

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

WEDNESDAY, THE 18TH DAY OF NOVEMBER 2015/27TH KARTHIKA, 1937

OP(Crl.).No. 359 of 2015 (Q)

CMP.4829/2015 of J.M.F.C., OTTAPPALAM

PETITIONER(S):

STANLY VARGHESE,
S/O.KARATHARA VEETIL VARGHESE
KODASSERY VILLAGE, KANAKAMALA DESOM
CHALAKUDY TALUK, THRISSUR DISTRICT.

BY ADV. SRI.T.N.MANOJ

RESPONDENT(S):

1. MOHAMMED HANEEF
S/O.PUTHENPEEDIKKAL MOHAMMED, KOTHAKURISSY DESOM
OTTAPPALAM TALUK, CHERPULASSERY VILLAGE
PALAKKAD DISTRICT. 678105
2. SAUDA, W/O.MOHAMMED HANEEF
KOTHAKURISSY DESOM, OTTAPPALAM TALUK
CHERPULASSERY VILLAGE, PALAKKAD DISTRICT.678105

THIS OP (CRIMINAL) HAVING COME UP FOR ADMISSION ON 18-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP(Crl.).No. 359 of 2015 (Q)

APPENDIX

PETITIONER(S)' EXHIBITS

P1 - TRUE COPY OF THE COMPLAINT CMP 4829/15 PENDING ON THE FILES OF THE
JUDICIAL MAGISTRATE OF 1ST CLASS AT OTTAPPALAM.

RESPONDENT(S)' EXHIBITS : NIL

// True Copy //

PA to Judge

[CR]

B. KEMAL PASHA, J.

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O.P.(Crl.) No.359 of 2015 Q
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Dated this the 18th day of November, 2015

J U D G M E N T

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- (1) At what stage, the court of a Magistrate is taking cognizance of the offences in a private complaint?
- (2) Can the court of a Magistrate proceed to the stage of Section 200 Cr.P.C, in a case covered by Section 188 Cr.P.C.?
- (3) Is a private complaint, in which the only relief sought for is the one under Section 156(3) Cr.P.C., maintainable?
- (4) What is the course of action that can be taken by the court of a Magistrate, in a case covered by Section 188 Cr.P.C.?

2. The petitioner and the respondents were doing business in Sharjah. It is alleged that, while in Sharjah, the respondents had induced the petitioner to part with UAE Dirhams equivalent to ₹35 lakhs of Indian money to the respondents on 13.11.2013 at the residence of the respondents at Sharjah, by promising the reconstitution of a partnership deed and the induction of the petitioner also as partner in the business of that firm. After taking away the money, nothing was heard about it from the respondents. When the petitioner approached the respondents, the 1st respondent handed over a cheque for an amount of 1,60,000 UAE Dirhams in favour of the petitioner drawn on Sharjah Main Branch of the ADC Bank. The said cheque, on presentation, returned dishonoured for insufficiency of funds. According to the petitioner, even through the original transaction, he was deliberately cheated and defrauded and hence, the complaint.

3. Petitioner filed the private complaint as CMP

No.4829/2015 before the Judicial First Class Magistrate's Court, Ottappalam alleging offences punishable under Sections 417 and 420 IPC, against respondents 1 and 2 as accused. It is true that the relief sought for in the complaint before the court below was for forwarding the complaint for investigation to the police under Section 156(3) Cr.P.C. At the same time, specific allegations have been raised by the petitioner in the complaint and it is discernible from the complaint that there are specific allegations constituting the offences alleged.

4. Even though the complainant has prayed before the court below for getting the complaint forwarded to the police for investigation under Section 156(3) Cr.P.C., instead of granting such a relief, the court below has chosen to proceed with the matter under Section 200 Cr.P.C., and directed the petitioner to be present before the court below with witnesses for examination. The same is under challenge herein, at the instance of the complainant.

5. Heard the learned counsel for the petitioner Sri. T.N.Manoj. According to him, the matter is squarely hit by Section 188 Cr.P.C., and the course adopted by the learned Magistrate is not legally sustainable. Further according to him, when the offence was allegedly committed abroad, it will not be possible for the petitioner to produce sufficient evidence before the learned Magistrate, and a proper investigating machinery alone will be able to collect sufficient evidence in a case of this nature.

6. The learned counsel for the petitioner has invited the attention of this Court to the decision of the Apex Court in ***Bhagat Ram v. Surinder Kumar*** [(2004) 11 SCC 622], wherein it was held:

“He could direct the police to register an FIR and investigate the matter. Even if the scope of investigation is limited as noticed in the said decision, the Magistrate has powers under S.202(1) of the CrPC to direct investigation and in the meanwhile he may

postpone issue of process against the accused by adopting any one of the courses mentioned in S.202(1)."

