

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.03.2016

CORAM:

THE HON'BLE MR.JUSTICE R.SUBBIAH

Crl.O.P.No.3298 of 2014 and Crl.O.P.No.28671 of 2015
and
M.P.No.1 of 2014 in Crl.O.P.No.3298 of 2014
and
M.P.Nos.1 & 2 of 2015 in Crl.O.P.No.28671 of 2015

1.A.Leo Charles ... Petitioner in Crl.O.P.3298 of 2014
2.Breddy
3.Sheikh Ameer
4.Tmt.amalarani ... Petitioners in Crl.O.P.28671 of 2015

Vs.

M.Vijayakumar ... Respondent in both Crl.O.Ps.

Prayer: Petitions filed under Section 482 of Cr.P.C., praying to call for the records in C.C.No.274 of 2013 on the file of the learned Judicial Magistrate No.1, Salem and to quash the same.

For Petitioner : Mr.V.K.Sathyamurthy

For Respondent : Mr.M.Saravanan Kumar

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COMMON ORDER

These criminal original petitions have been filed by the petitioners praying to quash the criminal proceedings in C.C.No.274 of 2013 pending on the file of the learned Judicial Magistrate No.1, Salem.

2.The petitioner in CrI.O.P.No.3298 of 2014 has been arrayed as 2nd accused and the petitioners in CrI.O.P.No.28671 of 2015 have been arrayed as accused 4 to 6 in the case in C.C.No.274 of 2013 pending on the file of the learned Judicial Magistrate No.1, Salem.

3.The brief facts, which are necessary for disposing these petitions, are as follows:-

3-1.The 1st petitioner A.Leo Charles (A2) is the Managing Partner of the firm M/s.Bricksteel Enterprises. The 2nd petitioner Breddy (A4) is the Manager, the 3rd petitioner Sheikh Ameer (A5) is the Public Relation Officer and the 4th petitioner Tmt.Amalarani (A6) is employed as the Computer Assistant in the said firm. The said firm is engaged in the activities of construction

of buildings and other related works. In the course of such business activities, the said firm executed civil works for Oil & Natural Gas Corporation, Karaikal (in short ONGC). While executing the said works, some disputes arose between the petitioners' firm and ONGC. Hence, the matter was referred to the Arbitrator in the year 2015. The 1st petitioner/A2, Managing Partner of the said firm, engaged the services of the respondent herein/complainant to assist their Advocate on technical aspects in the aforesaid Arbitration Proceedings, for which his remuneration was fixed and paid then and there. It is further case of the petitioners/accused that without the knowledge and consent of the 1st petitioner/A2, the respondent had given the address of the 1st petitioner/A2 to the Insurance Regulatory and Development Authority and he had himself registered as a Surveyor and Loss Assessor. The respondent had also used the office of the petitioners and its amenities and had thereby made personal gains. The respondent had also attempted to steal some of the files from the office of the petitioners and when it came to the knowledge of the 1st petitioner/A2, he had confronted the respondent on that issue and the respondent had accepted his mistakes and sought apology from the 1st petitioner/A2.

3-2. After the completion of the Arbitration proceedings, the service of the respondent was not required and it was, therefore, informed to him by the 1st petitioner/A2. However, the respondent insisted that he should be appointed on a regular basis, as a regular staff, which was declined by the 1st petitioner/A2. On coming to know that in the arbitration proceedings, an award was passed in favour of the petitioners' firm, the respondent started to demand a huge sum of Rs.2,50,000/- in addition to the amount already paid to him for his assistance and services done in the Arbitration proceedings. The 1st petitioner/A2 did not accept the said demand of the respondent; hence, enraged over the 1st petitioner's refusal, the respondent started threatening the petitioners stating that he would go to any extent to damage and spoil their reputation and also would cause loss to the petitioners. The respondent sent several communications to the petitioners' clients, with whom the petitioners were executing construction works, and also to Canara Bank with whom the petitioners were maintaining an account and to several others, including the Pope Benedict XVI, Vatican, Rome. Such communication was also sent to the Bishop of Salem by the respondent containing defamatory statements about the petitioners.

3-3.The respondent, in the beginning, filed a complaint to the Commissioner of Police, Salem City, against the 1st petitioner, his staff Sheik Ameer and respondent's neighbour one Mr.Jamaluddin (A3) on 09.11.2009, for alleged theft of a sum of Rs.1,900/- and a camera owned by him between 09.10.2009 and 03.11.2009. The above said complaint was investigated by the Assistant Commissioner of Police, Salem West. The 1st petitioner and two others were summoned for an enquiry by the Assistant Commissioner of Police, Salem West. After the enquiry and detail investigations, the Assistant Commissioner of Police found that the complaint given by the respondent was a false one and accordingly, he sent his enquiry report to the Commissioner of Police, Salem City.

