(2013) 02 BOM CK 0219

Bombay High Court

Case No: Criminal Writ Petition No. 152 of 2011

Amish Jayant Dharod		APPELLANT
	Vs	
The State of Maharashtra and Another		RESPONDENT

Date of Decision: Feb. 25, 2013

Citation: (2013) 3 BomCR(Cri) 384

Hon'ble Judges: R.S. Dalvi, J

Bench: Single Bench

Judgement

Roshan Dalvi, J.

The Petitioner has challenged the order of learned additional Metropolitan Magistrate, 2nd Court, Mazgaon, Mumbai directing the petitioner to submit his verification upon his complaint being filed before the learned Magistrate. The Petitioner has sought an order U/s. 156(3) of the CrPC upon his complaint. This is upon the premise that the learned Magistrate cannot take cognizance of the complaint filed by the Petitioner before any report is submitted by police officer upon his complaint for taking action against Respondent Nos. 2 and 3 in the complaint who are the police officers. The Petitioner, therefore, claims that though the learned Magistrate can issue an order U/s. 156(3) of CrPC, he cannot issue an order for verification of the complaint U/s. 200 of the CrPC. It is argued that the order U/s. 156(3) is pre cognizance stage and the order U/s. 200 is upon taking cognizance. The Respondents claim that the Petitioner''s case has been previously seen and does not require fresh consideration.

2. The complaint arises upon the Petitioner''s case of wrongful detention in police custody for 7 days pursuant to a false and malicious complaint of Respondent No. 1.

3. The Petitioner was a Director along with his brother, father and other Directors in one M/s. Vardhaman Dystuff Industries Ltd. A board meeting was fixed on 30th September, 2002. It was being attended by the Directors. Respondent No. 1 and her husband came and forced themselves into the board meeting which was to be held.

This was objected by some of the Directors including the Petitioner. Respondent No. 1 and her husband were requested to go out of the board room. Respondent No. 1 had carried a voice recording machine. She argued with the Petitioner. She lodged the false and dishonest complaint on the same day against the Petitioner. The Petitioner was called by the police in the police station in the evening of that day.

4. The initial complaint was U/s. 385, 504 and 509 of the IPC. There was, therefore, a complaint of extortion which was punishable with two years imprisonment or fine or both which was a bailable and compoundable offence. The complaint was also for insulting the modesty of a women for which punishment was of simple imprisonment for one year and fine and which was also bailable and compoundable. The complaint was also for insulting the complainant to provoke breach of peace which was non cognizable, bailable and compoundable.

5. Despite the three offences levelled against the Petitioner the police officers are stated to have added further charges. Initially the charge of cheating came to be added punishable U/s. 420 of the IPC. That is punishable with 7 years imprisonment or fine or both and is non bailable, though compoundable. Thereafter charges of criminal breach of trust, forgery, forgery for cheating, using forged documents as genuine etc. also came to be added punishable U/s. 406, 467, 468 & 471 of the IPC. Under these charges the Petitioner would be liable for punishment of 7 years and for 10 years extending to life imprisonment along with fine. All these charges are non bailable and not compoundable.

6. The Petitioner was produced for remand. Upon seeing the charges he was remanded to PC. The Petitioner remained in police custody for 7 days until he was released on bail. The incident took place and the complaint came to be filed on 30th September, 2002. On 5th October, 2002 Cr. Case No. 137 of 2002 came to be registered for charge U/s. 385, 504, 509 r/w. 34 of the IPC against the Petitioner father and brother. On 14th October, 2002 charge under Sections 406, 465, 467, 468, 471 and 420 were added. In view of the later charges the Petitioner taken in the custody. The Petitioner was arrested on 27th November, 2002. He was produced for remand on 28th November, 2002. He was remanded till 2nd December, 2002. He was granted bail on 3rd December, 2002.

