

IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE 16TH DAY OF APRIL 2019

BEFORE

THE HON'BLE MR. JUSTICE JOHN MICHAEL CUNHA

CRIMINAL PETITION NO.5866 OF 2013

YAKOOB SHARIEF S/ O MAHABOOB SAB K ADVOCATE

v/s.

THE STATE OF KARNATAKA

ORDER

What is the procedure to be followed when a complaint in writing is sent to the Magistrate through post? is the question that arises for consideration in this petition.

2. The skeletal facts necessary for understanding the controversy involved in this petition are as follows:

Respondent No.2 sent a written complaint to the learned JMFC, Chickballapur under registered post. It was received by the Magistrate on 22.05.2012. The learned Magistrate directed Registry to register the said complaint as PCR. By a subsequent order dated 13.07.2012, the learned Magistrate referred the complaint to the Jurisdictional police under Section 156 (3) Cr.P.C for investigation. The order reads as under:

13.07.2012

Complainant absent. Perused the complaint.

The allegations made in the complaint it reveals that the accused has committed the offences under Sections 323, 324, 420, 409 of Indian Penal Code etc., Hence refer the case to jurisdictional police under Section 156 (3) of Cr.P.C. for investigation

Await report by 06.10.12. '

3. The contention of learned Senior counsel for the petitioner/accused is that on receipt of complaint, learned Magistrate directed the office to register the case as private complaint. Once the case is registered as private complaint, provisions of Chapter XV come into play. As per Chapter XV of the Code, a Magistrate taking cognizance of an offence on complaint has two options viz., (i) to examine the complainant and the witnesses present upon oath and after considering the submissions on oath of the complainant and the witnesses, if there is no sufficient ground for proceeding, he shall dismiss the complaint. If in the opinion of the Magistrate, there is sufficient ground for proceeding, the Magistrate shall issue either summons or warrant to the accused, as the case may be. (ii) postpone the issue of process as prescribed under Section 202 Cr.P.C.

4. In the instant case, the learned Magistrate having directed registration of the case, in effect, the Magistrate has postponed the issue of process; therefore, by virtue of Section 202 Cr.P.C. when the Magistrate decides to postpone the issue of process, he is required to hold an enquiry where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction or direct investigation to be made by the police officer or by such other person as he thinks fit. But the proviso to 202 Cr.P.C. mandates that no such direction for investigation shall be made;

i) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

ii) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

5. The thrust of the argument of learned Senior Counsel for the petitioner is that unless the complainant and the witnesses were examined on oath under Section 202 Cr.P.C., the learned Magistrate did not derive jurisdiction to direct investigation by the police and therefore the impugned order dated 13.07.2012 passed by the learned Magistrate referring the complaint for investigation by the jurisdictional police is in violation of the mandatory provisions of Section 202 Cr.P.C., as result, the impugned direction as well as consequent investigation undertaken by respondent No.1 police being bad in law and without jurisdiction are liable to be quashed.

6. The submissions canvassed by learned Senior Counsel for the petitioner are seriously disputed by learned SPP II appearing for respondent No.1 State. Placing reliance on the decision of the Hon'ble Supreme Court in MADHAO AND ANOTHER Vs. STATE OF MAHARASHTRA AND ANOTHER, reported in (2013) 5 SCC 615 with reference to para 18, he contended that when a Magistrate receives a complaint, he is not bound to take cognizance in every case, if the facts alleged in the complaint disclose commission of an offence. The Magistrate has ample discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and forwarding of the complaint to the police for investigation under Section 156 (3) would be conducive to justice, to save the valuable time of the magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he would be justified in adopting that course as an alternative to taking cognizance of the offence itself. However, he reiterated that the power under Section 156 (3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190 (1) (a), but once he takes such cognizance and embarks upon the procedure contemplated in Chapter XV, he is not competent to revert back to the pre cognizance stage and avail of Section 156 (3) of Cr.P.C ..

