

21 November 2013

Cr.A. No. 1969 of 2013 (S.L.P. (Cr.) No. 1515 of 2013)

The Judgment was delivered by : K. S. Radhakrishnan, J.

1. Leave granted.

2. The appellant herein is the second accused in CC 1548/2011 pending on file of the Judicial Magistrate, First Class, Cherthalay, which was initiated by the Magistrate on a protest complaint filed by the first respondent herein for the offences punishable u/s. 420 read with S. 34 IPC. Summons were issued to accused persons by the learned Magistrate vide order dated 22.11.2011. That order was challenged in Revision before the High Court of Kerala on the ground that the Magistrate was not justified in initiating proceedings after a refer report was submitted by the Police, after due enquiry.

The High Court, however, dismissed the Revision Petition vide order dated 23rd November, 2012 stating that even if a refer report is filed by the police after conducting investigation, the Magistrate has the power to entertain a protest complaint and to issue summons to the accused and proceed in accordance with law. Aggrieved by the same, this appeal has been preferred.

3. This appeal has been preferred by the second accused, a divorced wife of the first accused. The first respondent herein initially filed a complaint against accused nos.1 and 2 before the Police Station Mohammeda which was registered as Crime No.302/2010. The operative portion of the complaint is as follows :-

"The accused 1 and 2 with the ambition for immediate profits and the intention to make loss to the complainant, had given the commitment to the complainant in his rental residence house, owned by Kamal Travels, at Aryakara, Tannermukkam on 13.10.2006 to provide job to his uncle's son Sajimon, in Aushathi Govt. Department and taken 1 lac rupee from complainant, from Raveendran, R/o Illathukalathil House, Kumarakam taken 1 lac rupees in the commitment to give job to his son Rathish from Prabhakaran, Puthanparambil House, Kumarakam, and from Arumukam, R/o Kalathil House, Udayaperoor taken 50,000/- rupees each, and from K.P. Prasad, R/o Tikarthil, Kothuruthi, taken 25,000/- rupees, thereafter the accused persons committed cheating without providing job to these persons."

4. An FIR was registered and the investigation ordered. Police conducted detailed investigation, relevant portion of the investigation report is as follows :-

"After completing the investigation and recording the statement of witnesses stated above, I came to the conclusion that the fact stated above was not occurred. The complainant through Adv. Rajan had made contact with the first accused Ramchandran Unni and given Rs.12000/- for the purpose of taking certified copy of the order passed in Water Authority case, which was decided by the Kerala High Court, wherein he relatives of the complainant were parties in the case for the purpose of being permanency in service. After two weeks, Ramchandran Unni had got the certified copies from High Court and given it to the complainant. Except this, the accused had not collected money from any person.

During the period when money was given as stated by the complainant, the second accused was not in the residential house at Muhamma with the first accused because they were separated to each other and started living in the house at Thiruvananthapuram.

It is also proved that the first accused had not received any amount from the complainant or any other persons for providing job to the relative of the complainant or any other person. The amount paid, as stated in the complaint, has not been proved by the complainant and others by submitting any reliable documents."

5. On the basis of the above-mentioned report, the police referred the case as not proved. Reference report was submitted to the Judicial Magistrate, First Class, Cherthalay for appropriate action. Later, the respondent/claimant filed a protest complaint before the above-mentioned Court for cancellation of the reference report and for taking cognizance of the case, on which, as already stated, the Magistrate passed an order dated 22.11.2011, which reads as follows :-

"Heard the counsel for the petitioner. Perused the evidence adduced and other case records, prima facie case alleged is made out. Hence, case is taken on file as CC No.154810 for offence u/S 420 and 34 IPC. Issue summons to both accused. Take steps 28.1.12."

6. The power of the Magistrate to take cognizance of an offence on a complaint or a protest petition on the same or similar allegations even after accepting the final report cannot be disputed. It is settled law that when a complaint is filed and sent to police u/s. 156(3) for investigation and then a protest petition is filed,

the Magistrate after accepting the final report of the police u/s. 173 and discharging the accused persons has the power to deal with the protest petition.

However, the protest petition has to satisfy the ingredients of complaint before Magistrate takes cognizance u/s. 190(1)(a) Cr.P.C.

7. This Court in Gopal Vijay Verma v. Bhuneshwar Prasad Sinha & Ors. [(1982) 3 SCC 510 1982 Indlaw SC 288] held that the Magistrate is not debarred from taking cognizance of a complaint merely on the ground that earlier he had declined to take cognizance of police report. The judgment was followed by a Three-Judge Bench judgment of this Court in Kishore Kumar Gyanchandani v. G.D. Mehrotra [AIR 2002 SC 483 = (2001) 10 SCC 59 2001 Indlaw SC 21092].

8. The High Court, in our view, rightly applied the legal principle, but omitted to consider the crucial question as to the involvement of the second accused, the wife of the first accused. In this connection, it is pertinent to refer to the statement of the complainant having been made during the investigation, which reads as follows :-

"Thereafter I, Kunjumon and Rajan were gone to Thiruvanthapuram and met his wife then she told that they were separated to each other and she don't know nothing about him. I have given payment of Ramchandran Unni on the words of Rajan and Kunjumon. I don't know where he is now. At the time of paying the amount I have not seen his wife or not talked to her. I don't know anything about him so I have given this complaint."

9. The above statement of the complainant clearly indicates that money was entrusted to the first accused (the husband of A-2) and not to A-2. Complainant has also stated that at the time of paying the amount, the wife was not seen. Police on investigation, noticed that during the period when money was entrusted to the first accused, the second accused was not in the residential house of first respondent. Investigation revealed that they were separated and second accused started living at Thiruvananthapuram.

10. The appellant has also produced a copy of decree of divorce dated 25.1.2010 before the Court, which will indicate that the second accused had obtained a decree of divorce against the first accused on the ground of cruelty u/s. 13(1)(a) of the Hindu Marriage Act, 1955. Considering the fact that the second accused had no role, even according to the complainant, there is no reason to prosecute the second accused. In our view, the Magistrate has not considered this vital aspect when the protest petition was considered by him.

11. Magistrate has to exercise judicial discretion and apply his mind to the contents of the petition. The reference report as well as the statement of the complainant would indicate that no offence has been made out so far as the second accused is concerned since, admittedly, no money was entrusted to her and that second accused is the divorced wife of the first accused.

That being the factual situation, we are inclined to allow the appeal so far as the second accused is concerned and the summons issued against the second accused would stand quashed. However, it is open to the Magistrate to proceed against the first accused.

12. The appeal is allowed, as above.

Appeal allowed