

(2017) 12 GAU CK 0047

GAUHATI HIGH COURT

Case No: 21 (AP)2017

Nabam Epo

APPELLANT

Vs

The State of Arunachal
Pradesh & Ors.

RESPONDENT

Date of Decision: Dec. 12, 2017

Acts Referred:

- Code of Criminal Procedure, 1973, Section 482, Section 195, Section 341, Section 340, Section 2 (d) - Saving of inherent powers of

Hon'ble Judges: Hitesh Kumar Sarma

Bench: SINGLE BENCH

Advocate: Dicky Panging, Mama Tang, Rajesh Sonar

Final Decision: Disposed off

Judgement

1. Heard Mr. Dicky Panging, learned counsel for the petitioner. Also heard Ms. Mama Tang, learned Additional Public Prosecutor, Arunachal Pradesh, as well as Mr. Rajesh Sonar, learned counsel for private Respondent Nos. 2 to 4.

2. This is an application, under Section 482 of the Code of Criminal Procedure, 1973, filed by the petitioner, seeking quashment of the order, dated 19.08.2016, passed by the Court of learned Chief Judicial Magistrate, Capital Complex, Yupia, and the order, dated 29.11.2016, passed by the Court of learned Judicial Magistrate, 1st Class, Capital Complex, Yupia, taking cognizance of an offence u/s. 211 of the Indian Penal Code against him without following the due process of law and the subsequent proceedings instituted in terms of the aforesaid orders, 19.08.2016, and 29.11.2016, respectively.

3. The fact, leading to the filing of the present criminal petition, is that the present petitioner had filed a First Information Report(FIR), on 02.12.2013, before the Doimukh

Police Station, alleging that on 27.11.2013, at about 8.00 hrs., the Respondent No. 2 and his party committed criminal trespass into his Mithun Farm, located at Aaying Nallah Emchi village, which Farm was established by him in the year 2001. There were 20 Mithuns breeding in the said Farm at the relevant point of time. The Respondent No. 2 and members of his party had destroyed the bamboo fencings of the said Farm, resulting in missing of 4(four) Mithuns. The Respondent No. 2 and his men had also destroyed the jungles which was the food of the Mithuns and also disturbed the environment of the Farm by throwing plastics, lighting fire, etc. It was also alleged in the said First Information Report(FIR) that the Respondent No. 2 and his men, had trespassed into the said Mithun Breeding Farm in the previous year also. 4. On receipt of the First Information Report(FIR), aforesaid, on the above facts, Doimukh Police Station registered a case, being No. DMK/PS Case No. 51/2013 u/ss. 447/427/379/34 of the Indian Penal Code; investigated into it, collected evidence, arrested the accused Respondent Nos. 2, 3 and

4. After completion of the investigation, the police laid the charge-sheet against the accused Respondent Nos. 2, 3 and 4, u/ss. 447/427/379/34 of the Indian Penal Code.

5. While the charge-sheet was pending before the Court of learned Chief Judicial Magistrate, aforesaid, for consideration of the charge, the Respondent Nos. 2 to 4, who are shown as accused in the charge-sheet; filed an application, being No. 46/2016, before the Court of the learned Chief Judicial Magistrate, Yupia, u/s. 340 of the Code of Criminal Procedure, 1973, with a prayer to hold an inquiry against the informant for commission of an offence u/s. 211 of the Indian Penal Code. Accordingly, the learned Chief Judicial Magistrate, Yupia, passed the impugned order, dated 19.08.2016, directing the Judicial Magistrate, 1st Class, Yupia, for taking cognizance of the offence u/s. 211 IPC, against the petitioner/informant of the aforesaid case, and pursuant to the said order, dated 19.08.2016, the Court of the learned Judicial Magistrate, 1st Class, Yupia, vide order, dated 29.11.2016, took cognizance of the offence against the petitioner/informant of the said case, u/s. 211 of the Indian Penal Code.

