section 204 of Cr.P.C. Learned counsel submits that the learned Magistrate has applied his mind and passed the impugned order of issuance of process against the applicants-accused. Learned counsel submits that it is always open to the Magistrate to take cognizance of a complaint and dispose of it in accordance with law. Learned counsel submits that preliminary enquiry is required to be conducted in respect of the family disputes falling in the category of cases as observed in para 111(vi) of Lalita Kumari vs. Government of Uttar Pradesh and others reported in AIR 2014 SC 187. Learned counsel submits that the Magistrate has correctly passed the order of issuance of process against the accused and the same is also confirmed

by the learned Sessions Judge. There is no substance in the criminal application and the criminal application is thus, liable to be dismissed.

Learned counsel for respondent No.1, in order to substantiate his submissions, places reliance on the judgments in the following cases:-

- i) Lalita Kumari vs. Government of U.P. and others, reported in AIR 2014 SC 187;
- ii) Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi and others, reported in (1976) 3 SCC 736;
- iii) Tula Ram and others vs. Kishore Singh, reported in AIR 1977 SC 2401; and
- iv) Ramdev Food Products Private Limited vs. State of Gujarat, reported in (2015) 6 SCC 439.

6. In the case of Tula Ram (supra), relied upon by learned counsel for respondent No.1, the Hon'ble Supreme Court has considered the order for investigation under Section 156 (3) on complaint. After considering various earlier decisions, the Supreme Court, on careful consideration of the facts and circumstances of the case, propounded the following legal provisions:-

"i) a Magistrate can order investigation under Section 156(3) only at the pre-cognizance stage, that is to say, before taking cognizance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under Section 156(3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by section 202 of the Criminal procedure Code.

ii) Where a magistrate chooses to take cognizance, he can adopt any of the following alternatives:-

(a) he can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

(iii) In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding, he can dismiss the complaint.

(iv) Where a Magistrate orders investigation by the police before taking cognizance under section 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 of the Code, as described above."

7. In the case of Mohd. Yousuf (supra), relied upon by the learned counsel for the applicant, the Supreme court in para 11 of the said judgment has made following observations:-

"11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

8. In the case of *Madhu Bala vs. Suresh Kumar* (supra), relied upon by the learned counsel for the applicant, the Supreme Court, in para 10 of the said judgment, has made following observations:-

"10. From the foregoing discussion it is evident that whenever a Magistrate directs an investigation on a "complaint the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the above Rules. It, therefore, passes our comprehension as to how the direction of a Magistrate asking the police to 'register a case' makes an order of investigation under section 156(3) legally unsustainable. Indeed, even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(1) of the Code which empowers the Police to Investigate into a cognizable 'case' and the Rules framed under Indian Police Act, 1861 it (the police) is duty bound to formally register a case and then investigate into the same. The provisions of the Code, therefore, does not in any way stand in the way of a magistrate to direct the police to register a case at the police station and then investigate into the same. In our opinion when an order for investigation under Section 156(3) of the Code is to be made the proper direction to the Police would be 'to register a case at the police station treating the complaint as the First Information Report and investigate into the same.'"

9. In the case of *Lalita Kumari vs. Government of U.P* (supra), relied upon by learned counsel for respondent No.1, the issue arises for consideration is whether police officer is bound to register F.I.R. upon receiving of any information relating to commission of cognizable offence under Section 154 of Cr.P.C. or the police officer has power to conduct "preliminary inquiry" in order to test veracity of such information before registering the same.

10. In the case of *Ramdev Food Products (P) Ltd. vs. State of Gujarat* (supra), relied upon the the learned counsel for respondent No.1, the following questions arise for consideration:-

(i) Whether direction of the Magistrate to call for a report under section 202 Cr.P.C. instead of directing investigation Section 156(3) Cr.P.C. is controlled by any defined parameters,

(ii) Whether in the course of investigation in pursuance of a direction under Section 202 Cr.P.C. the police officer is entitled to arrest an accused, and

(iii) Whether in the present case, the magistrate erred in seeking a report under Section 202 Cr.P.C. instead of directing investigation under Section 156(3) Cr.P.C.

The Supreme Court, while answering those questions, has observed that the direction under Section 156(3) is to be issued only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone issuance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice, it is considered appropriate to straightway direct investigation, such a direction is issued. Secondly, the cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed". Category of cases falling under para 111(vi) in Lalita Kumari (supra) may fall under Section 202 of the Code.

11. The provisions of Section 156(3) and Section 202 of the Code of Criminal Procedure are reproduced herein below:-

"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."