7. Insofar as the power of the learned Magistrate to direct investigation under Section 156 (3) Cr.P.C. is concerned, the learned Magistrate has referred to the decision of the Hon'ble Supreme Court in MONA PANWAR VS. HIGH COURT OF JUDICATURE OF ALLAHABAD THROUGH ITS REGISTRAR AND OTHERS, (2011) 3 SCC 496.

8. Further, placing reliance on the decision in the case of S.R. SUKUMAR Vs. S. SUNAAD RAGHURAM, reported in (2015) 9 SCC 609 and the decision of the Division Bench of Allahabad High Court in the case of STATE Vs. RAJENDRA LAL, MANAGER, UPPER DOAB SUGAR MILLS reported in 1957 SCC Online All 407, learned SPP- 2 emphasised that a complaint need not always be presented in person; even a letter addressed to the Magistrate disclosing the facts constituting criminal offence and requesting him to take action can also be treated as valid and proper complaint.

9. I have bestowed my careful thought to the submissions made at the Bar with reference to the procedure expounded by the Apex Court in the above referred decisions.

10. In Madhao and another Vs. State of Maharashtra and Another (2013) 5 SCC 615, the Hon'ble Supreme Court has explained that:

" 18. When a Magistrate receives a complaint he is not bound to take cognizance if the facts alleged in the complaint disclose the commission of an offence. The Magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156 (3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of

the offence itself. As said earlier, in the case of a complaint regarding the commission of cognizable offence, the power under Section 156 (3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190 (1) (a). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre cognizable stage and avail of Section 156 (3).

19. Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives;

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquire by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police. "

11. In *Mona Panwar Vs. High Court of Judicature of Allahabad* (2011) 3 SCC 496 it is held as under:

" 20. Taking cognizance is a different thing from initiation of the proceedings. One of the objects of examination of the complainant and his witnesses as mentioned in Section 200 of the Code is to ascertain whether there is prima facie case against the person accused of the offence in the complaint and to prevent the issue of process on a compliant which is either false or vexatious or intended only to harass such person. Such examination is provided, therefore, to find out whether there is or not sufficient ground for proceeding further.

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23. Normally, an order under Section 200 of the Code for examination of the complainant and his witnesses would not be passed because it consumes the valuable time of the Magistrate being vested in inquiring into the matter which primarily is the duty of the police to investigate. However, the practice which has developed over the years years is is that examination of the complainant and his witnesses under Section 200 of the Code would be directed by the Magistrate only when a case is found to be a serious one and not as a matter of routine course.If on a reading of a complaint the Magistrate finds that the allegations therein disclose a cognizable offence and forwarding of the complaint to the police for investigation under Section 156 (3) of the Code will not be conducive to justice, he will be justified in adopting the course suggested in Section 200 of the Code. "

12. Thus, from the scheme of the Code and the law expounded by the Hon'ble Supreme Court, it is clear that when a complaint is presented to the Magistrate under Chapter XV, Magistrate has mainly two options available to him:

a) to pass an order as contemplated under Section 156 (3) of the Code, before taking cognizance;

b) If he decides to take cognizance, to adopt any of the following measures viz.

i) direct examination of the complainant and his witnesses upon oath and if the allegations disclose commission of offence, issue process to the accused; if not, dismiss the complaint;

ii) postpone issue of process and either enquire into the case himself or direct an investigation by a police officer or by such other person as he thinks fit;

13. But the proviso to Section 202 of the Code prescribes that no such direction for investigation shall be made

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

14. By virtue of this proviso, the power of the Magistrate to direct investigation by the police or by such other person is circumscribed by a limitation or precondition viz., a) if the offence complained of is triable by the court of sessions; or

b) where the complaint has not been made by the court, the Magistrate cannot direct investigation unless the complainant and the witnesses present (if any) have been examined on oath.

In other words, if the complaint is made by a private individual and the Magistrate decides to send the complaint for investigation to the police, per force of this proviso, Magistrate cannot direct investigation by the police without first examining the complainant and the witnesses on oath (if any) as required under Section 200 of Cr.P.C.