6. According to the petitioner, the order, dated 19.08.2016, passed by the Court of the learned Chief Judicial Magistrate, Yupia, and the order, dated 29.11.2016, passed by the Court of the learned Judicial Magistrate, 1st Class, Yupia, are in violation of the mandatory provisions of Section 195 of the Code of Criminal Procedure, 1973.

7. It is further averred and submitted by the petitioner that the learned Chief Judicial Magistrate, Yupia, without making a complaint, in writing, as required u/s. 195 of the Code of Criminal Procedure, 1973, conducted the preliminary inquiry directly and directed the Judicial Magistrate, 1st Class, aforesaid, to take cognizance of the offence and proceed with the trial against the accused respondents. The said Judicial Magistrate, 1st Class, accordingly, proceeded for trial of the complaint in accordance with the order, dated 19.08.2016, passed by the learned Chief Judicial Magistrate, Yupia. In utter violation of the mandatory provisions and further continuance of such proceeding in the

Court of the said Judicial Magistrate, 1st Class, according to the petitioner, is abuse of the process of Court.

8. I have perused the petition as well as the annexures furnished therewith including the copies of impugned orders, the copies of the charge-sheet and the First Information Report(FIR), referred to above.

9. I have also perused the records of the learned trial Court.

10. It appears from the records of C.R. Case No. 46/2014, that this C.R. Case has been registered on the basis of a complaint filed by the accused respondents u/s. 340 of the Code of Criminal Procedure, 1973, for holding of an inquiry into the offence u/s. 211 of the Indian Penal Code allegedly committed by the present petitioner as informant.

11. The accused respondents further averred in the instant application that the informant/petitioner has no Mithun Breeding Farm, as claimed by him, and they had never committed the alleged offences and the First Information Report (FIR) was filed, just to harass them.

12. The learned Chief Judicial Magistrate, Yupia, during the course of preliminary inquiry, examined as many as 8(eight) witnesses. The witnesses stated that in the village, relevant in the instant case, where the alleged Farm is situated, there is a community land which is, in fact, a jungle area, and the villagers themselves are protecting the said area. The villagers used to collect bamboo, leaves of trees and other materials from that community land for their day-to-day requirements as well as for community feast, etc.. According to them, in the year 2013, the informant petitioner(accused in C.R. Case No. 46/2014) who was the village Headman, secretly obtained sanction from the State Government for opening a Mithun Breeding Farm on the community land without the knowledge of the villagers. About 30 people of the village, aforesaid, cleared the jungle for community purpose in the year 2013. Thereafter, the petitioner(accused in C.R. Case No. 46/2014) lodged the First Information Report (FIR) on the basis of which the charge-sheet was filed against the accused respondent Nos. 2 to 4.

13. After considering the entire evidence on record, in the C.R. Case, aforesaid, the Chief Judicial Magistrate, Yupia, had arrived at a conclusion that the First Information Report(FIR) lodged by the petitioner, was not based on valid reason and the same is filed, prima facie, with an intention to harass the complainant of the present case, i.e. CR Case No. 46/2014, and for getting undue advantage of possession of the community land. The learned Chief Judicial Magistrate, aforesaid, also found the petitioner to have committed the offence u/s. 211 of the Indian Penal Code. Therefore, the case records was forwarded by him to the Court of learned Judicial Magistrate, 1st Class, Yupia, for taking cognizance of the offence and for trial. It has also been reflected in the order, aforesaid, that the order as well as the findings recorded, therein, shall be treated as a

part of the complaint against the accused i.e. present petitioner, during the trial. The relevant part of the order passed by the learned Chief Judicial Magistrate on 19.8.2016 is reproduced below for convenience.

".....After considering the entire evidence on record this court has come to a conclusion that the complainant/FIR (sic) filed by the opposite party namely Nabam Epo was not based on valid reason and the same is filed prima facie with an intention to harass the complainant in the present case and for getting undue advantage for possessing the community land. In the present facts and circumstances of the case and the outcome of the inquiry conducted by this Court there seems commission of an offence by the accused Nabam Epo as provided under Section 211 of the Indian Penal Code. The present case record is forwarded to the Court of learned Judicial Magistrate First Class, Yupia, for taking cognizance of the offence and for trial. The present order cum finding will be treated as part of the complaint against the accused person during trial. The complainants will appear before the Court of the learned Judicial Magistrate First Class for further proceeding of trial."

