

Vijayalaxmi Vs. Thomas

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Court : Kerala

Decided On : Aug-12-2002

Reported in : I(2003)BC360

Judge : M.R. Hariharan Nair, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 173(2), 190, 200 and 202

Appeal No. : Crl. M.C. No. 672/01

Appellant : Vijayalaxmi

Respondent : Thomas

Advocate for Def. : T.O. Xavier, Adv. and; T.K. Latiff, Public Prosecutor

Advocate for Pet/Ap. : P. Vijayabhanu and P. Maya, Adv.

Disposition : Petition dismissed

Judgement :

M.R. Hariharan Nair, J.

1. One of the questions arising for decision in this case is whether in a case where the Police files Refer Report in a case sent up for investigation under Section 156(3) of the Cr.P.C. the Magistrate is free to take cognizance without a protest

complaint; but based on a fresh private complaint. Petitioners are two out of 13 accused in a case before the Chief Judicial Magistrate Court, Trichur which was registered on the basis of Annexure-A complaint filed on 15.5.1999. The complainant therein who is the present 1st respondent was a former Director of the company by name, 'Kuriland (P) Ltd.', of which the present petitioners 1 and 2 were Director and Manager respectively. Offences under Sections 3, 5(a)(b)(c)(i) and Section 6 of the Prize Chit and Money Circulation Banning Act, 1978 read with Sections 417 and 420 of the IPC were alleged against them.

2. The learned counsel for the petitioners submitted that there was an earlier complaint filed on 9.3.1999 raising the very same averments which was referred to the Police for investigation under Section 156(3) of the Cr.P.C. They registered the case as Crime No. 144/99 of the Trichur Town East Police Station. Pursuant to investigation a Refer Report was, however, presented in that case. The Police as also the trial Magistrate issued notice to the present 1st respondent (complainant) with regard to that final report. Instead of pursuing that matter, the complainant, however, chose to file a fresh complaint based on which the Learned Magistrate has taken cognizance. The said action violates the principle of Res judicaia. Yet another contention is that the complainant has no locus standi in so far as he is not a subscriber of the chitty and is only an Ex-Director like the 1st respondent . The counsel further submits that the averments in paragraphs 5 and 6 of the complaint are totally insufficient to bring out any offence under the Prize Chit and Money Circulation Scheme (Banning) Act, 1978, (for short Act 43/78) which is one of the enactments under which cognizance is sought to be taken especially when neither of the petitioners are now continuing in office in the Kuri company.

3. The learned counsel for the 1st respondent submitted that the petitioners' plea itself is barred by Res judicata in so far as the present petitioners had earlier filed Crl. M.C. No. 1735/1999 which was dismissed by this Court. According to her the merits of the contentions need not be gone into and the petition can be summarily dismissed as being hit by Res judicata.

4. Certain facts are admitted. The present first respondent had filed a complaint raising more or less the same grounds and invoking the same provisions and that

was referred to the Police. Annexure B report of the police shows that the Police has closed the matter. The reasons given therefor are the following:

- (i) The chitty conducted by the petitioners is going on smoothly;
- (ii) None of the subscribers are aggrieved by the conduct of the kuri;
- (iii) Offence under Section 420 of the IPC is not revealed in the above circumstances;
- (iv) The case has to be treated as non-cognizable as the relief available to the complainant is through the Civil Court under Act 43/78.

5. Though the correctness of the Refer Report is not directly involved here, it has to be mentioned straight away that the Police has proceeded on wrong premises. Section 10 of Act 43 of 1978 clearly states that offences punishable under the Act are cognizable. Only offences under Sections 3, 5(a)(b)(c)(i) and Section 6 of Act 43 of 1978 are invoked in the complaint besides offences under Sections 417 and 420 of IPC which are also cognizable offences. The fact that the chitty is flourishing may not be sufficient reason to conclude that the offence of cheating is not involved. Availability of civil right is also not good ground for denial of criminal proceedings. In the circumstances the Refer Report filed by the Police was not a proper one.

6. The test to be applied is whether a fresh complaint of the present nature could have been filed if actually the offence is non-cognizable as stated by the police and as treated by the learned Magistrate who closed the matter based thereon. When the prosecution steps are closed based on Refer Report usually a protest complaint is filed. What is evident from Annexure-C is that being dissatisfied with the findings of the Police to the effect that the case is non-cognizable, the petitioners filed complaint on 15.5.1999 and that the trial court closed the former case only on 24.6.1999 after issuing notice to the complainant. The complainant did not pursue the Refer Report and the former case as he was satisfied with the trial court's proceeding with the new private complaint. Can the second complaint be thrown out on the ground of want of a protest complaint challenging the Refer

Report?