15. Undeniably, in the case in hand, the offences complained of are not triable exclusively by the Court of Sessions. The complaint was not made to the Magistrate by any other criminal Court. Under the said circumstances, by virtue of sub-clause (b) of the proviso, the learned Magistrate could not have directed investigation by the police without examination of the complainant and the witnesses on oath as required under Section 200 of the Code.

16. It needs to be borne in mind that the " Investigation " envisaged in Section 202 contained in Chapter XV is different from " investigation " contemplated under Section 156 of the Code. Chapter XII of the Code in which Section 156 finds place relates to-Information to the police and their powers to investigate, which culminates in the filing of final report under Section 173 of the Code, whereas, Chapter XV deals with the Complaints made to Magistrates. These provisions therefore operate in different spheres. Investigation is directed by the learned Magistrate under Chapter XV of the Code only to facilitate him to decide whether or not sufficient grounds are available for him to proceed further in the matter. Therefore, it necessarily follows that if the Magistrate is of the opinion that any such assistance is required before proceeding into the matter, he must decide to call for the report of concerned police before taking cognizance of the offences. But once the Magistrate takes cognizance of the offences and embarks upon the procedure enshrined in Section 200 or 202 of Cr.P.C., he is not competent to revert back to the pre-cognizance stage and avail of Section 156 (3) of the Code.

17. In the instant case, at the first instance, the learned Magistrate directed the complaint to be registered as a private complaint. As a result, the Magistrate was required to follow the procedure under Section 200 or under Section 202 of Cr.P.c. Since the Magistrate had resorted to Section 202 of Cr.P.C., in view of the proviso to Section 202 of the Code as explained above, the learned Magistrate could not have issued a direction for investigation " unless the complainant and the witnesses present (if any) have been examined on oath under Section 200 ".This proviso is couched in mandatory terms. By use of the word " shall ", it cast an obligation upon the Magistrate to call upon the complainant to examine on oath himself and the witnesses present if any under Section 200. The compliance of this procedural requirement has a salutary purpose to achieve especially when the complaint is submitted in absentia. At that stage, apart from the genuineness/authenticity of the allegations made in the complaint even the identity of the complainant is not known to the Magistrate. It is possible that a person may set the law in motion by making a complaint to the Magistrate making false and

baseless allegations in fictitious name and in such eventuality, without enquiring into the genuineness of the complaint and without ascertaining the identity of the complainant, if a direction for investigation is issued to the police, even if after investigation the complaint turns out to be false, yet the rights and liberties of the victim would be prejudiced. Hence, in order to obviate any such misuse of legal machinery Section 202 of the Code contemplates either an inquiry by the Magistrate himself or a direction to the police for investigation before issuance of process. The proviso to Section 202 therefore is intended to achieve this object. The examination of the complainant in such circumstances is not only desirable, but is also a mandatory requirement under law, failure of which, in my view, will result in abuse of process of Court thereby vitiating the entire proceedings.

18. In the case in hand, learned Magistrate has committed two fundamental errors, which has resulted in procedural illegalities. Firstly, the learned Magistrate having resorted to the procedure in Chapter XV of the Code could not have reverted back to the pre-cognizance stage and referred the case to the jurisdictional police under Section 156 (3) of the Code. Secondly, having resorted to Section 202 of the Code could not have directed investigation by the police without examining the complainant and the witnesses, if any, present. Hence, the impugned order and consequent registration of the FIR and investigation undertaken by the respondent-police being opposed to Section 202 of the Code are liable to be quashed.

Accordingly, petition is allowed. The order dated 13.7.2012 passed by the learned Magistrate directing investigation by the respondent-police and registration of the FIR in Crime No.86/2012 and consequent proceedings arising there from are hereby quashed. The case is remitted to the learned Magistrate to proceed with the matter after examining the complainant and the witnesses if any, in terms of the proviso to Section 202 of the Code.