14. On receipt of the record of the C.R. Case No. 46/2014 from the learned Chief Judicial Magistrate, Yupia, along with the order, dated 19.08.2016, the Judicial Magistrate, 1st Class, Yupia, had passed the order, dated 29.11.2016, which has also been impugned in this petition. The learned Judicial Magistrate, 1st Class, Yupia, by referring to the order, dated 19.08.2016, passed by the learned Chief Judicial Magistrate, Yupia, had taken cognizance of an offence under Section 211 of the Indian Penal Code, against the accused (present petitioner). The order, dated 29.11.2016, by which cognizance was taken by the learned Judicial Magistrate, 1st Class, is also quoted below for convenience of appreciation.

"Case record received on transfer for further proceeding and disposal. Perusal of the record reveals that the instant complaint case was filed U/S 340 of the Cr.PC by the complainants Shri Tech Rimpum, Shri Tana Tasap and Shri Tech Sema on dated (sic) 09.12.2014 before the Hon"ble C.J.M. Yupia, with a prayer for holding an enquiry into the offence under Section 211 of the Indian Penal Code. It was claimed by the complainants that the accused person Shri Nabam Epo had filed a false FIR before the Doimukh Police Station alleging that the complainants had trespassed into his Mithun Farm at Ayin Nala area and damaged bamboo fencing resulting in missing/stolen (sic) of 4 numbers of his Mithun. Accordingly the complainants were arrested by the Doimukh Police Station and later on allowed them to go on bail. The complainants had further claimed that accused Nabam

Epo has no Mithun firm at Ayin Nala and the complainants have never committed the alleged offence. The Hon"ble CJM, Yupia after conduction (sic) inquiry as provided (sic) Section 340 of the Criminal Procedure Code by examining as many as 8 persons in the instant case has found incriminating materials against the accused Nabam Epo. Accordingly the instant case has been endorsed to me for further proceeding and disposal. In view the above consideration cognizance of offence under Section 211 IPC is taken against the accused Nabam Epo by this Court. Issue summons against the accused person. Fixing 16.12.2016 for app."

15. The learned counsel for the petitioner has submitted that the complaint filed by the Chief Judicial Magistrate, Yupia, is not a complaint as required to be filed under Section 195 Cr.PC. According to him, a complaint under Section 195 Cr.PC, should be a complaint as defined in Section 2 (d) of the Cr.PC. Referring to the definition of a "complaint", he has submitted that complaint means allegation made, orally or in writing, to a Magistrate with a view to his taking action under the Criminal Procedure Code, that some person, whether known or unknown, has committed an offence but does not include a police report. He has submitted, with reference to the order of the learned Chief Judicial Magistrate, Yupia, dated 19.8.2016, reproduced above, that the said order of the learned Chief Judicial Magistrate, has held that under the facts and circumstances of the case and outcome of the inquiry conducted by him, there seems commission of an offence by the accused/petitioner Nabam Epo, as provided under Section 211 IPC. The said order also shows that the case record was forwarded to the learned Judicial Magistrate, 1st Class, Yupia, for taking cognizance of the offence and for trial with a further direction that the said order cum finding will be treated as part of the complaint against the accused person during the trial.

