Chelliah Vs. Yesuvadial

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Court : Chennai

Decided On : Jul-06-1998

Reported in : 1999(1)ALT(Cri)47; 1999CriLJ1013

Judge : M. Karpagavinayagam, J.

Acts : Indian Penal Code (IPC) - Sections 354; Code of Criminal Procedure (CrPC) , 1974 - Sections 154(2), 156(3), 157(2), 173, 173(2), 173(2)(1), 190(1), 200, 203 and 357

Appeal No. : Cri. R.C. No 891 of 1995

Appellant : Chelliah

Respondent : Yesuvadial

Advocate for Def. : S. Ashok Kumar, Adv.

Advocate for Pet/Ap. : Lita Srinivasan, Adv.

Disposition : Petition dismissed

Judgement :
ORDER

M. Karpagavinayagam, J.

1. Whether the second complaint is maintainable after the first complaint on the same set of facts referred to as 'mistake of fact' by the police and the same has been received and recorded by the learned Magistrate as 'lodged' ?

2. Of course, this question has been analysed and answered by this Court on various occasions in various angles. But, now, the very same question would be considered and answered in a different angle.

3. Chelliah, the petitioner herein, was convicted for the offence under Section 354 of I.P.C. and sentenced to undergo R.I. for 3 months and to pay a fine of Rs. 500/-, in default, to undergo R.I. for 1 month in C.C. No. 219/93 on the file of the learned Judicial Magistrate, Nanguneri. The conviction was confirmed in the appeal as well in C.A. No. 52/94 on the file of the learned Sessions Judge, Tirunelveli, though there is some modification in the sentence.

4. The case of the prosecution is this. On 15-11-91 at about 1.30 midnight, when the victim, complainant Yesuvadial, was sleeping inside the house the petitioner tapped the door and woke her up and when she came out, he caught hold of her hands and attempted to outrage her modesty and when she cried, he ran away. On the same day, she gave a complaint to the Moontradaippu Police Station. Since there was no action up to 24-11 -92, she gave a complaint to the Deputy Superintendent of Police on 25-11 -92. Even then, there was no action. So, on 11-1-93, the complainant filed a private complaint in the Judicial Magistrate's Court, Nanguneri. The said complaint was referred for investigation under Section 156(3) Cr. P.C. The Sub-Inspector of Police, after investigation, referred the matter as 'mistake of fact' and filed a report before the Magistrate. In the said report, it was recorded as 'lodged'. Thereafter, on 16-5-93 the complainant filed a second complaint before the Judicial Magistrate, Nanguneri. This was taken on file and summons was issued to the accused. After trial, he was convicted and sentenced, as stated above.

5. Along with other grounds, the petitioner raised a ground before the trial Court as well as before the lower appellate Court that the second complaint was not maintainable. However, it was held that the second complaint was maintainable, as there is no bar for taking cognizance on the second complaint. Hence, the

revision.

6. Mrs. Lita Srinivasan, the learned counsel appearing for the petitioner, while reiterating the said ground before this Court, would contend that once the learned Judicial Magistrate, on receipt of the referred report as 'mistake of fact', after investigation under Section 156(3), Cr.P.C, passed an order, which is judicial in nature, as 'lodged' he has no jurisdiction to take cognizance on a fresh complaint on the same set of facts. In support of her submission,' the learned counsel referred several citations, which we shall see at a later stage.

7. Arguing contra, Mr. Ashok Kumar, the learned counsel appearing for the respondent/ complainant would submit that there was no bar for filing a second complaint, since there is no judicial order made earlier on the referred report filed by the police on investigation of the first complaint, to the effect that the learned Magistrate accepted the said report and dropped further action. Several citations have been referred to on this aspect. We would refer to these decisions also later.

8. It is not disputed that the present complaint is a second complaint, that on the same facts, the first complaint, which was given by the respondent/complainant, was referred to for investigation, and that the police filed the referred report as a 'mistake of fact'. It is also an admitted fact that on receipt of the referred report, the learned Judicial Magistrate passed an order as 'lodged'. Despite this order, the learned Magistrate took the second complaint on file and conducted the trial.

9. So, the question is whether the Magistrate has got power to do so having recorded in the referred report as 'lodged'.

10. In Manoharbal v. Vashdev 1983 Mad LW 319 : 1984 Cri LJ 47, Justice Natarajan (as he then was), on the similar fact, held that the order lodging the referred report filed by the police was not a judicial order and so, there is no bar in law for a second complaint. The relevant observation is this:

Consequently, when he receives a police report stating that the complaint would be referred either as false or as mistake of fact or mistake of law, he does not pass any judicial order, but merely lodges the complaint and does not take any further

action. In such circumstances, there is no bar in law for the Magistrate to entertain a second complaint and take cognizance of it and issue process to the accused.

