IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE 28TH DAY OF SEPTEMBER, 2018

BEFORE
THE HON'BLE MR.JUSTICE B. A. PATIL

CRIMINAL REVISION PETITION No.441/2018 c/ w CRIMINAL REVISION PETITION No.440/2018
In Crl.R. P. No.441/2018

State of Karnataka
v/s.
Smt. Gayathri Nayak

ORDER

These criminal revision petitions have been preferred by the State challenging the order passed by the Additional District and Sessions Judge, Udupi (Sitting at Kundapura) in private complaint Nos.1/2017 and 1/2016 dated 24.02.2018.

2. I have heard Sri Venkatesh P. Dalwai, learned Special Public Prosecutor for the petitioner, Sri Dinesh KumarK. Rao, learned counsel for the respondent No.1 and Smt.Haleema Ameen, learned counsel for the respondent No.2.

3. Since these two Criminal Revision Petitions are having similar set of facts, circumstances and question of law, though the orders have been passed in different private complaints, in order to avoid the repetition of law applicable to the present cases on hand, both are clubbed together for the purpose of disposal.

4. The gist in both the cases are that, private complaint Nos.1/2016 and 1/2017 were filed against the respondents-accused alleging certain allegations pertaining to the grant of lands in favour of accused No.2 by Committee consisting of her husband i. e. , accused No.1 and other accused who conspired to manipulate the records. The learned Magistrate by his orders dated 02.11.2016 and 25.01.2017, referred the matter for investigation by exercising power under Section 156 (3) of Cr.P. C and accordingly, the orders were communicated to the jurisdictional police. It is further stated that when the matter was under investigation and the final report was yet to be filed, in the meanwhile, the respondents-accused filed applications under Sections 156 (3) and 227 of Cr.P.C. and also under Section 19 of the Prevention of Corruption Act, 1988 praying to dismiss the complaints.

5. The learned Judge by exercising the power, allowed the applications. Assailing the same, the State is before this Court.

6. It is the contention of the learned counsel for the petitioner-State that the Court below without application of mind has entertained the applications filed under Sections 156 (3) and 227 of Cr.P.C. and also under Section 19 of the Prevention of Corruption Act, 1988, and has discharged the respondents-accused. The said orders of the Court below is virtually for recalling the orders dated 02.11.2016 and 25.01.2017.He further submitted that when once the matter has been referred for an investigation by exercising the power under Section 156 (3) of Cr.P. C, then thereafter, power of the Magistrate ceases till the final report is filed by the Investigating Agency under Section 173 (2) of

Cr.P. C. He further submitted that when sanction is very much required for the purpose of recording investigation, the said orders which have been passed by the Court below is arbitrary and erroneous.

7. He further submitted that the Court below has committed a grave error by allowing the applications filed under Section 227 of Cr.P.C. In order to substantiate the above said contentions, the learned counsel for the petitioner relied upon the case of the Hon'ble Apex Court in Shaikh Maqsood vs. State of Maharashtra reported in 2009 6 SCC 583.

8. Per contra, the learned counsel for respondent No.1 vehemently argued and submitted that when the learned Magistrate passed the orders dated 02.11.2016 and 25.01.2017 that itself clearly indicates the fact that he has applied his mind for the said proceedings and thereafter, he has passed an order under Section 156 (3). When he has taken the cognizance then, under such circumstances, he can entertain the applications under Section 156 (3) read with Section 227 of Cr.P.C. By referring the orders of the Court below, he further submitted that the respondents-accused Nos.3 and 6 in PCR No.1/2016 are public servants and if at all they have to be prosecuted, then under such circumstances, previous sanction from the concerned Government Department is very much necessary. The said fact was brought to the notice of the Court below and after considering the said fact the Court below has rightly allowed the application and discharged the respondents accused.

9. He further submitted that the respondents accused are innocent and though there is no material to proceed under Section 156 (3) of Cr.P.C. , the learned Magistrate has referred the matter for investigation. He further submitted that if there is any irregularity or illegality from the inception, then both the orders be set aside and the matters may be remitted back to the Court below to enquire it from the date when the complaint was filed. He further submitted that by justifying the orders of the Court below, the Court below has not committed any illegality while passing the orders. On these grounds, he prays to dismiss both the petitions.

