

GAHC010161612019



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./810/2019

RABINDRA CH. PAUL
S/O LATE JITENDRA CH. PAUL, P/R/A FLAT NO. C-II, HOUSE NO. 28,
BLOCK-A, BHASKAR NAGAR, KALAPAHAR, P.O.-BINOVA NAGAR, P.S.-
FATASIL AMBARI, DIST-KAMRUP(M), GUWAHATI-18, ASSAM, P/R/O
RADHA GOBINA ROAD, P.O. AND P.S.-DIGBOI, DIST-TINSUKIA, ASSAM,
PIN-786171

VERSUS

THE STATE OF ASSAM AND ANR.
REP BY PP, ASSAM

2:SMTI SANCHITA ROY
W/O SRI RABINDRA CH. PAUL
D/O SRI SURJENDU BIKASH ROY
R/O HOUS ENO. 38
BYE LANE NO. 4
PAHARTOLI
KALAPAHAR
P.O.-BINOVA NAGAR
P.S.-FATASIL AMBARI
GUWAHATI
DIST-KAMRUP(M)
ASSA

Advocate for the Petitioner : MR. A K PURKAYASTHA, MR. S K DAS, MR. S SHARMA, MS L DAS

Advocate for the Respondent : PP, ASSAM, MS. S SARMA (R-2), MS S AHOM, MR R KALITA, MR. A BISWAS

**BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI**

ORDER

Date : 13.11.2024

Heard Mr. A.K. Purkayastha, learned counsel for the petitioner. Also heard Mr. D. Das, learned Additional Public Prosecutor for the State and Ms. S. Sharma, learned counsel representing the respondent No. 2.

2. The petitioner has preferred this application u/s 482 Cr.PC, 1973, with a prayer for quashing the protest petition dated 07/09/2018 as well as the impugned order dated 07/03/2019 passed by the learned JMFC, Kamrup (M), in Complaint Case No. 6255/2018.

3. The petitioner and the respondent No. 2 are husband and wife and both are advocates by profession. After their marriage, they led conjugal life in a rented house and out of their wedlock, one female child was born. Thereafter, the respondent No.2 lodged an FIR with an allegation of physical and mental torture on demand of dowry articles by her husband i.e., the present petitioner. It was also alleged that her husband used filthy languages towards the relative of the respondent No. 2. Even her husband was not happy with her as she gave birth to a female child. Accordingly, a case was registered vide All Women P.S. Case No. 48/2011 under Section 498(A) IPC.

4. During investigation, the respondent No. 2 submitted an affidavit before the All Women Police Station, Panbazar stating that due to misunderstanding, she lodged an FIR and she is not interested to continue with the proceedings of the case and both of them decided to continue their married life with their daughter. Thereafter, on the basis of the statement/affidavit submitted by the

respondent no. 2, Final Report was submitted and subsequently, the said Final Report was accepted by the jurisdictional Magistrate on the prayer of the respondent no. 2.

5. It is also the case of the petitioner that due to adamant nature on the part of the respondent No. 2, the petitioner failed to lead a peaceful conjugal life with her. Consequently, the respondent No. 2 lodged another FIR before Fatashil Ambari P.S. on 09/08/2015 and she left her matrimonial home along with her minor daughter. On the basis of the said FIR, a case was registered vide Fatashil Ambari P.S. Case No. 515/2015 u/s 498A/323/294 IPC. After completion of investigation, again Final Report was submitted for want of evidence against the petitioner.

6. Further case of the petitioner is that on submission of FR, notice was issued to the respondent No.2, directing her to file an objection if any in accepting the FR and accordingly, the matter was fixed on 13/06/2016 and 18/06/2016 but on both the days, the informant/respondent No. 2 was absent. However, the learned Magistrate due to absence of the respondent no. 2 having found no any objection, accepted the FR and accordingly the case was closed finally.

7. On receipt of the report regarding acceptance of the FR, the respondent No. 2 filed a petition u/s 482 Cr.PC before this Court for quashing of the FR accepted by the trial court dated 18/08/2016. However, this Court disposed of the said criminal petition at the stage of motion with a direction of providing opportunity of being heard to the petitioner.

8. According to learned counsel for the petitioner, taking the advantage of

ex-parte order dated 30/08/2018 passed by this Court in Criminal Petition No. 860/2018, the respondent no. 2 filed a protest petition before the CJM, Kamrup (M) on 07/09/2018 with a prayer to consider the protest petition and took cognizance of the offence against the petitioner u/s 498(A) IPC.

