

Gopal Mukherjee and ors. Vs. Upendra Nath Mukherjee and anr.

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Court : Kolkata

Decided On : Aug-24-1983

Reported in : 1984CriLJ858

Judge : Monoj Kumar Mukherjee, J.

Appellant : Gopal Mukherjee and ors.

Respondent : Upendra Nath Mukherjee and anr.

Judgement :

Monoj Kumar Mukherjee, J.

1. Sri Upendra Nath Mukherjee alias Chakravorty filed a complaint before the sub-divisional Judicial Magistrate, Ghatal and on that complaint the learned Magistrate passed an order under Section 156(3), Cr.P.C. On completion of investigation the police submitted a report in final form wherein they prayed for discharge of the accused persons, as according to the police, the case was instituted on a mistake of Taw1. Thereafter, the complainant filed another complaint before the learned Magistrate in which he alleged that the police did not properly investigate into the case. The learned Magistrate took cognizance upon the complaint examined the complainant on solemn affirmation and called for the records of the police case. After perusing the same, and the documents filed by the complainant, the learned Magistrate issues summons against the accused-petitioners. The case was, thereafter, transferred by the learned Sub-Divisional Judicial Magistrate to another

Judicial Magistrate for disposal. Immediately thereafter the accused persons filed an application under Section 245(2) of the Cr. P. C. and by his order dated November 5, 1979, the learned Magistrate ordered that the same would be considered at the time of framing of charge. Four witnesses on behalf of the complainant, including the complainant, were thereafter examined and the learned Magistrate on perusal of the evidence framed a charge under Section 379 of the I.P.C., against all the accused-petitioners. Aggrieved thereby, the accused-petitioners have filed this revisional application for setting aside the order framing the charge and for quashing the proceeding.

2. The first point that has been urged in support of the Rule is that the learned Magistrate erred in entertaining a./fresh complaint when the previous complaint was before the learned Magistrate and this, according to the learned Advocate for the petitioners, has made the entire proceeding, based on the second complaint, illegal. Reliance in this regard has been placed upon Notes of Cases of Patna High Court reported in 1981 Cri LJ NOC 118, The short note of the case reads as under:

Criminal P. C. (2 of 1974), Sections 156, 190, 200 and 203 -- Acceptance of Police Report that First Information Report is false by Magistrate -- Magistrate cannot go back to summon the accused on the basis of protest petition.

It appears that the above judgment of the Patna High Court is based on two decisions of the Supreme Court reported in : 1978 CriLJ8 (Tularam v. Kishore Singh) and : 1978 CriLJ187 (Bindes-wari Prosad v. Kali Singh). So far as the case reported in : 1978 CriLJ8 is concerned, the Supreme Court has observed that where a Magistrate orders investigation by the Police before taking cognizance under Section 156(3) of the Code and receives the final 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. The other case of the Supreme Court dealt with a case of filing of successive complaints, where cognizance was taken upon the first complaint and thereafter, it was dismissed, and following the same another complaint was filed. In that context, the Supreme Court observed that a second

complaint could lie only on new facts or even on previous facts only if a special case was made out. In the context of the above two decisions of the Supreme Court, I am Unable to accept the judgment of Patna High Court, as it appears from the note itself. I must confess, however, that in the absence of the details of the case, it is difficult to ascertain the facts and circumstances leading to the principle laid down there, Be that as it may, the above two judgments of the Supreme Court, in my view, do not support the contention of Mr. Moitra, learned Advocate for the petitioner. According to the judgment of the. Supreme Court in the case of Tula Ram 1978 Cri LJ 8 (Supra) the learned Magistrate may take cognizance on the original complaint which was filed at the time the order under Section 156(3) of the Code was passed. But it does not lay down any proposition that there cannot be any fresh complaint, which is known as 'protest petition', after the police submits a final report. The reason is not far to seek. 'Complaint' has been defined under the Code to mean any allegation made orally or in writing to a Magistrate with a view to his taking action under the Code (emphasis mine) that some person, whether known or unknown, has committed an offence, but does not include a police report. The law is now well settled that action under the Code refers to the provision of Section 200 and the other provisions of the Code appearing thereafter. In a given case an 'aggrieved person may approach a learned Magistrate with an application making a specific prayer for taking action under Section 156(3), Cr. P. C, and not for treating the same as a complaint. In such a case if the learned Magistrate passes an order under Section 156(3) of the Code and the case ultimately ends in a final report, the aggrieved person may file a complaint (protest petition) detailing the allegations constituting the offence and the grounds of his protest against the investigation. On such a complaint, the learned Magistrate may take cognizance legally and proceed according to the provisions of the Code. The other case of the Supreme Court is of no avail to the petitioner as on the first complaint no cognizance was taken. I am, therefore, unable to hold that the cognizance in the instant case is bad in law.

3. Mr. Moitra next contended that the learned Magistrate erred in law in not disposing of the application under Section 245(2), Cr. P. C. when it was filed. To bring home his point, Mr. Moitra argued that had the application been considered at that time, the learned Magistrate would have found that the complaint did not

disclose any offence whatsoever. This contention is devoid of any substance. The complaint did disclose an offence and the learned Magistrate did not act illegally in directing that the application would be heard at the time of framing of charge. Mr. Moitra, however, argued that the learned Magistrate should have passed an order on that application, instead of keeping the same pending. The very fact that charge has been framed on the basis of the evidence adduced on behalf of the complainant before the learned Magistrate shows that the application stands disposed of, though of course no formal order was passed thereupon.

4. It was next urged by Mr. Moitra that the learned Magistrate should not have framed any charge against the petitioners as the evidence did not disclose any offence. While on this point, Mr. Moitra drew my attention to the statement made by the complainant, in cross-examination before charge to the effect that he entered into a solenama with the accused with regard to the land in question. This statement made by the complainant in cross-examination does not lead us anywhere as the solenama was not exhibited through the complainant nor was anything elicited about the nature of the solenama. As regards the contention of Mr. Moitra that the evidence of the witnesses does not make out a prima facie case I find that P. W. 1 Upendra Nath Mukherjee (the complainant), P. W. 2, Satya Charan Patra, P.W. 3 Bhusan Patra, P. W. 4 Nepal Majhi and P. W. 5 Gopal Chandra Dolui have stated on oath that the land in question belongs to the complainant. P. W. 5 has further stated that accused never possessed the said land, Oral evidence prima facie goes to show, therefore, that the land belongs to the complainant. That apart, I find that the record-of-rights in respect of the land in question has been exhibited (Ext. 1) and therein the plot in question stands in the name of the complainant in his 16 annas' share. The presumption, though rebuttable, arising therefrom is also in favour of complainant. As regards the allegation of theft of trees, all the five P. Ws, have spoken about the same. Prima facie, therefore, a case under Section 379, I. P. C. has been made out against the accused persons.

5. Mr. Moitra lastly argued that considering the evidence on record the learned Magistrate should not have framed a charge under Section 379, I. P. C. and only charge that might have been framed was under Section 379 read with Section 34

of the I. P. C. In view of the specific evidence of the witnesses that all the accused persons committed theft in respect of the trees in question, I think that a charge under Section 379 of the I. P. C. is the proper charge. As no other point has been raised in support of Rule, the application fails and the Rule is discharged.

6. Let the records go down early.

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