10. Learned counsel for the the respondent No.2 Smt.Haleema Ameen, vehemently argued by supporting the arguments of the learned counsel for the respondent No.1 that the Court below after considering all the legal aspects and by relying upon the decisions of the various High Courts has rightly passed the impugned order. There is no illegality or irregularity in allowing the petitions. On these grounds, she also prays to dismiss the petitions. She further submitted that the complainant has not been made as a party before this Court and as such, the petitions are also not maintainable in law. On these grounds, she prays to dismiss the petitions.

11. I have carefully and cautiously gone through the submissions made by the learned counsel appearing for the parties and also gone through the impugned orders passed by the Court below and also other materials which has been made available in this behalf.

12. As could be seen from the records, it is an undisputed fact that in PCR No.1/2016, one Sri. Suresh Shetty has filed a private complaint dated 24.11.2017 under Section 200 of Cr.P. C. for the offences punishable under Section 13 of the Prevention of Corruption Act, 1908 and Section 120B of IPC against the respondents-accused and therefore, learned Magistrate by its order dated 02.11.2016 after considering the materials placed on record passed the following order:

"The complaint lodged under Section 200 of Cr.P.C. to initiate the proceedings against accused Nos.1 to 6 under section 13 of the Prevention of Corruption Act, 1908 and section 120 of IPC is ordered to be investigated by Dy.S. P. by Anti Corruption Bureau, Udupi.FIR against accused Nos.1 to 5 under section 13 (c) of the Prevention of Corruption Act and related sections and also under section 120 of IPC.

So far as accused No.6, FIR as against accused No.6 will be registered only with regard collection of evidence in respect of involvement of accused Nos.1 to 5. The Investigating Officer shall inform this court before proceeding against accused No.6 restricting to arrest accused No.6 except calling upon her to give statement before him and submit records relating to alleged offences committed in respect of grant of revenue land. In any eventuality, if the Investigating Officer reels that accused No.6 is to be arrested, the question of sanction arises. In that regard, the Investigating Officer Officer shall take prior permission of this Court and then proceed for apprehending accused No. 6 if it is found to be necessary in the course of Investigation while collecting investigation. So, FIR shall be registered against accused Nos.1 to 6 registered against accused Nos.1 to 6 and investigation in respect of violation of section 13 of the Prevention of Corruption Act and 120 of I. P. C. conducted against accused Nos.1 to 5 only.

Office is directed to intimate the complainant to provide one set of copies of the document enclosed to the complaint which in turn refer the matter to Dy.S. P. , Anti Corruption Bureau, Udupi under section 156 (3) of Cr.P. C ".

13. By going through the said order, it indicates that he has directed the Dy.S. P, Anti Corruption Bureau, Udupi under Section 156(3) of Cr.P.C. to investigate the matter and posted the case for awaiting the final report and even the order sheet indicates that a copy of the order along with the documents were sent to Anti Corruption Bureau, Udupi on 05.11.2016.Though, it is the contention of the learned counsel for the respondent No.1 that learned Magistrate while passing the order dated 02.11.2016 has applied his mind and has taken the cognizance and under such circumstances, he is having every power to entertain the applications which have been filed subsequently under Section 227 of Cr.P.C.

14. By going through the said order, it indicates that the Magistrate has exercised one of the powers vested with him under Section 190 of Cr.P.C. For the purpose of brevity, I quote Section 190 of Cr.P.C. which reads as under:

"190. Cognizance of offences by Magistrates-

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts; (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

15. I also feel that it is just and proper to quote Section 200 of Cr.P.C., which reads as under:

"200. Examination of complainant- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate: Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

16. On going through these two sections, it discloses that when a complaint is being filed before the Magistrate under Section 200 of Cr.P.C. , he has got powers either to refer the matter under Section 156 (3) of Cr.P.C. to investigate the said case by the Investigating Agency and ask them to give a final report or he can also take the cognizance and if he feels that he himself can proceed in accordance with law, then he can proceed as per the provisions of Chapter XVI of Cr.P. C.