7. In the 3 Judge Bench decision of the Apex Court in ***Fakhruddin Ahmad Vs. State of Uttaranchal and another*** [2008) 17 SCC 157], it was held that the expression "cognizance" is not defined in the Code but, it is a word of indefinite import. The Apex Court has also relied on the decision in ***R.R. Chari v. State of U.P.*** [AIR 1951 SC 207], wherein it was held:

"7. ... What is 'taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) Cr.P.C, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this

Chapter, proceeding under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence.”

8. In ***Fakhruddin Ahmad*** (*supra*), it was held that it is neither practicable nor desirable to precisely define as to what is meant by the term “taking cognizance”. Whether the Magistrate has or has not taken cognizance of the offence will depend upon the circumstances of the particular case, including the mode in which the case is sought to be instituted and the nature of the preliminary action. At the same time, in the decision in ***R.R. Chari*** (*supra*) relied on by the Apex Court in ***Fakhruddin Ahmad*** (*supra*), it has been

clearly indicated that apart from the application of mind on the contents of the petition, the Magistrate must have done something for the purpose of proceeding in a particular way as indicated in the subsequent provisions in the Cr.P.C. namely, by proceeding under Section 200 Cr.P.C. and thereafter, proceeding with it under Section 202 Cr.P.C., for the taking of cognizance of the offence.

9. It was further held in ***Fakhruddin Ahmad*** (*supra*) in paragraph 17:

“Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an

offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender.”

10. In ***Fakhruddin Ahmad*** (*supra*), the Apex Court has relied on the decision in ***S.K. Sinha, Chief Enforcement Officer v. M/s Videocon International Ltd. & Others*** [AIR 2008 SC 1213], wherein it was held:

“ 'Cognizance' has no estoeric or mystic significance in criminal law. It merely means 'becomes aware of' and when used with reference to a Court or a Judge, it connotes 'to take notice of judicially'. It indicates the point when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone. 'Taking cognizance' does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to

commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender.”

11. It is not discernible that so far, the court below has taken cognizance of the offences involved. For forwarding a complaint under Section 156(3) Cr.P.C. for investigation, the court is not taking cognizance of the offences. In a 3 Judge Bench decision of the Apex Court in ***Devarapalli Lakshminarayana Reddy and others v. V. Narayana Reddy and others*** [AIR 1976 SC 1672], it was held:

“The expression, “taking cognizance of an offence” by the Magistrate has not been defined in the Code. The ways in which such cognizance can be taken are set out in clauses (a), (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the

circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If, instead of proceeding under Chapter IX, he, has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence.”

12. It was further held in **Devarapalli Lakshminarayana** (*supra*) that the power to order investigation by police under Section 156(3) Cr.P.C. is different from the power to direct investigation conferred by

Section 202(1) Cr.P.C. The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, whereas, the second is at the post-cognizance stage when the Magistrate is in seisin of the case. It was held therein that if once the Magistrate takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to go back to the pre-cognizance stage and avail of Section 156(3) Cr.P.C.

13. When the court is proceeding through Section 200 Cr.P.C., in some cases, the court is taking cognizance of the offences even when there is an order under Section 202(1) Cr.P.C. for investigation by the police. For invoking such a power of investigation through the police for collecting evidence during inquiry, as per the mandate of Section 202(1)(b) Cr.P.C., it is a condition precedent that the court has to examine on oath, the complainant and the witnesses, if any present, under Section 200 Cr.P.C. Here, in this particular case, so far, the complainant or the

witnesses have not been examined by the court below on oath under Section 200 Cr.P.C. Therefore, still, the court below has not proceeded through Section 200 Cr.P.C., and has not taken cognizance of the offences involved. It is trite law that for taking cognizance of the offences, the court has to apply its mind. It cannot be said that cognizance of the offences has been taken on a mere decision by the court to proceed to the stage of Section 200 Cr.P.C., without applying its mind in the matter.

14. On going through the provisions, it seems that when the Magistrate decides to issue process, definitely, the Magistrate takes cognizance of the offences. Even prior to that, in some cases, it can be said that cognizance has been taken. In a case wherein the Magistrate has applied his mind on the offences on examining the complainant, even then it can be said that cognizance has been taken. Even in such case, the Magistrate is competent to have an investigation in the matter through police on the strength of

Section 202(1) Cr.P.C.

