

GAHC010173712023



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

Case No. : Crl.Pet./813/2023

DULAL BORAH
S/O LATE GANESH BORA
R/O MACHKHOWA NO. 1 BORAJAN
P.O. AND P.S. MACHKHOWA
DIST. DHEMAJI, ASSAM

VERSUS

MRIDUL SAIKIA AND ANR
S/O LATE DURNA KT. SAIKIA
R/O POTHALIAL GAON
MACHKHOWA, P.O. AND P.S. MACHKHOWA,
DIST. DHEMAJI, ASSAM ,
PIN-787058

2:THE STATE OF ASSAM
REP. BY THE PP
ASSA

Advocate for the Petitioner : MR. R S MISHRA, MS M NIROLA,MR. P BORDOLOI
Advocate for the Respondent : PP, ASSAM, MR. M K DAS

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

24.10.2024

Heard Mr. P. Bordoloi, learned counsel for the petitioner. Also heard Mr. D.

P. Goswami, learned Additional P.P. for respondent No. 2. None appears for the respondent No. 1.

1. By filing this application u/s 482 Cr.PC, the petitioner has challenged the order dated 30/10/2021 passed by the learned Judicial Magistrate First Class(herein after JMFC) Dhemaji in GR case no. 217/2021, directing the respondent No. 1 to file a formal complaint petition.

2. The brief facts of the case is that an FIR has been lodged before the officer-in-charge, Machkhowa Police outpost on 20/02/2021 stating inter alia that the petitioner for his personal gain had made seal of the President by himself without the knowledge of the Teachers Association and the President of the governing body of the college and had also taken signatures of nine members of the governing body and sent a report before the concerned authority that the governing body has no objection if the petitioner be appointed as Principal of the said college.

3. On receipt of the FIR, a case was registered vide Dehmaji PS case No. 92/2021 u/s 420/468 of IPC and investigation was initiated. After completion of investigation, the investigating officer submitted final report vide FR No. 33/2021. Subsequently, the respondent No. 1 filed a petition before the learned JMFC, Dhemaji stating that the complainant had objection with the final report submitted by the investigating officer and prayed to allow the complainant to continue with the case. Accordingly, the learned magistrate passed an order dated 30/10/2021 directed the complainant to file a formal complaint petition.

4. The learned counsel for the petitioner has submitted that the petitioner is serving as a lecturer in Machkhowa Junior College in the District of Dhemaji, Assam since 1997 and being the only qualified teacher in the said school to hold

the post of Principal-in-charge but have been deprived of the said post. In this regard, the petitioner had filed several writ petitions before this court and the said petitions were disposed of directing the petitioner to submit a fresh representation before the Director of Secondary Education Assam to allow him to hold the post of Principal-in-charge.

5. It is further submitted that on 27/03/2022, the respondent No1 as complainant filed a complaint petition before the court of learned CJM, stating the same as stated in the FIR in Dhemaji PS case No. 92/2021 and subsequently some witnesses were examined as per section 202 Cr.PC.

6. According to learned counsel for the petitioner, the statement of the witnesses recorded u/s 202 Cr.PC did not reflect commission of any offence on the part of the petitioner u/s 420 or 468 IPC. But surprisingly without going through proper adjudication of the case, the learned JMFC most mechanically took cognizance of the offence against the petitioner on 14/06/2023.

7. It is further contended by learned counsel for the petitioner that the learned trial court committed gross illegality and passed the impugned orders contrary to the settled position of law. Therefore, the impugned order dated 30/10/2021 passed in GR case No. 217/2021 (DMJ) and the order dated 14/06/2023 passed in CR case No. 24/2022 by the learned JMFC, Dhemaji are liable to be set aside.

8. Another point raised by learned counsel for the petitioner that no sanction was accorded before taking cognizance of the offence which is mandatory as the petitioner is a public servant. In support of his submission, the learned counsel has placed reliance on the following case laws -

- a. (2023) Live Law (SC) 730 (Zunaid vs. State of UP and others)
- b. (2012) 6 SCC 228 (General Officer Commanding, Rashtriya Rifles vs. CBI and

another).

9. From the order of Magistrate, it is evident that he has relied on the material placed before him along with objection/ protest petition submitted by complainant and thereafter has issued summons to accused-petitioner.

10. In view of the above, I find substance in the submission advanced by learned counsel for the petitioner. Relevant exposition of law on this aspect may be referred in brief as under.

11. Chapter XIV, [Cr.P.C.](#) deals with conditions requisite for initiation of proceedings and also the powers of cognizance of a Magistrate. [Section 190](#), relevant for our purpose, is reproduced as under:

"190. (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."