17. As could be seen from the order sheet, nowhere he has specifically mentioned that he has taken cognizance and thereafter, he has referred the matter under Section 156 (3) of Cr.P. C. I am conscious of the fact that if the Magistrate applies his mind to the said facts and circumstances of the case, that itself is sufficient and in this behalf, the Court below has exercised the first power and has proceeded to refer the matter to the Dy.S.P., Anti Corruption Bureau, Udupi, directing him to investigate and submit his report. The words used in the said order indicates that the learned Magistrate instead of proceeding under Chapter XVI, he has proceeded under Section 156 (3) of Cr.P.C. Even after investigation, if the Investigating Agency submits the report, then the provisions of Section 173 of Cr.P.C. will attract and that it will act upon. This proposition of law has been elaborately discussed by the Hon'ble Apex Court in the case of Jamuna Singh and Ors. Vs. Bhadai Shah reported in AIR 1964 SC 1541 which reads as under:

"6. The Code does not contain any definition of the words " institution of a case ".It is clear however and indeed not disputed that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein. Section 190 (1) of the Code of Criminal Procedure contains the provision for cognizance of offences by Magistrates. It provides for three ways in which such cognizance can be taken. The first is on receiving a complaint of facts which constitute such offence; the second is on a report in writing of such facts-that is, facts constituting the offence-made

by any police officer; the third is upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion that such offence has been committed. Section 193 provides for cognizance of offences being taken by Courts of Sessions on commitment to it by a Magistrate duly empowered in that behalf. Section 194 provides for cognizance being taken by High Court of offences upon a commitment made to it in the manner provided in the Code.

(7) An examination of these provisions makes it clear that when a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence a case is instituted in the Magistrate's Court and such a case is one instituted on a complaint. Again, when a Magistrate takes cognizance of any offence upon a report in writing of such facts made by any police officer it is a case instituted in the Magistrate's Court on a police report.

(8) To decide whether the case in which the appellants were first acquitted and thereafter convicted was instituted on a complaint or not, it is necessary to find out whether the Sub-Divisional Magistrate, Gopalganj, in whose Court the case was instituted, took cognizance of the offences in question on the complaint of Bhadai Sah filed in his Court on November 22, 1956 or on the report of the Sub-Inspector of Police dated December 13, 1956.It is well settled now that when on a petition of complaint being filed before him a Magistrate applies his mind for proceeding under the various provisions of Chapter XVI of the Code of Criminal Procedure, he must be held to have taken cognizance of the offences mentioned in the complaint. When however he applies his mind not for such purpose but for purposes of ordering investigation under S.156 (3) or issues a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence. It was so held by this Court in R. R. Chariv. State of U. P. , 1951 SCR 312:(AIR 1951 SC 207) and again in Gopal Dasv. State of Assam, AIR 1961 SC 986.

(9) In the case before us the Magistrate after receipt of Bhadai Shah's complaint proceeded to examine him underS. 200 of the Code of Criminal Procedure.That section itself states that the Magistrate taking cognizance of an offence on a complaint shall at once examine the complainant and the witnesses present, if any, upon oath.This examination by the Magistrate underS. 200 of the Code of Criminal Procedure puts it beyond doubt that the Magistrate did take cognizance of the offences mentioned in the complaint. After completing such examination and recording the substance of it to writing as required byS. 200 the Magistrate could have issued process at once underS. 204 of the Code of Criminal Procedure or could have dismissed the complaint underS. 203 of the Code of Criminal Procedure. It was also open to him, before taking either of these courses, to take action underS. 202 of the Code of Criminal Procedure.

That section empowers the Magistrate to " postpone the issue of process for compelling the attendance of persons complained against, and either enquire into the case himself or if he is a Magistrate other than a Magistrate of the third class, direct an enquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint. "If and when such investigation or inquiry is ordered the result of the investigation or inquiry has to be taken into consideration before the Magistrate takes any action under S.203 of the Code of Criminal Procedure.

(10) We find that in the case before us the Magistrate after completing the examination underS. 200 of the Code of Criminal Procedure and recording the substance of it made the order in these words:

" Examined the complaint ons. a. The offence is cognizable one .To S. I. Baikunthpur for instituting a case and report by 12-12-56. "

If the learned Magistrate had used the words " for investigation " instead of the words " for instituting a case ” the order would clearly be underS. 202 of the Code of the Criminal Procedure. We do not think that the fact that he used the words " for instituting a case " makes any difference. It has to be noticed that the Magistrate was not bound to take cognizance of the offences on receipt of the complaint. He could could have, without taking cognizance, directed an investigation of the case by the police underS. 156 (3) of the Code of Criminal Procedure. Once however he took cognizance he could order investigation by the police only underS. 202 of the Code of Criminal Procedure and not underS. 156 (3) of the Code of Criminal Procedure. As it is clear here from the very fact that he took action underS. 200 of the Code of Criminal Procedure, that he had taken cognizance of the offences mentioned in the complaint, it was open to him to order investigation only underS. 202 of the Code of Criminal Procedure and not underS. 156 (3) of the Code. It would be proper in these circumstances to hold that though the Magistrate used the words " for instituting a case " in this order of November 22, 1956 he was actually taking action under S.202 of the Code of Criminal Procedure, that being the only section under which he was in law entitled to act.

