

Goutam and Others Vs. State of Karnataka and Another

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Court : Karnataka

Decided On : Jan-24-1992

Reported in : 1992CriLJ2897; ILR1992KAR1772; 1992(2)KarLJ114

Judge : N.D.V. Bhat, J.

Appeal No. : Criminal Petn. No. 217 of 1990

Appellant : Goutam and Others

Respondent : State of Karnataka and Another

Advocate for Def. : M. Marigowda, Govt. Pleader and ;F.S. Dabali, Adv.

Advocate for Pet/Ap. : A.B. Patil, Adv.

Judgement :

ORDER

1. This petition is preferred with a prayer to quash the entire proceedings in P.C. No. 41/89 (C.C. No. 1014/89 on the file of the Judicial Magistrate First Class (hereinafter referred to as 'JMFC'), I Court, Hubli. The facts relevant for the disposal of this petition, briefly stated, are as under :

2. The instant respondent 2, Parashuram, filed a complaint under S. 200, Cr.P.C., before the JMFC, I Court, Hubli asserting that the instant petitioners have committed offences punishable under Ss. 323, 504 r/w 34 of I.P.C.

3. The learned JMFC, on the receipt of the complaint, passed an order dt. 11-8-1989 which reads as under :

'Complainant present and filed complaint Under Section 200, Cr.P.C. Cognizance taken. Register the case and sent it to Gr. P.S.I. for investigation Under Section 156(3), Cr.P.C. returnable by 1-9-89'.

Thereafter, it is seen that, the Police Sub-Inspector, Hubli investigated into the matter and filed charge sheet before the JMFC. It is also seen that after the charge sheet was received, the JMFC passed an order dt. 24-10-1989, directing the issue of summons to the accused. It is also seen that, thereafter, the plea of the accused was also recorded and the accused pleaded not guilty. It is at this stage, that, this petition is filed challenging the entire proceedings before the JMFC, I Court, Hubli.

4. I have heard Sri A. B. Patil, learned counsel for the petitioner, Sri Dabali, learned counsel for respondent 2 and Sri Marigowda, learned Government Pleader.

5. Sri Patil, petitioner's counsel contended that the learned JMFC after having taken the cognizance was not competent to refer the case under S. 156(3), Cr.P.C. to the Police Sub-Inspector, Hubli for investigation and report. It was contended by the petitioner's counsel that having regard to the provisions reflected in Sections 200 to 202, Cr.P.C., the only course which was available for the learned JMFC, after having taken cognizance of the case, was to examine the complainant and to act as stated in the provisions reflected in S. 202.

6. On the other hand, counsel for respondent 2, Sri F. S. Dabali submitted that, having regard to the circumstances, particularly having regard to the fact that the advocate for the accused did not have any objection for framing the charge and having regard to the fact that even the plea of the accused has been recorded and having regard to the fact that the matter has been posted for further proceedings, the irregularity, if any, committed by the learned JMFC is cured in the context of the provisions of S. 460, Cr.P.C. and that therefore, the proceedings in question cannot be quashed at all.

7. Sri Marigowda, learned Government Pleader submitted to the Court that, this Court may pass such order as it deems fit in the facts and circumstances of the case.

8. It is seen that the complaint was filed under S. 200, Cr.P.C. The order that is passed by the learned JMFC, next after the receipt of the complaint, is already culled out hereinabove. The learned JMFC, in his order, has stated in unequivocal terms that he had taken cognizance of the case. When the learned JMFC himself has stated that he has taken cognizance, there should not be any controversy in the case whether he has taken cognizance or not. Learned JMFC should be taken to have meant what he has said.

9. If that be so, it will have to be seen as to whether the learned JMFC has erred in referring the case to the police for investigation under S. 156(3), Cr.P.C. It is significant to note here that the Magistrate has stated in unequivocal terms that he is referring to the case for investigation under S. 156(3), Cr.P.C. In so far as this aspect is concerned, the Supreme Court in the decision in Devarapalli Lakshiminarayana Reddy v. V. Narayana Reddy, reported in : 1976 CriLJ1361 , has made the position of law beyond the shadow of doubt. The gist of the decision can be summarised as under. The power to order police investigation under S. 156(3) is different from the power to direct investigation conferred by S. 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second is exercisable at the post-cognizance stage when the Magistrate is in seisin of the case. Therefore, in the case of a complaint regarding the commission of cognizable offence, the power under S. 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under S. 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter 15 he is not competent to switch back to the pre-cognizance stage and avail of S. 156(3). It is made clear that if the Magistrate once takes cognizance, and if the Magistrate wants the case to be investigated by the police, he should have recourse only to the provisions reflected in S. 202 of the Code. In the instant case, I have already pointed out that the Magistrate has taken cognizance. In that view of the matter it would follow that it was not permissible for the Magistrate to switch back to the procedure available to him next before the

pre-cognizance stage. At this juncture, it is necessary to notice the provisions of S. 202, Cr.P.C. S. 202 reads as under :

Section 202 : Postponement of issue of process :

(1) Any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognizance or which has been made over to him under S. 192, may, if he thinks fit, 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 S. 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'.