3-4.Subsequently, the respondent again gave a false complaint on 10.12.2009 against the petitioners and others for alleged theft of a sum of Rs.1,900/- and a camera owned by him between 09.10.2009 and 03.11.2009 to the Inspector of Police, Suramangalam, Salem City. A case was registered in Crime No.2221 of 2009 by the Inspector of Police, Suramangalam Police Station, Salem City, for the offence under Section 380 IPC against the petitioners and others.

3-5.However, after conducting a detailed investigation and enquiry, the then Inspector of Police, Suramangalam Police Station found it as false case. Further, the Inspector of Police filed the chargesheet against the respondent under Section 211 IPC for giving a false complaint, before the learned Judicial Magistrate No.II, Salem and the same was taken on file in C.C.No.168 of 2010.

3-6.The respondent herein filed a petition in CrI.O.P.No.19968 of 2010 before this Court for quashing the said proceedings in C.C.No.168 of 2010. This Court, by order dated 22.09.2010, quashed the said proceedings observing that on investigation, if the Police found that it is a false complaint, they ought to have forwarded a final report stating that it is a mistake of fact or complaint is not true; instead of that, without obtaining a complaint from the alleged accused, the police ought not to have proceeded with the same complaint to file a report under Section 211 IPC; however, this Court gave liberty to the accused persons/petitioners herein to institute a separate complaint for the alleged offence.

3-7. Thereafter, the 1st petitioner/A2 filed a complaint against the respondent and the same was taken on file as C.C.No.384 of 2011 on the file of the learned Judicial Magistrate No.II, Salem under Section 211 IPC and the same is pending.

3-8. While so, the respondent filed another complaint against the petitioner before the Inspector of Police, Suramangalam Police Station; but, the Inspector of Police refused to register the complaint. Thereafter, on 28.12.2011 the respondent again filed complaints/petitions before the learned Chief Judicial Magistrate, Salem, against the petitioners herein and the others. The complaints/petitions filed by the respondent were taken on file as CrI.M.P.No.193 of 2012 and CrI.M.P.No.194 of 2012. Thereafter, the cases were transferred from the file of the Chief Judicial Magistrate to the Judicial Magistrate No.1, Salem and renumbered as CrI.M.P.5354 of 2012 and CrI.M.P.No.5355 of 2012.

3-9. Thereafter, the respondent filed CrI.M.P.No.3456 of 2012 to examine the Assistant Commissioner of Police and accordingly, he was examined as P.W.1 on 07.01.2013 on behalf of the respondent, wherein a letter and other documents were marked as Ex.P.1 to P.3. In the same petition, one Ponnusamy

was examined as P.W.2 and Ex.P.4 was marked and thereafter, one Kamalasekaran was examined as P.W.3 and through him, Ex.P.5 & P6 were marked.

3-10. According to the petitioners, though the respondent examined P.W.1 to P.W.3, after the transfer of the case, the complainant was never examined nor was his evidence recorded as required under law. It is very essential to examine the complainant in a private complaint case, which is mandated under Section 200 of Cr.P.C. But, strangely the learned Judicial Magistrate No.I, Salem, by his order dated 03.10.2013 has stated as follows_

"Records perused. The averments of the complaint along with the deposition of witnesses and the documents marked, would make out a prima facie case against the accused. Hence, take the complaint on file against the first accused u/w 167, 204, 218 IPC and the accused 2 to 6 u/w 167, 204, 218 r/w 107 IPC and issue summons by 08.11.2013."

Thus, the complaint was taken on file by the learned Judicial Magistrate No.I, Salem and assigned C.C.No.274 of 2013.

3-11. Aggrieved over the cognizance taken by the learned Magistrate, now the present petitions have been filed by the

petitioners before this Court praying to quash the criminal proceedings.

4.The respondent has filed a detailed counter, denying the allegations made by the petitioners and opposing the prayer of the petitioners to quash the criminal proceedings.

5.Heard both sides and perused the materials available on record.

6.The present criminal original petitions have been filed by the petitioners mainly on two grounds_

1)The offences alleged in respect of Sections 167, 204 IPC and 218 IPC have nothing to do with the petitioners herein because the said sections are relating to the public servants only. Apart from the same, there is nothing on record to suggest that these petitioners were in possession of any public record or any document at any point of time.