12. Chapter XV, thereafter has four Sections, i.e., [Section 200](#) to [203](#), which deal with complaint to Magistrate. Chapter XVI deals with commencement of proceedings before Magistrate and [Section 204](#) empowers a Magistrate to issue summons or a warrant, as the case may be, to secure attendance of an accused, if in the opinion of Magistrate, there is sufficient ground to proceed and take cognizance of offence.

13. If magistrate finds that Police has not made proper investigation and

submitted final report, it can direct police to make further investigation in the matter, or, if there is sufficient material, he can pass order taking cognizance and summoning accused.

14. As long back as in 1977, Supreme Court in [Tula Ram Vs. Kishore Singh](#) AIR 1977 SC 2401 said that Magistrate can ignore a final report submitted by Police including the conclusion and take cognizance of case under [Section 190\(1\)\(b\)](#) on the basis of material collected during investigation and issue process, or in the alternative, he may take cognizance of original complaint, examine the complainant and his witnesses and thereafter issue process to accused, if he is of opinion that case should be proceeded with.

15. In M/s [India Carat Pvt. Ltd. Vs. State of Karnataka](#) 1989 (26) ACC 280 (SC), Supreme Court has observed in para 16 of judgment that Magistrate can take into account statements of witnesses examined by Police during investigation, take cognizance of offence complained of, order to issue a process to accused. [Section 190\(1\)\(b\)](#) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion of making out a case against accused. Magistrate can ignore conclusion arrived at by Investigating Officer, independently applying his mind to the facts emergent from investigation and can take cognizance of case or in alternative he can take cognizance of original complaint and examine complainant and his witness and thereafter issue process to accused, if he is of opinion that the case should proceed. Following observations of Court fortify what is observed above:

"16. The position is, therefore, now well settled that upon receipt of a police report under [Section 173\(2\)](#) a Magistrate is entitled to take cognizance of an offence under [Section 190\(1\)\(b\)](#) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses

examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. [Section 190\(1\)\(b\)](#) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under [Section 190\(1\)\(b\)](#) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure [laid down in Section 200](#) and [202](#) of the Code for taking cognizance of a case under [Section 190\(1\)\(b\)](#) though it is open to him to act under [Section 200](#) or [Section 202](#) also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.

17. The fact that in this case the investigation had not originated from a complaint preferred to the Magistrate but had been made pursuant to a report given to the police would not alter the situation in any manner. Even if the appellant had preferred a complaint before the learned Magistrate and the Magistrate had ordered investigation under [Section 156\(3\)](#), the police would have had to submit a report under [Section 173\(2\)](#). It has been held in [Tula Ram and others Vs. Kisohre Singh](#) 1978 (1) SCR 615 that if the police, after making an investigation, send a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of a case under [Section 190\(1\)\(b\)](#) and issue process or in the alternative he can take cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he is of opinion that the case should be proceeded with."

16. The observations made in para 16 and 17 in M/s [India Carat Pvt. Ltd. Vs. State of Karnataka](#) (supra) make it very clear that Magistrate if proceeds to take cognizance on Police report, material which can be examined by him would be such which has been collected during investigation. If Magistrate finds that Police has not properly made investigation and appropriate material has not been collected, it is always open to him to direct Police for further investigation

but if Magistrate finds fault with investigation made by Police and still finds justification to proceed with the matter taking into account complaint made by complainant, in such case he has to examine complainant and his witness and thereafter issue process.

17. In [Gangadhar Janardan Mhatre vs. State of Maharashtra and others](#) 2004 (7) SCC 768, the Court reiterating above view said as under:

"The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under [Section 119\(1\)\(b\)](#) and direct the issue of process to the accused."

18. Having said so, Court has also made it clear that while proceeding to issue process considering facts emergent from investigation and taking a different view than what has been reported by Police, Magistrate need not apply procedure [laid down in Section 200](#) and [202](#). However, if Magistrate finds lack of material with investigation of Police, option available to him is to take into account original complaint and if that is adopted by Magistrate, he is bound to follow procedure prescribed in [Section 200](#) and [202](#) for taking cognizance, but he can not mix-up the material placed by complainant along with Protest Petition to take cognizance after rejecting Police Report but without following the procedure prescribed under Chapter 15.

19. A similar view has also been expressed in [Rakesh and another Vs. State of U.P. And another](#) 2014 (13) SCC 133 where Court referred to and relied on the decision in [H.S. Bains Vs. State \(UT of Chandigarh\)](#) 1980 (4) SCC 631.

20. In [Minu Kumari and another Vs. State of Bihar and others](#) 2006 (4) SCC 359, Court said as under:

"11. When a report forwarded by the police to the Magistrate under [Section 173\(2\)\(i\)](#) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under [Section 156\(3\)](#) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he has again option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under [Section 156\(3\)](#). The position is, therefore, now well-settled that upon receipt of a police report under [Section 173\(2\)](#) a Magistrate is entitled to take cognizance of an offence under [Section 190\(1\)\(b\)](#) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. [Section 190\(1\)\(b\)](#) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under [Section 190\(1\)\(b\)](#) and direct the issue of process to the accused."

