

Mukundaiah Vs. State of Karnataka

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Court : Karnataka

Decided On : Oct-08-1991

Reported in : ILR1992KAR812; 1991(3)KarLJ117

Judge : Hanumanthappa, J.

Acts : [Negotiable Instruments Act, 1881](#); Banking Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 - Sections 138 and 142; Code of Criminal Procedure (CrPC) - Sections 156(3) and 204

Appeal No. : Crl. Petn. No. 1097 of 1991

Appellant : Mukundaiah

Respondent : State of Karnataka

Advocate for Def. : C.H. Jadhav, HCGP for R-1 and ;A.V. Gangadharappa, Adv. for R-2

Advocate for Pet/Ap. : K. Sri Ram, Adv.

Disposition : Criminal petition dismissed

Judgement :

ORDER

Hanumanthappa, J.

1. The point for consideration in this case is that, on a private complaint if the matter is referred to the police for enquiry and to submit a report under Section 156(3) Cr.P.C. and on receipt of such a report and its acceptance, whether the Magistrate can order to issue notice to the complainant for fresh examination. To answer this point, it is proper to make a reference to the order under challenge which reads as follows:

'10-5-1991. State by A.P.P. Accused Notice issued to the complainant. Case called out. Complainant absent Re-issue notice to complainant. Call on 20-7-1991.'

2. A few facts leading to the above order are:

Respondent-2 had advanced a sum of Rs. 30,000/- to the petitioner. On demand, the petitioner issued a cheque for the said sum representing that as soon as it is presented for encashment, the same would be honoured. Believing his words, the 2nd respondent presented the cheque for encashment. It was dishonoured. Hence, the 2nd respondent issued a notice under Section 138 of the Negotiable Instruments Act, as the transaction in question covered under the said Act. The said notice was served on the petitioner. In spite of the demand made in the said notice, the petitioner failed to pay the amount. Then, the 2nd respondent filed a complaint under Section 200 Cr.P.C. read with Sections 138 and 142 of the Act before the VII Additional Chief Metropolitan Magistrate, Bangalore City, to take action against the petitioner. The said complaint was filed on 29-11-1990. The procedure regarding recovery of the amount and taking action for the failure to pay the amount has been prescribed under Sections 138 and 142 of the Negotiable Instruments Act (hereinafter referred to as the Act) which read as follows:

'138. Dishonour of cheque for insufficiency, etc., of funds in the accounts:-

'Where any cheque drawn by a person on an account maintained by him with a banker for payment or any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid either because of the amount of money standing to that credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that

bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this Section shall apply unless -

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within a period of its validity whichever is earlier,

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount to the payee or as the case may be to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

142. Cognizance of Offences, -

Notwithstanding anything contained in the code of criminal procedure, 1973 (2 of 1974),-

(a) no Court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee, or as the case may be, the holder in due course of the cheque.

(b) such complaint is made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138;

(c) no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.'

Reading of these two Sections makes it clear that on presenting a private complaint under Section 200 Cr.P.C., it is not necessary for the learned Magistrate

to make a direction to the police to enquire and submit a report under Section 156(3) Cr.P.C. This position is implied in the Section itself. In spite of that, on receipt of the complaint on 29-11-1990 the learned Magistrate ordered to refer the complaint to the Police for investigation and to report under Section 156(3) Cr.P.C. On 28-12-1990 the police submitted the report, viz., charge-sheet. The same was accepted and the case came to be numbered as C.C.No. 1636 of 1990. Then the learned Magistrate ordered to issue summons to the accused returnable by 10-5-1991. On 10-5-1991 the learned Magistrate ordered to issue summons to the complainant/respondent-2 herein. On 25-7-1991 notice was issued to the complainant. Aggrieved by the said proceedings the petitioner who is the accused in the said case has filed this petition contending that the approach of the learned Magistrate in directing to issue summons to the complainant amounts to taking cognizance twice which is forbidden in law.