15. It seems that the court below wants to proceed under Section 202(1) Cr.P.C. and in such case, definitely, the attempt of the court below is to have an inquiry. When the offences are allegedly committed abroad, in such a case, the provisions under Section 188 Cr.P.C. will come into play. As per Section 188 Cr.P.C., when the offence is committed abroad, no such offence shall be *inquired into or tried* in India, except with the previous sanction of the Central Government.

16. The sanction contemplated under the proviso to Section 188 Cr.P.C. is not for taking cognizance of the offences, whereas, such a sanction is required for the inquiry or trial. There is no quarrel with regard to the proposition that the stage contemplated under Sections 200 and 202(1) Cr.P.C. is also the stage of inquiry. In such case, the court below cannot conduct an inquiry in the matter, except with the previous sanction of the Central Government

in this particular case.

17. The learned counsel for the petitioner has invited the attention of this Court to ***Muhammed Rafi v. State of Kerala*** [2009 (1) KLT 943 (DB)] wherein an identical situation was dealt with. It was held therein:

“Learned Magistrate has, without referring to S.188 of the Cr.P.C., posted the complaint for an enquiry as contemplated under S.202 of the Cr.P.C. Obviously, this is clearly wrong, as an enquiry by a Court into an offence committed outside India can only be with the sanction of the Central Government.”

18. When the learned Magistrate has bypassed the provisions contained under Section 156(3) Cr.P.C. in this particular case, even if the court wants to have an investigation for the purpose of taking cognizance of the offences through police, it is not possible as an inquiry is also barred without the previous sanction of the Central

Government. It cannot be said that still, the court below has taken cognizance of the offences. Here, the learned Magistrate has committed a grave error in deciding to have an inquiry when an inquiry is not possible, without the previous sanction of the Central Government as per Section 188 Cr.P.C.

19. It is true that the relief sought for in the complaint is for a direction to the police under Section 156(3) Cr.P.C. for conducting investigation in the case. Simply from the fact that such a relief alone has been sought for in the complaint, it cannot be said that it does not constitute a complaint within the meaning of Section 2(d) Cr.P.C. As per Section 2(d) Cr.P.C.;

“ “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.”

20. The learned counsel for the petitioner has invited the attention of this Court to the decision of the three Judge Bench of the Apex Court in ***Bhimappa Basappa Bhu Sannavar v. Laxman Shivarayappa Samagouda*** [AIR 1970 SC 1153], wherein it was held in paragraph 6:

“The word 'complaint' has a wide meaning since it includes even an oral allegation. It may, therefore, be assumed that no form is prescribed which the complaint must take. It may only be said that there must be an allegation which prima facie discloses the commission of an offence with the necessary facts for the Magistrate to take action. S.190(1)(a) makes it necessary that the alleged facts must disclose the commission of an offence.”

Therefore, going by Section 2(d) or 190(1)(a) Cr.P.C., when it *prima facie* discloses an offence, it has to be treated as a complaint.

21. Even a complaint can be preferred orally. It does

not matter as to what is the relief sought for in the complaint. What has to be looked into is whether the complaint is filed before a Magistrate with a view to his taking action under the Code, that the person against whom it is filed has committed an offence. If the complaint reveals an offence, then, it constitutes a complaint even if the relief sought for is simply a direction to the police to investigate the matter under Section 156(3) Cr.P.C. In a matter covered by Section 188 Cr.P.C., the only possible relief that can be sought for by the complainant is nothing but the relief contemplated under Section 156(3) Cr.P.C. alone. In such a private complaint, the court cannot grant any other relief.

22. In such a case wherein the averments in the complaint do not reveal any offence or the offence alleged, the learned Magistrate shall reject the complaint. In this particular case, the court below ought to have directed the police to conduct an investigation in the matter, as per Section 156(3) Cr.P.C. So far, the inquiry has not been

commenced before the court below. At the same time, the court below has decided to have an inquiry. The said decision taken by the court below is not in accordance with law, and therefore, the same is liable to be set aside.

In the result, this O.P.(CrI.) is allowed. The decision taken by the court below to proceed with the matter under Section 200 Cr.P.C., is quashed. The court below is directed to proceed with the complaint in accordance with law, in the light of the observations made above. When the said decision taken by the court below stands quashed, it is open to the court below, once again to rely on the provisions contained in Section 156(3) Cr.P.C.

Sd/-
(B.KEMAL PASHA, JUDGE)

aks/19/11

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PA to Judge