"202. Postponement of issue of process.-

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

12. In the case in hand, the learned Magistrate has passed the following orders:-

R.C.C. 17/11

4.2.2011

ORDER

4.2.2011

Case fixed for verification statement of complaint. R/on 23.2.2011.

Sd/-

J.M.F.C. Renapur

ORDER

4.3.2011

Call report U/Sec. 156(3) of Cr.P.C. from concerned Police Station.

Sd/-

J.M.F.C. Renapur

ORDER

14.9.2011

Complainant is directed to file certified copy of alleged document before issuing process against accused. It is necessary documents while consider at the time of issue process under. The Xerox copy of alleged document is on record. Hence complainant is directed to file certified copy of alleged document.

Sd/-

J.M.F.C. Renapur

ORDER

5.10.2011

Read complaint, report of police, and statements. The complainant in said complaint stated that the accused prepared false, forged document and same used as a genuine one in official working. But there is no prima facie evidence

regarding that on record. Hence for that complainant to lead additional evidence before issue process.

Sd/-

J.M.F.C. Renapur

13. In the light of the order passed on 5.10.2011, respondent No.1-original complainant has examined himself before the Court and accordingly, learned Magistrate has passed the impugned order dated 27.3.2014 issuing process against the applicants-accused for the offences punishable under Sections 420, 467, 468, 471 r.w. 34 of I.P.C.

14. The powers under Section 156(3) can be invoked by the Magistrate before taking cognizance directing the police to investigate into the allegations and submit a report or charge sheet under section 173 of Cr.P.C. On the other hand, Section 202 of Cr.P.C. contemplates taking cognizance and the directions for investigation for the purpose of deciding whether there is sufficient ground to proceed or not. Such investigation must also end up only with the report contemplated under Section 173 of Cr.P.C. It is well settled that even if the Magistrate does not say in his order, while directing investigation under Section 156(3) of Cr.P.C., that F.I.R. should be registered, it is the duty of the police officer in charge of the police station to register the F.I.R. regarding cognizable offence disclosed by the complainant. In the case in hand, it appears that the Magistrate has not acted in accordance with the provisions of Cr.P.C.

15. In this context, it is relevant to re-produce the provisions of section 190 of Cr.P.C.;

"190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section(2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

The expression 'police report' as referred in clause (b) of Section 190 of Cr.P.C. has been defined in section 2(r) to mean a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of Cr.P.C. It is manifest that the Magistrate can take cognizance under Section 190(1) upon the 'police report' meaning thereby the report submitted under Section 173(2). The Magistrate has jurisdiction in the event of final form is filed (i) to accept the final form (ii) in the event the protest petition is filed, to treat the same as complaint petition and if prima facie case is made out, to issue process (iii) to take cognizance of the offence against the person, although final report has been filed by the police in the event he is of the opinion that sufficient material exists in the case diary itself thereof and (iv) to direct re-investigation into the matter.

16. In the case in hand, after directing police investigation under Section 156(3) of Cr.P.C., the Magistrate has passed order dated 14.9.2011 directing the complainant to file certified copies of the documents for issuing process against the accused. In the light of the order passed by the Magistrate dated 4.3.2011 under section 156(3) of Cr.P.C., the concerned police officer has not registered F.I.R. and carried out investigation, if any. It is also not clear whether the concerned police officer has submitted the report as contemplated under Section 173(2) of Cr.P.C. as referred in section 190(1)(b) of Cr.P.C. Thus, the impugned order does not stand. I have no hesitation in directing the Magistrate and the concerned police Officer to rectify their mistake by registering of an appropriate F.I.R. The delay in lodging of such F.I.R. shall not have any effect. The concerned police officer is also directed to complete the investigation strictly in accordance with law, as expeditiously as possible and preferably within a period of six (06) months from today. On receipt of report from the police on completion of

investigation, the Magistrate shall deal with the matter strictly in accordance with law. Hence the following order:-

ORDER

I. Criminal application is partly allowed.

II. The impugned order dated 27.3.2014 passed by learned Judicial Magistrate, First Class, Renapur, in R.C.C. No.17 of 2011 and the order dated 23.11.2015 passed by learned Additional Session Judge-3, Latur in Criminal Revision No.62 of 2014 are quashed and set aside.

III. In terms of the order passed by the Magistrate dated 4.3.2011 calling report under Section 156(3) of Cr.P.C. from concerned police station, the concerned Police Officer is directed to register an appropriate F.I.R. and to complete the investigation fairly and strictly in accordance with law, as expeditiously as possible and preferably within a period of six months from today.

IV. On completion of investigation and on receipt of report from the police, the Magistrate shall deal with the matter strictly in accordance with law.

V. With the above observations, criminal application is disposed of. Rule made absolute in the above terms.

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