9. Learned counsel for the petitioner has submitted that the law relating to the protest petition is absolutely clear and unambiguous when the Apex Court as well as this court in number of judicial decisions has settled the law that when a FR is forwarded by the police u/s 173(2) Cr.PC, the magistrate would have three different options such as –

- (1) accept the report and take cognizance of the offence and issue process,
- (2) may discharge and drop the proceeding and
- (3) may direct further investigation u/s 156(3) Cr.PC.

10. It is also the submission of the learned counsel for the petitioner that the law pertaining to protest petition is absolutely well settled which lays down upon receipt of police report u/s 173(3) Cr.PC, a Magistrate is entitled to take cognizance of offence u/s 190(1)(b) Cr.PC even if the said police report seems to be that no case is made out against the accused persons. In such case, the Magistrate is required to take into account the statement of the witnesses examined by the investigating officer during investigation and take cognizance of offence if he finds any prima facie case against the accused person and in such the Magistrate is not bound to follow the procedure envisaged in sections 200/202 Cr.PC.

11. The learned counsel for the petitioner has further contended that there is a huge delay on the part of the informant/ respondent No. 2 to file protest petition and admittedly there is no explanation on her part as to why she was unable to attend the court on the date fixed by the trial court to accept the FR.

In support of his submission, the learned counsel has placed reliance on the following case laws –

- a. (1980) 4 SCC 631 (H.S. Bains Director of Small Savings cum Deputy Secretary, Finance, Punjab and Chandigarh vs. State (Union Territory of Chandigarh))
- b. (2013) 4 GLT 103 (Moinul Haque vs. State of Assam)
- c. (2004) 7 SCC 768 (Gangadhar Janardhan Mhatre vs. State of Maharashtra)
- d. (2018) 2 GLT 1192 (Barsha Bora Bordoloi vs. State of Assam and another)

12. In response, learned counsel for the respondent No. 2, has argued that though the trial court had accepted the FR but admittedly on that day, the respondent No. 2 was absent. It transpires that the order was passed on 18/08/2016 on closure of FR without hearing the respondent No. 2. It is also not in dispute that vide order dated 30/08/2018 this court held that no notice was served to the respondent No. 2 and accordingly, the impugned order dated 18/08/2016 was set aside and the matter was remitted back to the learned trial court to consider the closure/final report afresh. Accordingly, learned counsel for the respondent No. 2 has submitted that there is no any irregularity

in filing of protest petition before the trial court by the respondent No. 2 and after following the necessary formalities, learned trial court issued notice to the petitioner. Hence, learned counsel for the respondent No. 2 prays for dismissal of quashing petition.

13. Having heard the learned counsel for the parties, the only question to be determined in this petition is whether the order dated 07.03.2019 passed by the learned JMFC is in accordance with law.

14. In the case of ***Vishnu Kumar Tiwari vs. State of Uttar Pradesh, through Secretary Home, Civil Secretariat, Lucknow & Anr.***, reported in ***(2019) 8 SCC 27***, it was held as follows-

“..... 42. In the facts of this case, having regard to the nature of the allegations contained in the Protest Petition and the annexures which essentially consisted of affidavits, if the Magistrate was convinced on the basis of the consideration of the final report, the statements under Section 161 of the Code that no prima facie case is made out, certainly the Magistrate could not be compelled to take cognizance by treating the Protest Petition as a complaint. The fact that he may have jurisdiction in a case to treat the Protest Petition as a complaint, is a different matter. Undoubtedly, if he treats the Protest Petition as a complaint, he would have to follow the procedure prescribed under Sections 200 and 202 of the Code if the latter section also commends itself to the Magistrate. In other words, necessarily, the complainant and his witnesses would have to be examined. No doubt, depending upon the material which is made available to a Magistrate by the complainant in the Protest Petition, it may be capable of being relied on in a particular case having regard to its

inherent nature and impact on the conclusions in the final report. That is, if the material is such that it persuades the court to disagree with the conclusions arrived at by the investigating officer, cognizance could be taken under Section 190(1)(b) of the Code for which there is no necessity to examine the witnesses under Section 200 of the Code. But as the Magistrate could not be compelled to treat the Protest Petition as a complaint, the remedy of the complainant would be to file a fresh complaint and invite the Magistrate to follow the procedure under Section 200 of the Code or Section 200 read with Section 202 of the Code. Therefore, we are of the view that in the facts of this case, we cannot support the decision of the High Court.