7. The initial investigation was started by one Police Officer Rathod. Thereafter Respondent No. 3 and 4 got the Petitioner remanded under the added sections. In view of the added sections petitioner was remanded to PC till 3rd December, 2002 when he was granted bail. Thereafter no charges were pressed against him and offence was classified as NC

8. The Petitioner has claimed that he was unnecessarily detained because of a completely false case made out by the police officer by adding further sections to the initial complaint. The Petitioner claims he was wrongfully confined for 7 days. It is his case that even the initial case under Sections 385, 504 and 509 was followed by

a vague complaint of the Petitioner having withdrawn large amount on the basis of certain fabricated documents constituting criminal breach of trust. It is clarified by the Petitioner that thereafter without any additional material on record the charge of forgery and fabrication also came to be filed only because he did not settle the complaint of the complainant upon the insistence of the police officers because he claimed that that was upon illegal demands. The Petitioner claimed that he was slandered by this custody. It caused him mental trauma.

9. The Petitioner wrote several letters to the Dy. Commissioner of Police, Zone- I for reinvestigation of the matter. They were ignored.

10. The Petitioner filed a petition before Human Rights Commission. That has been dismissed.

11. The Petitioner sought to make an application against the respondent u/s 195 r/w. 34 of the CrPC before the Metropolitan Magistrate Court. That complaint has also been dismissed, not only upon the technicality but upon the fact that the case of filing of a false and malicious complaint by any of the Respondents against the Petitioner was not made out. It is observed by the learned Magistrate that merely because the case is treated as "NC final" it cannot be said that the complaint was filed with malicious and dishonest intention and therefore, the Petitioner has not been allowed to proceed U/s. 195 r/w. 340 of IPC. The learned Magistrate has concluded that there was no material to proceed under those sections and therefore dismissed the complaint. Had the learned Magistrate found substance in the malicious prosecution made by the police officers he would have issued the complaint in writing against the errant police officers. The Petitioner lodged the complaint U/Sections 177, 182, 203, 211, 217, 218 & 120B of the IPC against the officers. The learned Magistrate refused to file a complaint in writing as was required U/s. 177, 182 & 211 for allowing the Petitioner to proceed u/s 195 r/w. Section 340 of the CrPC. The appeal against that order as also been dismissed on merits. The appellate court has accepted the reasoning of the learned Magistrate that there is no clear finding of a false and malicious complaint and that certain documents produced in evidence are considered upon investigation. Hence Section 195 of the CrPC which comes into operation and when the Court intends to take cognizance was not involved (See State of Punjab Vs. Raj Singh and Another,)

12. The Petitioner has thereafter filed his private complaint in the 2nd M.M. Court at Mazgaon, in which the aforesaid order has come to be passed. The Petitioner emphasis the extent of his personal liberty and the fundamental right not to be arrested upon a flimsy complaint (See Joginder Kumar Vs. State of U.P. and others,)

13. Mr. Ponda, counsel on behalf of Petitioner, argued that the complaint has been filed for offences u/s 177, 182, 203, 211, 217, 218 and 120B of IPC. The Petitioner would not be able to prosecute Respondent Nos. 3 and 4 under the complaint himself. The complaint would have to be lodged by the police officer for offences

U/s. 177, 182 and 211 alleged by the Petitioner. These are for furnishing false information to make police officer to use his power erroneously and for making a false charge with intent to insult the Petitioner. The Petitioner claims that since the complaint U/s. 195 has been dismissed because the Petitioner could not have lodged complaint himself against the police officers the Petitioner''s private complaint must be investigated by another independent officer who must make a report U/s. 156(3) of the CrPC.

14. Mr. Ponda argued that learned Magistrate cannot himself take cognizance of the private complaint of the Petitioner. Another officer must make a report in that behalf. Consequently, he applied for an order U/s. 156(3) of the CrPC only. That has not been granted and the learned Magistrate has asked Petitioner to submit his verification. Mr. Ponda argued that directing the Petitioner to submit his verification would be taking cognizance that the learned Magistrate cannot do so until the police report is submitted. That would be only for the charge made out against the police officers. The learned Magistrate has upon going through the facts of the case recorded his opinion that the case is not fit for directions U/s. 156(3) of the CrPC.

15. The Petitioner contends that since he has been wrongfully prosecuted, he is entitled to have his complaint investigated and examined and if after such investigation no case is seen to be made out a report in that behalf would be filed.