16. According to the learned counsel for the petitioner, this order is a direction for taking cognizance of the offence and to proceed with the trial, and therefore, it is not a complaint within the meaning "complaint" as defined in the Code. He has also referred to the order taking cognizance by the learned Chief Judicial Magistrate, Yupia, wherein it has been stated that the case record was received on transfer for further proceeding and disposal and that the perusal of the case record revealed that the instant complaint was filed under Section 340 Cr.PC, by the complainants and the case was endorsed to him by the learned Chief Judicial Magistrate, Yupia, for further proceeding and disposal. In consideration of such order, he had taken cognizance of the offence under Section 211 IPC against the accused respondents. Such facts are apparent from the orders reproduced above. The learned counsel for the petitioner has submitted that the order of the learned Judicial Magistrate, 1st Class, makes it clearly appear that he had taken cognizance of the case on the basis of the order passed by the learned Chief Judicial Magistrate, directing him to take cognizance and proceed with the trial without applying

his own mind before taking cognizance of the offence. In this regard, the learned counsel for the petitioner has referred to the decision of the Hon"ble Supreme Court, in the case of Surendra Gupta ?vs- Bhagwan Devi (Smt) and Another, reported in (1994) 4 Supreme Court Cases 657 and submitted that, in the said case, the question for decision was, whether dismissal of the petition under Section 482 Cr.PC was justified on the ground that the impugned order was appealable under Section 341 of the Cr.PC. In the said decision of the Hon"ble Supreme, it has been observed that the right to appeal under Section 341 Cr.PC is conferred against filing of a complaint, and, what is a complaint is clear from Clause (d) of Section 2 of the Cr.PC. But, in the instant petition, under Section 482 Cr.PC, the petitioner has not only challenged the order dated 19.8.2016, referred to above, passed by the learned Chief Judicial Magistrate, Yupia, making the complaint, but also the order of taking cognizance by the learned Judicial Magistrate, 1st Class, Yupia, dated 29.11.2016. Therefore, the present petition before this court is not only against making complaint under Section 340 Cr.PC, but also against taking cognizance by the learned Judicial Magistrate, 1st Class.

17. On the other hand, the learned counsel for the respondent Mr. R Sonar, has strenuously argued that since appeal lies against an order under Section 340 Cr.PC, the provisions of Section 482 Cr.PC cannot be invoked in this case. He has referred to the decision of the Hon"ble Supreme Court in the case of Hamida -vs- Rashid @ Rasheed and Ors. reported in (2008) 1 SCC 474 where in paragraph-7 (1) it has been laid down that "the power under Section 482 Cr.PC is not to be resorted to, if there is a specific provision in the Code, for the redress of the grievance of the aggrieved party."

18. As referred to above, the challenge before this court, in the instant petition, is not only the inquiry and the order of the learned Chief Judicial Magistrate, Yupia, dated 19.8.2016, but also the order of the learned Judicial Magistrate, 1st Class, dated 29.11.2016 taking cognizance. As has been stated above, the appeal under Section 341 Cr.PC relates to only the complaint filed under Section 340 Cr.PC and not in respect of taking cognizance by the learned Magistrate on such complaint.

19. The Hon"ble Supreme Court in the case of Pratish ?vs- State of Maharashtra and others reported in (2002) 1 SCC 253 held that the preliminary inquiry made under Section 340 Cr.PC is not for finding whether any particular person is guilty or not. Far from that, the purpose of the preliminary inquiry, even if the court opts to conduct it, is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed. If it is found after making the preliminary inquiry that opinion, as aforesaid, is formed by the learned court, such court has to make a complaint in writing to the Magistrate of 1st Class.

20. Referring to the submission made by the learned counsel for the petitioner, let us now see whether the order dated 19.8.2016, passed by the learned Chief Judicial Magistrate, was a complaint, in writing, or it was, in fact, a direction/order to the learned Judicial

Magistrate, 1st Class to proceed with the trial. In fact, the order of the learned Chief Judicial Magistrate, recorded, prima-facie guilt of the accused person rather than forming an opinion only to file a complaint as required under Section 195 Cr.PC. There is a direction contained therein to take cognizance and to proceed with the trial. However, this order could have been appealed against by the present petitioner under Section 341 Cr.PC as Section 341 provides that only the complaint filed under Section 340 Cr.PC can be appealed against. Appeal, referred to in Section 341 Cr.PC, is not in respect of taking cognizance by the learned Magistrate on the complaint filed under Section 340 of the Cr.PC.