11. The above referred decision was rendered on the basis of the observation made by Justice Maheswaran (as he then was), in Subramnian T.K. v. T.K. Gunasekaran 1982 M LW 245 : : 1983 CriLJ149 . In that case, it was argued that the second complaint is not permissible, since the earlier order passed by the Magistrate on the referred report stating 'lodged' would amount to dismissal under Section 203, Cr.P.C. It was held that the said submission is devoid of substance and that order would not be construed as dismissal under Section 203, Cr.P.C. and as such there is no prohibition for the entertainment of a second complaint. The relevant observation is as follows :

Therefore, it is clear that when the Magistrate orders investigation under Section 156(3) of the Cr.P.C, he cannot be said to have taken cognizance of the offence. In the instant case, the Magistrate did not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding. He ordered only an investigation under Section 156(3) of the Cr.P.C. In the case of a complaint in respect of the cognizance of an offence, the Magistrate can invoke Section 156(3) before he takes cognizance of the offence under Section 190(1)(a) of the Code. In the present case, the Magistrate did not embark upon the procedure under Chapter XV of the Cr.P.C. He did not examine the complainant and the witnesses under Section 200, Cr.P.C. The question of dismissing the complaint under Section 203, Cr.P.C, therefore, did not arise. Instead of proceeding under Chapter XV, the Magistrate ordered investigation by police under Section 156(3) and received a report and lodged the F.I.R. The argument of the counsel for the petitioners that the order 'Lodge the F.I.R.' will amount to dismissal under Section 203, Cr.P.C. is devoid of substance and must fail. As the complaint has not been dismissed under Section 203 of the Cr.P.C, there is no prohibition for the entertainment of a second complaint.

12. However, in the following decisions, it was held that the order of Magistrate recording as mistake of fact on police report is a judicial order and subsequent complaint in respect of very same occurrence is not maintainable :

(1) Namasivayam v. State (Sathar Sayeed, J.).

(2) Nagalingam v. State 1985 MLW 99 (S.A. Kader, J.).

(3) Ramasubbu v. State 1987 Mad LW 79 : 1988 Cri LJ 214 (K.M. Natarajan, J.).

(4) Krishna Rao v. L.S. Kumar : 1998(1)CTC329 (S. Thangaraj, J.)

13. In this context, it is relevant to refer the judgment of Rangasamy, J. (as he then was) rendered in Subramaniam v. State of Inspector of Police, C.B., C.I.D. (1995) 1 MLW 308, in which it is ruled, while not accepting the view of Hon'ble Justice Natarajan, expressed in Manoharbal v. Vashdev 1983 MLW 319 : 1984 Cri LJ 47 that the recording of a referred report sent by the police cannot be the judicial order, that the order of the Magistrate accepting the referred report must be considered to be the judicial order, in view of the judgment of the Apex Court.

14. Though divergent views have been expressed in the above decisions with regard to the question whether the order accepting the referred report is a judicial order and consequently, whether a second complaint could be maintained, none of the decision does refer to the judgment of the Apex Court in Bhagwant Singh v. Commr. of Police : 1985 CriLJ1521 .

15. In this case, the Apex Court observed that in a case where the Magistrate to whom a report is forwarded under Sub-section (2) of Section 173, Cr.P.C. decides not to take cognizance of the offence and to drop the proceedings, the Magistrate shall give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. It is further observed by the Apex Court that it shall be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the complaint filed by him.

16. It is a well settled law that when the report is filed under Section 173(2)(1), Cr.P.C. by the police after investigation before the Magistrate, two different situations may arise. The report may be a charge-sheet (positive report) or may be a referred report (negative report).

17. In the case of charge sheet, the learned Magistrate may do one of the following three things :

(1) He may accept the charge sheet and take cognizance of the offence and issue process, or

(2) he may disagree with the report and drop the proceeding, or

(3) he may direct further investigation under Section 156(3) and require the police to. make a further report.

18. In the case of referred report, the learned Magistrate again has an option to adopt one of the three courses as mentioned below :

(1) he may accept the report and drop the proceedings; or

(2) he may disagree with the report by taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process, or

(3) he may direct further investigation to be made by the police under Section 156(3), Cr.P.C.

19. When the Magistrate decides to take cognizance of the offence and to issue process, the complainant or the informant is not prejudicially affected. But if the Magistrate decides to drop the proceedings, then the complainant would certainly be prejudiced because the complaint lodged by him would have failed in its purpose. So in this context, the Apex Court would give the mandatory guideline which is as follows :

When the interest of the informant in prompt and effective action being taken on the F.I.R. lodged by him is clearly recognised by the provisions contained in Section 154(2), Section 157(2) and Section 173(2)(ii), it must be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the F.I.R. lodged by him. There can, therefore, be no doubt, that when, on a consideration of the report made by the officer in charge of a police station under

Section 173(2)(i), the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under Section 173(2)(i) decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the F.I.R., the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report.

20. In the light of the above observation, if we look at the facts of the instant case, we could safely conclude that it cannot be contended that the present complaint, which is a second complaint, is not maintainable. Admittedly, no notice was given to the respondent, before the learned Magistrate chose to pass any order on the referred report forwarded to him under Section 173, Cr.P.C. Virtually, the complainant had lost a vital right to place before the Magistrate her submissions, to persuade the Magistrate to take cognizance of the offence and issue process.