6A. The term 'protest complaint' is not seen used anywhere in the Cr.P.C. It is Section 173 of the Cr.P.C. that deals with the filing of final report on completion of investigation. Section 173(2) prescribes the format for the report. Such report may either be a Refer Report or a charge sheet. The Code does not appear to contemplate Police investigation and a magisterial enquiry simultaneously. If an investigation has already been commenced by the Police, the Magistrate cannot conduct an enquiry into the grievances placed before him by the complainant without stopping or suspending Police Investigation. However, once the final report is received in the nature of a Refer Report, the Magistrate has several options. He may ;

- (i) accept the final report and close the mailer;
- (ii) disagree with the conclusion of the Police and demand further investigation;
- (iii) proceed with the matter as a case of private complaint.

7. There is no bar even for re-opening an order of the Magistrate after the Refer Report is accepted on the basis of further material that may come to his notice subsequently. The inhibition is only that he can never direct that instead of Refer Report a charge sheet should be submitted, because what should be the nature of the final report is a matter within the domain of the Police. However, he is not bound to close the matter simply because the Police did not find it proper to present a charge sheet. He can still take cognizance of the offence under Section 190(1)(b) and straight away issue process even without waiting for the response of the complainant. In other words in the matter of exercise of his power to take cognizance he is not bound by the conclusions drawn by the Police.

8. If sufficient justification exists there is nothing that stands in the way of the Magistrate to proceed notwithstanding the filing of the Refer Report. That being so, a Magistrate is not debarred from entertaining a private complaint from the same complainant merely because he has already passed an order accepting the final form submitted by the Police; provided that order was not passed after hearing the

complainant and rejecting his submissions on the merits and the second complaint is on identical facts. In other cases, the Magistrate may even take into account the statement of the witnesses examined by the Police during investigation and order issue of process against the accused under Section 190(i)(b) i.e., without recourse to the procedure prescribed by Sections 200 and 202 even if the complainant remains silent.

9. The complainant who receives copy of the Refer Report either from the Police or from the Court may object to the findings and request for taking cognizance. The objection so filed is usually called a 'protest' or 'protest complaint'. If the complainant files any such petition, the Magistrate should treat the petition as a complaint and dispose it of in accordance with Chapter XV of the Code. What emerges from the above is that through a private complaint presented to Court after the final report is filed a complainant can always request the Court to take cognizance of the offences.

The power of the Court to take cognizance based on such complaint, or through objection filed to the Refer Report (Protest Complaint) remains unaffected by the conclusion of the Police. In the instant case the final report was filed in Court on or after 28.4.99. According to the Police, copy of the Refer Report had been served on the complainant earlier. It was thereafter that Annexure-A private complaint was presented on or about 15-5.1999. The order of the C.J.M. accepting the Refer Report was passed on 24.6.1999; but that was not on the merits. As already mentioned, the learned Magistrate has always independent jurisdiction to take cognizance. Hence the contention regarding Res judicata raised by the petitioners has no force.

10. On the merits also, the case deserves to be proceeded with. It is true that if we go by the averments in paragraph 5 of the complaint alone, there may not be justification for invoking the offence under Sections 3 and 5(a)(b)(c)(i) and Section 6 of the Act of 43 of 1978. But then the relevant averment is not contained in para 5 alone. Paragraph 3 of the complaint shows that definite allegations were raised against the accused based on the provisions of Act 43 of 1978 as well. It is averred that the company had stated that there would be taking of lot in every

instalment for giving bonus prizes for Rs. 2000/- for 70 subscribers; that the company was collecting 14 instalments amounting to Rs. 14,000/- additionally to conduct price chit along with conventional chit with intent to cheat the public and to gain wrongfully; that in the brochure the company gave an illusion to the public that there was a chance of getting bonus prize of Rs. 2,38,000/- for the most lucky subscribers and that the company was collecting Rs. 14,000/-- more from subscribers to be included in the lot for bonus prize amount and thus cheated 12000 subscribers by giving false hope of winning the bonus prize of Rs. 2000/- for 70 prize winners for each instalment. If these averments are established, probably, there would be scope for applying Sections 3 and 5 of Act 43 of 78 as well. Whether evidence would be available therefor is yet another matter. That is to be gone into by the trial court in the course of trial.