21. In [Sunil Bharti Mittal Vs. Central Bureau of Investigation](#) 2015 (4) SCC 609, Court said:

"... even if a person is not named as an accused by the police in the final report submitted, the Court would be justified in taking cognizance of the offence and to summon the accused if it feels that the evidence and material collected during investigation justifies prosecution of the accused (See [Union of India v. Prakash P. Hinduja and Anr.](#) 2003 (6) SCC 195. Thus, the Magistrate is empowered to issue process against some other

person, who has not been charge-sheeted, but there has to be sufficient material in the police report showing his involvement. In that case, the Magistrate is empowered to ignore the conclusion arrived at by the investigating officer and apply his mind independently on the facts emerging from the investigation and take cognizance of the case. At the same time, it is not permissible at this stage to consider any material other than that collected by the investigating officer."

22. Thus the "material" which can be examined by Magistrate when Police submitted final report and upon notice issued to complainant, Protest Petition is filed along with some material by complainant, is confined to investigation only. When matter has been investigated by Police after registering a report, Magistrate obviously is not proceeding according to procedure prescribed in Chapter XV. I find that it would not be appropriate for Magistrate not to follow procedure under [Section 200](#) and [202](#) Cr.P.C. but straightway relying on complaint filed before him by complainant along with Protest Petition, took cognizance and summon were issued to the accused after rejecting Police Report. This is not legal and permissible.

23. In [Mohammad Yusuf Vs. State of U.P.](#) 2007 (9) ADJ 294, Police submitted final report which was not accepted by Magistrate, not on the basis of material collected by Police, but, relying on Protest Petition and accompanying affidavit, Magistrate issued process. Court disapproved the aforesaid procedure adopted by Magistrate and said:

"Where the magistrate decides to take cognizance under [section 190 \(1\) \(b\)](#) ignoring the conclusions reached at by the investigating officer and applying his mind independently, he can act only upon the statements of the witnesses recorded by the police in the case-diary and material collected during investigation. It is not permissible at that stage to consider any material other than that collected by the investigating officer. In the instant case the cognizance was taken on the basis of the protest

petition and accompanying affidavits. The Magistrate should have adopted the procedure of complaint case under Chapter XV of the [Code of Criminal Procedure](#) and recorded the statements of the complainant and the witnesses who had filed affidavits under [Section 200](#) and [202 Cr.P.C.](#) The Magistrate could not take cognizance under [section 190 \(1\) \(b\)](#) Cr.P.C. on the basis of protest petition and affidavits filed in support thereof. The Magistrate having taking into account extraneous material i.e. protest petition and affidavits while taking cognizance under [section 190 \(1\) \(b\)](#) Cr.P.C. the impugned order is vitiated." (emphasis added)"

24. In [Kallu and others Vs. State of U.P.](#) 2010 (69) ACC 780, Court said:

"Therefore, in present case also, if the material in the case diary was not sufficient for summoning the accused persons to face the trial, then the protest petition filed by the complainant against the final report ought to have been registered as complaint and after following the procedure [laid down in section 200](#) and [202 Cr.P.C.](#)"

25. Court further held:

"If after taking evidence under [section 200](#) and [202 Cr.P.C.](#), the magistrate decides to take cognizance against the accused persons, final report has to be rejected, but in any case, cognizance cannot be taken merely on the basis of affidavits or other material filed by the complainant in support of the protest petition against final report without following the procedure laid down under Chapter XV [Cr.P.C.](#), if the material in the case diary is not sufficient to take cognizance."

26. In [Mitrasen Yadav Vs. State of U.P.](#) 2010 (69) ACC 540, Court said that on the basis of Protest Petition and documents filed therewith, no cognizance under [Section 190\(1\)\(b\)](#) Cr.P.C. can be taken.

27. Looking to exposition of law, discussed above, I find that in the present case, Magistrate has not referred to material placed before him or collected by Investigating Officer but has rejected final report on the basis of facts and material placed along with Protest Petition and the subsequent complaint. This approach on the part of the Magistrate, I find contrary to what has been [laid down in](#) the above authorities and the same cannot be sustained.

28. Hence, the order dated 30.10.2021 and 14.06.2023 passed by the learned JMFC are hereby set aside. The concerned Magistrate shall pass a fresh order on the protest petition filed by the informant/respondent No.2 in the light of the observation made hereinabove within a period of two months from the date of receipt of certified copy of this order.

29. Accordingly, the criminal revision petition stands disposed of.

JUDGE

Comparing Assistant