10. A careful perusal of the provisions adumbrated in S. 202 would go to show that no direction for investigation shall be made by the Magistrate 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 S. 200. In the instant case, it is clear that the Magistrate has not followed the mandatory provisions reflected in S. 202 also.

11. Sri Dabali, however, as pointed out earlier, contended that the defect if any, is curable both having regard to the provisions reflected in S. 460 and S. 465, Cr.P.C. Section 460 reads as under :

'Section 460 : Irregularities which do not vitiate proceedings :

If any Magistrate not empowered by law to do any of the following things, namely -

(a) to issue a search-warrant under S. 94;

(b) to order, under S. 155, the police to investigate an offence;

(c) to hold an inquest under S. 176;

(d) to issue process under S. 187, for the apprehension of a person within his local jurisdiction who has committed an offence outside the limits of such jurisdiction;

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

(f) to make over a case under sub-section (2) of S. 192;

(g) to tender a pardon under S. 306;

(h) to recall a case and try it himself under S. 410; or

(i) to sell property under S. 458 or S. 459,

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

A careful perusal of provisions of S. 460 would indeed go to show that the said section will come into play only in the context of a situation when a Magistrate not empowered by law has done any of the things referred to thereunder. The case in question is not one where the Magistrate after having taken cognizance has failed to follow the mandatory provisions reflected in S. 200 and/or S. 202, Cr.P.C. It will have to be next seen as to whether there is any merit in the submissions made by the counsel for respondent 2 with reference to the provisions reflected in S. 460

and Section 465. Section 465 reads as under :

'Section 465 : Finding or sentence when reversible by reason of error, omission or irregularity :

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.'

A careful perusal of the said provisions would go to show that no finding, sentence passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceeding under the Code or any error or irregularity in any sanction for the prosecution, unless in the opinion of the Court, a failure of justice has in fact been occasioned thereby.

12. On a careful reading of the aforesaid provisions, it appears to me that the illegality committed by the learned JMFC in the instant case is not one which can be cured by the provisions of S. 465, Cr.P.C. It is necessary to notice here that the trial is yet to commence and the evidence is yet to take place and it is at this stage that this illegality is brought to the notice of this Court. The question as to whether this Court should say that the illegality is cured or whether this Court should cure the illegality by a proper order the question as to whether failure of justice is occasioned or not in a case like the one which is in hand does not arise in the

instant case having regard to the fact that the case is still at the pre-evidence stage. Further, this aspect has been made clear by a decision of this Court in Rudrappa Basappa v. Mallareddappa Sahabagouda reported in 1970 (1) KLJ Sn Item No. 152. Among other things, it is pointed out in the said case that the examination of the complainant on oath is a mandatory provision in the Code which cannot be cured by S. 537 of 1898 Code. In that view of the matter, it appears to me that having regard to the mandatory provisions reflected in S. 202 and in the context of the decision of this Court referred to immediately hereinabove, and having regard to the stage at which the objection is take, the illegality committed by the Magistrate cannot be said to be curable at all. It is necessary to notice here that the provisions of S. 460 and S. 465, Cr.P.C. are pari materia with the provisions reflected in Sections 529 and 537 of the Criminal P.C., 1898. Under these circumstances, I have no hesitation whatsoever in holding that the illegality committed by the learned JMFC is not curable at all.

13. For the reasons stated hereinabove, the Criminal Petition is allowed. The order dt. 11-8-1989 passed by the learned Judicial Magistrate, First Class, I Court, Hubli in No. PC 41/89 (subsequently numbered as CC 1014/89) directing the investigation of the offence under S. 156(3), Cr.P.C. and the further proceedings thereof in furtherance of the said order are hereby quashed. The matter is remitted to the Judicial Magistrate, First Class, I Court, Hubli for proceeding according to law from the stage next after he had taken cognizance of the case, in the light of the observations made hereinafter and in the context of the provisions reflected in S. 200, Cr.P.C. onwards.

14. Petition allowed.