43. *It is true that law mandates notice to the informant/complainant where the Magistrate contemplates accepting the final report. On receipt of notice, the informant may address the court ventilating his objections to the final report. This he usually does in the form of the Protest Petition. In Mahabir Prasad Agarwala v. State [Mahabir Prasad Agarwala v. State, 1957 SCC OnLine Ori 5 : AIR 1958 Ori 11] , a learned Judge of the High Court of Orissa, took the view that a Protest Petition is in the nature of a complaint and should be examined in accordance with the provisions of Chapter XVI of the Criminal Procedure Code. We, however, also noticed that in Qasim v. State [Qasim v. State, 1984 SCC OnLine All 260 : 1984 Cri LJ 1677] , a learned Single Judge of the High Court of Judicature at Allahabad, inter alia, held as follows: "6. ... In Abhinandan Jha [Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC 117 : 1968 Cri LJ 97 : (1967) 3 SCR 668] also what was observed was "it is not very clear as to whether the Magistrate has chosen to treat the Protest Petition as*

complaint". This observation would not mean that every Protest Petition must necessarily be treated as a complaint whether it satisfies the conditions of the complaint or not. A private complaint is to contain a complete list of witnesses to be examined. A further examination of complainant is made under Section 200 Cr.PC. If the Magistrate did not treat the Protest Petition as a complaint, the Protest Petition not satisfying all the conditions of the complaint to his mind, it would not mean that the case has become a complaint case. In fact, in majority of cases when a final report is submitted, the Magistrate has to simply consider whether on the materials in the case diary no case is made out as to accept the final report or whether case diary discloses a prima facie case as to take cognizance. The Protest Petition in such situation simply serves the purpose of drawing Magistrate's attention to the materials in the case diary and invite a careful scrutiny and exercise of the mind by the Magistrate so it cannot be held that simply because there is a Protest Petition the case is to become a complaint case."

44. *We may also notice that in Veerappa v. Bhimareddappa [Veerappa v. B himareddappa, 2001 SCC OnLine Kar 447: 2002 Cri LJ 2150], the High Court of Karnataka observed as follows: (SCC OnLine Kar para 9) "9. From the above, the position that emerges is this: Where initially the complainant has not filed any complaint before the Magistrate under Section 200 Cr.PC, but, has approached the police only and where the police after investigation have filed the 'B' report, if the complainant wants to protest, he is thereby inviting the Magistrate to take cognizance under Section 190(1)(a) Cr.PC on a complaint. If it were to be so, the Protest Petition that he files shall have to satisfy the requirements of a complaint*

as defined in Section 2(d) Cr.PC, and that should contain facts that constitute offence, for which, the learned Magistrate is taking cognizance under Section 190(1)(a) Cr.PC. Instead, if it is to be simply styled as a Protest Petition without containing all those necessary particulars that a normal complaint has to contain, then, it cannot be construed as a complaint for the purpose of proceeding under Section 200 Cr.PC."

45. *"Complaint" is defined in Section 2(d) of the Code as follows: "2. (d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. Explanation.—A report made by a police officer in a case which discloses, after investigation, the commission of a noncognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;"*

46. *If a Protest Petition fulfils the requirements of a complaint, the Magistrate may treat the Protest Petition as a complaint and deal with the same as required under Section 200 read with Section 202 of the Code. In this case, in fact, there is no list of witnesses as such in the Protest Petition. The prayer in the Protest Petition is to set aside the final report and to allow the application against the final report. While we are not suggesting that the form must entirely be decisive of the question whether it amounts to a complaint or is liable to be treated as a complaint, we would think that essentially, the Protest Petition in this case, is summing up of the objections of the second respondent against*

the final report.”

15. On perusal of the above opinion of the Hon'ble Supreme Court, it is also reflected that the Magistrate also had the liberty to reject the Protest Petition along with all other material which may have been filed in support of the same. In that event the Complainant would be at liberty to file a fresh complaint. The right of the Complainant to file a petition under Section 200 Cr.PC. is not taken away even if the Magistrate concerned does not direct that such a Protest Petition be treated as a complaint.

16. In the present case as the Magistrate had already recorded his satisfaction that it was a case worth taking cognizance and fit for summoning the accused, this court is of the view that the Magistrate ought to have followed the provisions and the procedure prescribed under Chapter XV of the Cr.P.C. Accordingly, the order dated 07/03/2019 passed by the learned JMFC, Kamrup (M), in Complaint Case No. 6255/2018 is hereby set aside.

17. However, it is open to the Magistrate to treat the Protest Petition as a complaint and proceed in accordance with law as laid down under Chapter XV of the Cr.PC. It is made clear that this Court does not make any comments on the merits of the matter and any observations made would not influence the concerned Magistrate in taking an appropriate decision as required above.

18. With the above observation, this criminal petition is disposed of accordingly.

JUDGE

Comparing Assistant