(11) The fact that the Sub-Inspector of Police treated the copy of the petition of complaint as a first information report and submitted "charge sheet" against the accused persons cannot make any difference. In the view we have taken of the order passed by the Magistrate on November 22, 1956, the report made by the police officer though purporting to be a report under S.173 of the Code of Criminal Procedure should be treated in law to be a report only under S.202 of the Code of Criminal Procedure.

(12) Relying on the provisions inS. 190 of the Code that cognizance could be taken by the Magistrate on the report of the police officer the learned counsel for the appellants argued that when the Magistrate made the order on 22-11 1956 his intention was that he would take cognizance only after receipt of the report of the police officer and that cognizance should be held to have been taken only after that report was actually received in the shape of a charge-sheet underS. 173 of the Code, after December 13, 1956.The insuperable difficulty in the way of this argument, however, is the fact that the Magistrate had already examined the complainant underS. 200 of the Code of Criminal Procedure. That examination proceeded on the basis that he had taken cognizance and in the face of this action it is not possible to say that cognizance had not already been taken when he made the order " to Sub inspector, Baikunthpur, for instituting a case and report by 12-12-56. "

(13) Cognizance having already been taken by the Magistrate before he made the order there was no scope of cognizance being taken afresh of the same offence after the police officer's report was received. There is thus no escape from the conclusion that the case was instituted on Bhadai Sah’s complaint on November 22, 1956 and not on the police report submitted later by the Police Sub-Inspector, Baikunthpur.The contention that the appeal did not lie underS. 417 (3) of the Code of Criminal Procedure must therefore be rejected.

(14) The next contention raised on behalf of the appellants is that the High Court was not justified in interfering with the order of acquittal passed by the learned Assistant Sessions Judge. The reasoning on which the learned Assistant Sessions Judge rejected the evidence of the prosecution witnesses

and the reasons for which the learned Judges of the High Court were of opinion that there was no real effort by the learned Sessions Judge to assess the credibility of the evidence have been placed before us. It is quite clear that the High Court examined the matter fully and carefully and on a detailed consideration of the evidence came to the conclusion that assessment of the evidence had resulted in a serious failure of justice. The principles laid down by this Court in a series of cases as regards interference with orders of acquittal have been correctly followed by the High Court. There is nothing, therefore, that would justify us in re-assessing the evidence for ourselves. As relevant parts of the evidence were however placed before us, we think it proper to state that on a consideration of such evidence we are satisfied that the decision of the High Court is correct.

(15) As a last resort the learned counsel for the appellants argued that the Magistrate had acted without jurisdiction in asking the police to institute a case and so the proceedings subsequent to that order were all void. As we have already pointed out, the order of the Magistrate asking the police to institute a case and to send a report should properly and reasonably be read as one made under S.202 of the Code of Criminal Procedure. So, the argument that the learned Magistrate acted without jurisdiction cannot be accepted. At most it might be said that in so far as the learned Magistrate asked the police to institute a case he acted irregularly. There is absolutely no reason, however, to think that irregularity has resulted in any failure of justice. The order of conviction and sentence passed by the High Court cannot be reversed or altered on account of that irregularity."

18. In the said decision quoted supra, the Hon'ble Apex Court has specifically observed that the order of the learned Magistrate directing the police to institute the case and to send the report should properly and reasonably be read as one made under Section 202 of Cr.P.C. In that light, the contentions which has been taken up by the learned counsel for the respondents that the Magistrate has applied his mind and taken the cognizance is not acceptable. The facts and the order clearly goes to show that the said facts mentioned in the order sheet and thereafter, passing the order referring to investigation under Section 156 (3) of Cr.P.C., is only an irregularity and not an illegality as noticed above so as to result any failure of justice.