3. According to Sri. Sriram, learned Counsel for the petitioner, when once the matter is referred to the police who in turn submits the report under Section 156(3) Cr.P.C. and the same is accepted, it is not proper for the learned Magistrate to call upon again the complainant to give her/his statement, otherwise such an approach amounts to taking cognizance both on the private complaint and on the charge-sheet filed by the police. In support of his contention, Sri Sriram, learned Counsel for the petitioner, relies upon a Decision of the Kerala High Court in KESAVAN NATESAN v. MADHAVAN PEETHAMBARAN AND ORS., 1984(1) KLJ 324. For these reasons, the learned Counsel for the petitioner submits that entire proceedings on the file of the learned Magistrate be set aside as the same have resulted in miscarriage of justice. Further, according to him, if the proceedings are continued, the same amount to abuse of process of the Court.

4. As an answer to these contentions, Sri. Gangadharappa, learned Counsel for the 2nd respondent and Sri. Jadhav learned High Court Government Pleader, for the 1st respondent, submit that, though the procedure adopted by the learned Magistrate is a little bit strange, yet the same cannot be said that any illegality has crept in that order. According to them, it is for the learned Magistrate either to accept or to reject the report submitted by the police. Even in a case where charge-sheet is submitted, it is still open to the learned Magistrate to call upon the

complainant for recording their statement and then to take action. To substantiate the same, both the learned Counsel, viz., the learned Counsel for the 2nd respondent and the learned High Court Government Pleader, rely upon Section 190 Cr.P.C. which reads as follows:

'190 (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 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.'

According to them, when a procedure has been clearly prescribed in the Act particularly under Section 142 of the Act, when a complaint is lodged for an offence punishable under Section 138 of the Act, making reference to the police and getting report under Section 156(3) Cr.P.C. is unwarranted.

5. It is true, as contended by Sri. Gangadharappa and Sri. Jadhav, that, when a procedure contemplated has to be followed for an offence punishable under Section 138 of the Act, referring a matter to the police for enquiry and to report and then acting on it is unwarranted. Apart from this, the law is quite clear that merely because the police files charge-sheet pursuant to the private complaint made that itself is not sufficient to hold that the report is binding on the learned Magistrate. The report submitted by the police is just a gist of the enquiry and, therefore, it cannot be said that it shall either be accepted and acted upon or straight away be rejected. Even if it is accepted, that itself would not form part of the complaint. Even when a charge-sheet is filed pursuant to reference of a complaint still it is open to the Magistrate to dispense with such a report and to direct the

complainant to give a statement if so desired and then to proceed with the case after issuing summons as contemplated under Section 204 Cr.P.C, which reads as follows:

'204(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be -

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under Sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under Sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of Section 87.'

6. There is much force in the contention that for an offence punishable under Section 138 of the Act, the procedure as contemplated under Section 142 of the Act is an answer and making reference to police under Section 156(3) Cr.P.C. is not warranted. This contention is supported by the Decision of this Court in H. MOHAN v. STATE OF KARNATAKA, : ILR 1991 KAR612 where in it is held as follows:

'The main contention of the petitioners is that the learned Magistrate had no jurisdiction to entertain and act upon the charge-sheet filed by the Police in view of

the provisions of Section 142 of the Act. It reads thus:

'Cognizance of Offences - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -

(a) No Court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee, or, as the case may be, the holder in due course of the cheque.'

It is clear from the language employed in Section 142 of the Act that no Court shall take cognizance of any offence punishable under Section 138 except upon a written complaint made by the payee. It means that the payee has to file a private complaint under Section 200 Cr.P.C. before the competent Magistrate and the Police are not empowered to act upon a private complaint filed for an offence under Section 138 of the Act. I do not find any force in the argument of the learned High Court Government Pleader that Section 4 and 5 Cr.P.C. empower the Police to entertain the complaint filed in respect of an offence under Section 138 of the Act as the said provisions are not attracted in view of the above extracted provisions of Section 142 of the Act.'