21. However, taking cognizance and to proceed with the trial by the learned Magistrate without applying his mind appears to be not in conformity with the requirement of law. The learned Magistrate must apply his independent mind before taking cognizance of an offence. But, this was not done in the instant case, and rather, it is found that cognizance was taken on being directed vide the order, dated 29.11.2016.

22. Whether the order passed by the learned Chief Judicial Magistrate, is a complaint, as defined in Section 2 Sub-Section (d) of the CrPC, needs to be looked into in view of the argument raised on the issue and on the facts of the case. Section 2 (d) of the Cr.PC, as stated above, provides for, complaint, oral or in writing to a Magistrate with a view to taking action under the Code that some person whether known or unknown committed an offence in the instant case. The admitted position is that there is no oral complaint. The order of the learned Chief Judicial Magistrate, in the last paragraph, makes it clear that his order cum finding will be treated as part of the complaint against the accused person during trial. The aforesaid sentences, used in the order, make it clear that there is a complaint and the order cum finding of offence recorded by him in his order dated 19.8.2016 shall form part of the complaint. But, in fact, there is no such complaint filed. The order of the learned Judicial Magistrate, 1st Class dated 29.11.2016 makes it appear that he had taken cognizance on the basis of the order dated 19.8.2016 and not on the basis of any other written or oral complaint filed by the learned Chief Judicial Magistrate, and as such, he could not have taken cognizance of alleged complaint, purportedly filed under Section 340 Cr.PC. That apart, the inquiry under Section 340 Cr.PC has to be made in respect of any offence referred to in Clause (b) of Sub-Section (i) of Section 195 Cr.PC which appears to have been committed in or in relation to any proceeding in any Court, or as the case may be, in respect of a document produced or given in evidence in a proceeding before the Court.

23. There is a case filed by the present petitioner, as informant, before the police, which was charge-sheeted vide Charge-sheet No.21/2014 dated 31.07.2014. There is no materials in the record to show that any proceeding was pending before the learned Chief Judicial Magistrate, Yupia, in respect of the FIR filed by the present petitioner as informant and subsequent charge-sheet filed by the police against the respondents before the court of learned Chief Judicial Magistrate. Section 195(b)(i) Cr.PC provides

that,

"the offence must be alleged to have been committed in or in relation to any proceeding in any Court."

There was no proceeding pending in any court at the relevant point of time when the learned Chief Judicial Magistrate proceeded with under Section 340 Cr.PC. That being so, the proceeding under Section 340 could not have been taken by the learned Chief Judicial Magistrate. However, the alleged complaint made by the learned Chief Judicial Magistrate under Section 340 Cr.PC is appealable under Section 341 Cr.PC, as discussed above. But, cognizance taken by the learned Judicial Magistrate, 1st Class, could not have been taken, vide his order dated 29.11.2016, as the complaint was not a complaint as defined under Section 2 (d) Cr.PC as specifically discussed above. That being so, the complaint under Section 340 Cr.PC itself is not a complaint within the meaning of "complaint" as defined in Section 2(d) Cr.PC, and therefore, no cognizance could have been taken on such alleged complaint.

24. Whatever it may be, the complaint filed by the learned Chief Judicial Magistrate, Yupia under Section 340 of the Cr.PC is appealable under Section 341 of the Cr.PC and the grounds canvassed before this Court by the learned counsel for the petitioner could have been taken in the appeal if there was an appeal.

25. However, the order of the learned Judicial Magistrate First Class taking cognizance of the offence against the accused/petitioner on the direction of the learned Chief Judicial Magistrate, without application of mind, is not as per the requirement of law, and therefore, needs to be quashed.

26. Accordingly, the order, dated 29.11.2016, passed by the learned Judicial Magistrate First Class, Yupia in CR Case No. 46/2014 is quashed.

27. The criminal petition is disposed of accordingly.

28. Send down the LCR along with a copy of this judgment.