21. In such a situation the complainant cannot be prevented from filing a complaint again on the same set of facts. In the instant case, she approached the Magistrate by filing a private complaint stating that she has got witnesses to prove her case against the petitioner/accused. However, the learned Magistrate thought it fit to refer the said complaint to the police under Section 156(3) for investigation. After investigation, the police filed the referred report as a 'mistake of fact'. The learned Magistrate, especially, in a private complaint, on receipt of the referred report ought to have issued a notice to the complainant to give an opportunity of being heard, so that the complainant could make her submissions to persuade the Magistrate to take cognizance of the offence. Obviously, this has not been done in the instant case. In the light of the said situation, it cannot be said that the Magistrate has applied his mind to the referred report and passed an order indicating the acceptance of the report.

22. Moreover, in the present case, it is not stated in the order either as 'recorded as a mistake of fact' or as 'accepted the referred report and dropped the proceeding'. Admittedly, it is merely endorsed as 'lodged'. This would show that there is no indication that the learned Magistrate has applied his judicial mind to consider whether the report could be accepted or not.

23. As indicated earlier, when the referred report is filed, the Apex Court observed in Tula Ram v. Kishore Singh : 1978 CriLJ8 and H.S. Bains v. State (Union Territory of Chandigarh) : 1980 CriLJ1308 , that the Magistrate had only three courses open, namely, (1) he may accept the report and drop the proceedings, or (2) he may disagree with the report and take cognizance, or (3) he may direct further investigation. In the instant case, none of the three courses was adopted by the Magistrate. Instead, the learned Magistrate had embarked upon a fourth course of action, by merely mentioning as 'lodged', which the law does not permit. Therefore, merely recording as lodged or merely recording as a mistake of fact without application of mind and without giving reason for accepting such a report would not be, in my view, held to be a judicial order.

24. As Rangasamy, J. held in (1995) 1 MLW 308 (supra), the order accepting the referred report and dropping the proceedings would certainly be the judicial order, as it falls under the first category out of three courses which could be adopted by the Magistrate, while the referred report is filed under Section 173(2), Cr.P.C. by the police. But, making an endorsement by the Magistrate, as recorded as a 'mistake of fact' or 'lodged' would not amount to accepting the report or dropping of the proceedings. At the most it could be said that it is an endorsement by the Magistrate for having received the report by the Court. The said endorsement would never be taken to mean accepting the reasonings of the Police Officer for referring the case as a 'mistake of fact'. In other words, when the learned Magistrate while adopting the first course, he has to apply his mind and pass a reasoned order, that too, after hearing the complainant, more particularly in the private complaint.

25. As held by the Apex Court in : 1985 CriLJ1521 (supra), the requirement for a judicial order would be complied with only when the order has been passed by the

Magistrate after hearing the complainant by giving reason reflecting his judicial application of mind, while accepting the referred report and then alone it would be a judicial order which would disentitle the complainant to approach the Magistrate with the second complaint with the same set of facts.

26. In a similar situation, Honourable Justice T. S. Arunachalam (as he then was), in the case of Nallaya Gbunder v. Thiruvengadam report in 1992 MLW 316 would observe, while holding the second complaint as permissible, that the earlier disposal in the referred report by recording as 'lodged' or 'mistake of law' is a nonest in the eye of law.

27. TO SUM UP: Order accepting the referred report and dropping of the proceedings in a private complaint by the Magistrate is certainly a judicial order, as he is entitled to pass such an order, as held by the Apex Court. However, mere recording as 'lodged', 'filed' or 'mistake of fact' would not be regarded as a judicial order, as it would not indicate the mind of the Court to accept the same and drop the proceedings. The said wording recorded on the referred report by the Magistrate at the most is an endorsement or the acknowledgement for having received the referred report from the police. Unless the learned Magistrate applies his mind in order to find out whether to accept and drop the proceedings and unless in the process of finding out the same, the complainant in the private complaint is heard after intimation and unless the learned Magistrate records his reasons for doing so, the said order cannot be termed to be a judicial order, as provided in the first course out of three courses to be adopted, by the Apex Court. Only when such a judicial order is passed, the second complaint on the same set of facts is impermissible. In such a situation, the complainant has to question the said judicial order before the higher forum to get it set aside in order to pursue his complaint. In the instant case, as there is no judicial order and there is only an endorsement as 'lodged', the complainant cannot be prevented from ventilating her grievance through the same Court by filing a second complaint.

28. For the foregoing discussion, I am of the view that the conviction imposed upon the petitioner by the trial Court and confirmed by the lower appellate Court is perfectly valid and there is no reason to interfere with the conclusion arrived at by

both the Courts below.

29. In the result, the Revision, which has no merit, is liable to be dismissed and accordingly, the same is dismissed.

Cri. R.C. No. 891 of 1995

M. Karpagavinayagam, J.

30. After the pronouncement of the judgment, it is requested that the fine amount of Rs. 1,000/-could be directed to be paid to the complainant/ respondent herein, as compensation as provided under Section 357, Cr.P.C. Accordingly, the trial Court is directed to pay the fine amount of Rs. 1,000/- already deposited to the complainant as compensation after due intimation.