19. Be that as it may, it is well settled principles of law that when compliant has been filed under Section 200 of Cr.P.C., two options have been left open for him and if he first applies his mind and thereafter, if he direct the police to investigate under Section 156 (3) of Cr.P.C., that itself clearly goes to show the fact that he himself is not intending to proceed in the matter as per the Section 202 of Cr.P.C and he must obtain the report of the Investigating Agency. When once he has passed an order under Section 156(3) of Cr.P.C. , and under such circumstances, he could not have reverted back to exercise the power under Section 200 of Cr.P.C. He was required to proceed only in accordance with the provisions contained in Chapter XVI of Cr.P.C. He could not put the clock back. The power exercised under Section 156 (3) of Cr.P.C. would be a pre-cognizance period. Therefore, the orders dated 02.11.2016 and 25.01.2017 directing the investigation on the complaints shows clearly that it is an exercise of power within the purview which was there with the Magistrate. When once he has taken the said aspect, then under such circumstances, he could not have proceeded further until the final report is filed.

It is well established principles of law that when once the Magistrate exercises the power and directs the police to investigate and give the report, then thereafter, it interferes in exercise of statutory power of investigation by the Police by the Magistrate for less/lest direction for withdrawal of any investigation which is ought to be carried out is not envisaged under the Cr.P.C. The Magistrate power in this regard is limited even otherwise, he does not have any enhanced power. Ordinarily, he has no power to recall or review his own order. This proposition of law has been laid down by Hon'ble Apex Court in the case of Dharmeshbhai Vasudevbhai and others vs. State of Gujarat and others reported in (2009) 6 Supreme Court Cases576. For the purpose of brevity, I quote Para Nos.7 and 8 which reads as under:

"7. When an order is passed under sub section (3) of Section 156 of the Code, an investigation must be carried out. Only when the investigating officer arrives at a finding that the alleged offence has not been committed by investigation if it is found that a prima facie case has been made out, a charge-sheet must be filed.

8. Interference in the exercise of the statutory power of investigation by the police by the Magistrate far less direction for withdrawal of any investigation which is sought to be carried out is not envisaged under the Code of Criminal Procedure. The Magistrate's power in this regard is limited. Even otherwise, he does not have any inherent power. Ordinarily, he has no power to recall his order. This aspect of the matter has been considered by this Court in S. N. Sharma v. Bipen Kumar Tiwari. "

20. On going through the said proposition of law, once the complaint is sent for registration of FIR and investigation on the allegations contained therein, the learned Magistrate has no jurisdiction to recall the order. This proposition of law has also been laid down by Hon'ble Apex Court in the case of Subramanium Sethuraman vs. State of Maharashtra reported in (2004) 13 SCC324. At paragraph 14, it has been observed as under:

"14. In Adalat Prasad case this Court considered the said view of the Court in K. M. Mathew case and held that the issuance of process under Section 204 is a preliminary step in the stage of trial contemplated in Chapter XX of the Code. Such an order made at a preliminary stage being an interlocutory order, same cannot be reviewed or reconsidered by the Magistrate, there being no provision under the Code for review of an order by the same court. Hence, it is impermissible for the Magistrate to reconsider his decision to issue process in the absence of any specific provision to recall such order. In that line of reasoning this Court in Adalat Prasad case held:(SCC p.343, para 16)

"Therefore, we are of the opinion, that the view of this Court in Mathew case that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct ιαω ..... ”

21. On going through the said proposition of law and the facts and circumstances of the case on hand, they are aptly applicable to the present facts of the case on hand.

22. By going through the order of the Court below, the learned trial Judge without proper application of judicial mind into the matter has acted illegally and directed to drop the case. When the investigation was not completed, he has no power to recall or review his own order, which is the

power of the Appellate Court. Then, under such circumstances, the impugned orders of the Court below are not sustainable in law.

23. Keeping in view the above said facts and circumstances, both the petitions are allowed and the impugned orders dated 02.11.2016 and 25.01.2017 are set aside and the matter is remitted back to the Court below to proceed in accordance with law as observed above.

24. When it has been observed by this Court that the learned Magistrate is not having any power to recall or review his own order, under such circumstances, he has to wait till final report is given under Section 173(2) of Cr.P.C. After the receipt of the said report, he will have liberty to consider the matter in accordance with law.

In view of disposal of the main petition, I. A. No.1/2018 does not survive for consideration.