Under similar circumstances, this Court in K.B. SUBBIAH SHETTY v. M. SURENDRA RAO AND ANR., 1966(2) Mys. L.J. 74 and in B.M. SANTHURAMASA AND ORS. v. STATE OF MYSORE, 1966(2) Mys. L.J. 89 dealing with the scope of Section 251A and 252 Cr.P.C. about private complaint and reference to the police held that where on a private complaint, the Magistrate examined the complainant and then referred the complaint to the police for investigation and report and after enquiry the police submit a charge sheet, the case was not one that instituted on a police report within Section 251A Cr.P.C. and, therefore, the proper procedure the Magistrate should have adopted was one under Section 252 Cr.P.C. Similar was the view taken by this Court in K.V. SUBBAIAH v. STATE OF MYSORE AND ANR., AIR 1969 Mysore 184. This view was based on the principle laid down by the Supreme Court in JAMUNA SINGH AND ORS. v. BHADAI SHAH, : 1964 CriLJ468 wherein it was held thus:

'When on a petition or complaint being filed before him the Magistrate applies his mind for proceeding under the various provisions of Chapter XVI of the Code of Criminal Procedure, he must be held to have taken cognizance of the offences mentioned in the complaint. When, however, he applies his mind not for such purpose but for purposes of ordering investigation under Section 156(3) or issues a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence. AIR 1951 SC 297 and AIR 1961 SC 986 Ref.

Where the Magistrate after completing the examination of the complainant on oath under Section 200 and recording the substance of it made the order in these words:

'Examined the complaint on s.a. The offence is cognizable one. To S.I. Baikunthpur for instituting a case and report by 12-12-1956' Held that if the Magistrate had used the words 'for investigation' instead of the words for instituting a case' the order would clearly be under Section 202 of the Code. The fact that he used the words 'for instituting a case' did not make any difference. The Magistrate was not bound to take cognizance of the offences on receipt of the complaint. He could have, without taking cognizance, directed an investigation of the case by the police under Section 156(3). Once, however, he took cognizance he could order investigation by the police only under Section 202 and not under Section 156(3). As it was clear here from the very fact that he took action under Section 200 that he had taken cognizance of the offences mentioned in the complaint, it was open to him to order investigation only under Section 202 and not under Section 156(3). It would be proper in these circumstances to hold that though the Magistrate used the words 'for instituting a case' in this order he was actually taking action under Section 202 that being the only section under which he was in law entitled to act.'

On the same line dealing with the scope of Sections 156(3), 173(1), 190(1)(b), 200, 203 and 204 Cr.P.C. the Supreme Court in H.S. BAINS v. THE STATE (UNION TERRITORY OF CHANDIGARH), : 1980 CriLJ1308 held as follows:

'The mere fact that he had earlier ordered an investigation under Section 156(3) and received a report under Section 173 will not have the effect of total effacement of the complaint and therefore the Magistrate will not be barred from proceeding

under Sections 200, 203 and 204.

Thus, a Magistrate who on receipt of a complaint, orders an investigation under Section 156(3) and receives a police report under Section 173(1), may, thereafter, do one of three things: (1) he may decide that there is no sufficient ground for proceeding further and drop action: (2) he may take cognizance of the offence under Section 190(1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report: (3) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.'

From the above discussion, it is clear that inspite of submitting charge-sheet under Section 156(3) Cr.P.C. it cannot be said that it is binding on the learned Magistrate. It is still open for him to call upon the complainant and take her/his statement and if it is made out a prima facie case to issue summons to secure the attendance of the accused. Further the contention of the learned Counsel for the petitioner that taking cognizance by one Magistrate and directing the complainant to appear before the Court to record her statement by his successor amounts to taking cognizance twice, cannot be accepted as correct. Because, in the instant case, in the beginning itself the learned Magistrate did not record the statement of the complainant. The learned Magistrate who dealt with the matter earlier has followed the procedure upto making reference to the police. Then, after receipt of the report, his successor ordered to issue summons to the complainant presumably exercising his power under Section 142 of the Act. He also invoked the law laid down by the Supreme Court referred to above. Hence, it cannot be said that the order of the learned Magistrate is in any way illegal, or, the same has resulted in preventing to secure ends of justice.

7. Hence, this Criminal Petition is dismissed as no merit.