2.In the instant case, the respondent, being the complainant, was not examined on

oath and no statement of the complainant has been recorded in this case. Therefore, the cognizance taken by the learned Magistrate is without any basis.

7. In view of the grounds taken by the petitioners that the allegations made in the complaint have nothing to do with the petitioners, at the outset it is appropriate for this Court to see the allegations made in the complaint filed by the respondent.

8. As per the allegations made in the complaint, according to the respondent, the 1st accused in this case viz., one Gunasekar was working as Inspector of Police, Suramangalam Police Station, at the relevant point of time. The 2nd accused Leo Charles and the 1st accused Gunasekar are friends. The respondent/complainant was assisting the firm M/s. Bricksteel Enterprises, in which the 1st petitioner/A2 is the Managing Partner, in the arbitration proceedings. When the respondent came to know that the 1st petitioner gave bribe of Rs.5 lakhs to the General Manager of ONGC on 03.02.2008, the respondent informed the same to the Executive Director-cum-Asset Manager of ONGC and also the Superintendent of Police, CBI, Chennai. From then onwards, the petitioners herein

developed enmity towards the respondent. The 1st petitioner herein/A2 engaged the 3rd accused Jamaluthin, who is the neighbour of the respondent, to spy on the respondent and watch his every movement. Their aim was to kill the respondent. While the matter stood thus, on 09.10.2009 the respondent's camera was stolen from his locked house by using duplicate key and similarly, on 03.11.2009, a sum of Rs.1,900/- was stolen from the respondent's house. In this regard, the respondent lodged a complaint with the Suramangalam Police Station, wherein 1st accused Gunasekar was working as Inspector of Police, and the said complaint was registered in Crime No.2221 of 2009 on 10.12.2009. But, the 1st accused instead of conducting investigation as against the petitioners herein and other accused, filed a chargesheet as against the respondent under Section 211 IPC alleging that the respondent filed a false complaint. The said chargesheet was taken on file in C.C.No.168 of 2010 before the learned Judicial Magistrate No.II, Salem. Aggrieved over the same, the respondent filed Crl.O.P.No.19968 of 2010 before this Court and by order dated 22.09.2010, this Court allowed the said petition and quashed the said chargesheet; while allowing the said petition, liberty was given to the petitioners herein by this Court to file a complaint against the

respondent. Thereafter, the 1st petitioner herein filed a complaint, which was taken on the file as C.C.No.381 of 2011 before the learned Judicial Magistrate No.II, Salem, against the respondent under Section 211 IPC.

8.While so, the respondent again lodged a complaint with the Suramangalam Police Station as against the petitioners herein. Since the said complaint was not taken on file, the respondent filed Crl.O.P.No.2720 of 2011 before this Court and by order dated 07.02.2011, this Court directed the respondent herein to give a fresh complaint. Thereafter, the present complaint was filed by the respondent, which culminated into the case in C.C.No.274 of 2013 on the file of the learned Judicial Magistrate No.1, Salem.

9.It is the main allegation in the complaint that the 1st accused Gunasekar, then Inspector of Police, Suramangalam Police Station, in order to save his friend 2nd accused/1st petitioner herein, instead of filing the chargesheet against the petitioners and other accused, had falsely filed the chargesheet as against the complainant himself in C.C.No.168 of 2010 before the learned Judicial Magistrate No.II, Salem, under Section 211 of Cr.P.C. Thus,

he helped the petitioners/accused to escape from the clutches of law. The present complaint lodged by the respondent was taken on file as C.C.No.274 of 2013 as against the 1st accused under Sections 167, 204, 218 IPC and accused 2 to 6 under Sections 167, 204, 218 r/w 107 IPC.

10.As observed earlier, it is the main submission of the learned counsel for the petitioners that before taking cognizance, the respondent being the complainant was not examined on oath by the learned Magistrate; therefore, cognizance taken by the learned Magistrate is without any basis and the procedure adopted by the learned Magistrate is contrary to the law under Section 200(a) of Cr.P.C. In this regard, the learned counsel for the petitioners has also relied upon by the judgment delivered by the Andhra Pradesh High Court reported in **2003 (1) ALT (Cri) 309 [K.Laxma Reddy and ors Vs. The State of A.P.through Sho]**, wherein it has been held that when a complaint is filed, the Magistrate has to record the sworn statement of the complainant, and the object of such examination is to test whether the complaint makes out a *prima facie* case so as to enable the Magistrate to issue process. For the same proposition, the learned counsel for the petitioners has also

relied upon the judgment delivered by the Karnataka High Court, reported in ***ILR 2008 KAR 474 [Sri.K.Venkataramaiah and ors Vs. Sri Katterao]***.