11. I have already found that the learned Magistrate was not wanting in jurisdiction for taking cognizance based on the second private complaint. Here is a case where the grievance projected by the complainant earlier remained not acted upon at the hands of the Police. Prosecution was denied by Police based on wrong premises. It is presumably in such situation that the trial court has taken cognizance of the offence against the accused including the present petitioners. It may be that the complainant was a former Director who has some grudge against the present or other Directors. That, however, does not take away his rights as a citizen to bring to the notice of the court cognizable offences allegedly perpetrated by the Directors, Section 39 of the Cr.P.C. provides for this.

12. I have perused Rule 106 of the Kerala Chitties Rules. No doubt, power is given thereunder to the Registrar of chitties or an inspecting officer if he is satisfied that there are grounds to institute prosecution under the Act to initiate the same with the permission of the Assistant Inspector General of Registration (Chit Schemes). The prohibition contained in Rule 107 of the said Rule is only that no prosecution would lie at the instance of the Registrar of Chitties or by the Inspecting Officer other than the Inspector General of Registration except with the previous sanction of the Assistant Inspector General of Registration (Chit Schemes). There is no mention in Rule 107 that a private person cannot set the law in motion other than through recourse to the procedure contemplated in

Section 106. So, viewed from any angle, the complaint deserves to be proceeded with further.

13. The circumstances in which this Court would be justified in interfering under Section 482 of the Cr.P.C. are well settled now. The mere fact that there would be only lesser chance of successful prosecution by a private individual does not appear to be a relevant factor for stifling the prosecution at this stage. The accused will not be deprived of their right to establish their innocence, even if trial is continued. I am not satisfied that continuance of proceedings in the case would lead to an abuse of the process of Court.

14. During hearing reliance was placed on the decision reported in Kumari v. Sankara Raman (2001 (2) KLT 503) and K.P.G. Nair v. Gindal Menthol India Ltd. (JT 2000 (Suppl.) SC 519) in support of the contention that merely because a person is a Director of the company, he cannot be prosecuted. That was a case initiated alleging offences under Section 138 of the N.I. Act where there is specific provision governing the liabilities of the Directors viz., Section 141(2) of the Act. The decision rendered with reference to the particular provision cannot be generalised.

15. In Kader v. State of Kerala (1999 (3) KLT 55), it has been found that the Magistrate has a duty not only to bring to book a person against whom allegation is made in the complaint, but also to protect the interest of the absent accused in such matters. It is also held that what all matters should be taken into consideration to arrive at the conclusion that the Magistrate should take cognizance of the offence, would depend upon the facts and circumstances of each case. He has necessarily to consider the allegations made in the complaint as also in the statement of the complainant recorded under Section 200 Cr.P.C. The learned Magistrate in the present case has chosen to take cognizance and that indicates that he has applied his mind to the relevant aspects.

16. I have already referred to recitals in the complaint and the nature of fraud which is alleged by the complainant. When these accusations are considered, it cannot be said that the learned Magistrate has gone wrong in taking cognizance of the offence even though notice was not given at that stage to the accused. In fact

no such notice is contemplated under the Cr.P.C.

17. In *State of Haryana v. Brij Lal Mittal and Ors.* (1998 (5) SCC 343) it was held that simply because a person is a Director of the company he does not vicariously become liable for offence committed by the company and that it must be shown that he was in charge of the company and also responsible to the company for the conduct of the business. Here again the findings were rendered with reference to Section 34 of Drugs and Cosmetics Act, 1940 which reads as follows:

'34. Offences by companies:- (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence'.

18. As far as the offences in the present case are concerned, the relevant enactment does not appear to contain any provision similar to the above. Liability of the Director is a matter which can be gone into at the stage of trial. Suffice it to say, *prima facie*, that the allegation in para 6 of the complaint that the persons who are responsible for the conduct of the chitty are the accused persons and that the 1st respondent is the person who is responsible for the day-to-day affairs of the company are sufficient to enable further proceedings in the case. Whether the petitioners had dissented against the conduct of the Chitty in the particular form; whether they were consenting parties to the advertisement dated 5.11.1998 made mention of in para 3 of Annexure-A complaint; whether there was suppression of facts or mention of wrong facts made with fraudulent intentions involved in the advertisement and in the publication of bye-laws etc. are matters for evidence in the case. Suffice it to say that I am not convinced that this is a fit case where the extra ordinary jurisdiction under Section 482 of the Cr.P.C. can justly be invoked.

In these circumstances, I find no merit in the Crl.M.C. and it is accordingly dismissed. Nothing contained herein should affect the decision making process on the part of the trial court once the trial is concluded.

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