16. Mr. Ponda on behalf of the Petitioner drew my attention to the case of Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others, in which the distinction between the concept of taking cognizance U/s. 156(3) and issuing process U/s. 202(1) is set out. It is held that the power u/s. 156(3) can be invoked by the Magistrate when he has not taken cognizance of the case, while Section 202 would come into operation after the Magistrate started dealing with the complaint in accordance with chapter XIV of the CrPC. The Magistrate would be required to apply his mind and be satisfied of a prima facie case for issue of process U/s. 202. The Magistrate has in this case not issued process. The Magistrate has only asked for verification by the Petitioner. The judgment also observes whether the Magistrate applies his mind for proceeding U/s. 200 he takes cognizance of the offence within the meaning of Section 190(1)(a). If he only orders investigation by the police U/s. 156(3) he cannot be said to have taken cognizance of the offence. Hence it is concluded in the judgment that Section 156(3) is the pre-cognizance stage whereas Section 202 is the post cognizance stage. It is also observed that the Magistrate only calls upon the police to exercise their powers of investigation U/s. 156(1) for collection of evidence followed by the report of the charge sheet U/s. 156(3) of the CrPC and Section 202 would come into play only after the evidence has been collected and further evidence is required so that Magistrate can issue process or Magistrate may postpone to issue process until that such further evidence is collected and pass order U/s. 202 of the CrPC.

17. Mr. Ponda also relied upon the case of Suresh Chand Jain Vs. State of Madhya Pradesh and Another, which holds that before taking cognizance of the offence, an investigation U/s. 156(3) CrPC can be ordered. But the complainant was not required to be examined on oath because Magistrate would not take cognizance of the offence. This case also laid down that the investigation U/s. 202, which requires postponement of the issue of process is different from what is contemplated U/s. 156. Hence if the Magistrate does not take cognizance and before he takes cognizance he would order investigation U/s. 156(3) and if he proposes to take cognizance, albeit on insufficient material or proposes to obtain fresh material, he would issue an order U/s. 202(1) of the CrPC. Similarly see also Manharibhai Muljibhai Kakadia and Another Vs. Shaileshbhai Mohanbhai Patel and Others, , Gopal Das Sindhi and Others Vs. The State of Assam and Another & Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, so that the Magistrate has to be only prima facie satisfied.

18. The learned Magistrate has found no case to order investigation U/s. 156(3) of the CrPC. It has to be first seen whether that order can be faulted. Though the Petitioner has contended that without any further material the later charges U/s. 406, 465, 467, 468 & 471 of the IPC came to be added to the initial charges U/s. 385, 504 & 509 of the IPC against the Petitioner; the orders on the complaint filed U/s. 195 and 340 of the CrPC show a finding of fact by the Magistrate that there was no clear case of a false and malicious complaint and certain documents produced by the complainant were the basis of further charges which has been upheld by the Appellate Court. That finding has now attained finality. The Petitioner seeks to reopen that case by way of his private complaint. This the Petitioner cannot do. Hence the impugned order that no case for investigation u/s 156(3) is made out cannot be faulted.

19. The learned Magistrate could have dismissed the complaint itself. However, he has called upon the Petitioner to submit his verification. That, of course, would be upon taking cognizance. Hence the complaint cannot proceed against the police officers U/s. 177, 182 & 221 of the IPC. The complaint would only proceed against the private party who was the complainant in the initial complaint against the Petitioner herein. The order of the learned Magistrate calling upon the Petitioner to be examined on oath also cannot be faulted. It may only be clarified that, therefore, the Petitioner shall have to proceed only against the private party, being the complainant in the initial complaint filed against the Petitioner after recording his verification and if any case of a false and malicious complaint of the complainant against the Petitioner is made out. The case against the public officers being the police officers involved in the investigation of the complaint against the Petitioner herein has rested finally upon the order of the Sessions Court in appeal in the complaint of the Petitioner u/s 195 and 340 of the CrPC. Consequently the impugned order is confirmed accordingly and with the above clarification the Writ Petition is dismissed.