11. But, it is the reply of the learned counsel for the respondent that non-examination of the complainant could be considered only as an irregularity and it will not vitiate the proceedings. In this regard, the learned counsel for the respondent has also invited the attention of this Court to Section 460(e) of Cr.P.C., which deals with the irregularity, which does not vitiate the proceedings. As per Section 460(e) of Cr.P.C., if any magistrate, who is not empowered by law, takes cognizance of an offence under Clause (a) or Clause (b) of Sub-Section (1) of Section 190, then it will not vitiate the proceedings. Thus, the learned counsel for the respondent submitted that even if the complainant was not examined on oath, as per Section 460(e), it will only be an irregularity, and it will not vitiate the proceedings.

12. But, in my considered opinion, the said submission of the learned counsel for the respondent is not legally sustainable, because as per Section 460 (e) of Cr.P.C., if any magistrate who is

not empowered by law takes cognizance of an offence under Clause (a) or Clause (b) of Sub-Section (1) of Section 190, then it will not vitiate the proceedings and it could only be considered as irregularity. But, that is not the state of affairs, in the instant case. In the instant case, the learned Magistrate is empowered to take cognizance, but he has not taken the oath of the complainant for taking the complaint on file. As per Section 200, if Magistrate has taken cognizance without examination of the complainant, definitely such a procedure is contrary to Section 200 of Cr.P.C. Therefore, I find some force in the submission made by the learned counsel for the petitioner. On this sole ground, I am of the opinion, the cognizance taken by the learned Magistrate is liable to be set aside.

13. It is other submission of the learned counsel for the petitioners that cognizance was taken by the learned Magistrate as against the petitioners herein for alleged offence under Sections 167, 204, 218 r/w 107 IPC. To attract Sections 167, 204, 218 IPC, the accused should be a public servant. But, the petitioners herein/accused are not public servants. To attract Section 167 IPC, the public servant should have been in-charge of, control and custody of, any document and pursuant to which he should have

prepared or translated or framed any document which to his knowledge is believed to be incorrect. But, in the instant, the petitioners herein are not the public servant. Similarly, to attract Section 204 IPC, no document which formed part of the investigation was either secreted or destroyed at any point of time by the petitioners herein. To attract Section 218 IPC, the petitioners herein were not authorised to prepare any record or suppress any material in respect of the records available at that point of time with the investigating officer. Further, the main ingredient in respect of the offence under Section 107 IPC is that there must be intentional aiding in respect of the main offence alleged against the petitioners. The complaint and the evidence available in this case do not disclose any cognizable offence against the petitioners herein and there is no evidence to co-relate the petitioners with the said offence.

14. In other words, it is the submission of the learned counsel for the petitioners that so far as the petitioners herein are concerned, none of the sections, under which the petitioners were charged, will attract the offence against them. In this regard, an elaborate argument was also made by the learned counsel for the

petitioners, by inviting the attention of this Court to the ingredients of those sections and a submission was made stating that even if the allegations made in the complaint are taken at their face value and accepted in their entirety, they do not *prima facie* constitute any offence or make out any case against the petitioners herein.

15. But, it is the reply of the learned counsel for the respondent that the complaint was taken on file under Sections 167, 204, 218 r/w 107 IPC, on the allegation of abetment and criminal conspiracy. The said allegation has to be established only during the course of trial.

16. But, irrespective of the submissions made on either side, since I am inclined to set aside the impugned order of taking cognizance, on the sole ground of non-examination of the complainant by the Magistrate, as per Section 200 of Cr.P.C, I am not dealing with the other submissions made by the learned counsel for the petitioners. Non-examination of the complainant on oath by the Magistrate before taking the complaint on file is only a procedural irregularity and moreover the object of such examination is to test whether the complaint makes out a *prima facie* case.

Hence, I am of the opinion that it would be appropriate to remand the matter back to the Court below to examine the complainant on oath and proceed further in accordance with law.

17. Accordingly, the impugned order of taking cognizance is set aside and the matter is remanded back to the Court below with a direction to examine the complainant on oath and to proceed further in accordance with law.

The criminal original petitions are ordered accordingly. Consequently, connected Miscellaneous Petitions are closed.

28.03.2016

Internet : Yes / No
Index : Yes / No
SSV

NOTE:- Issue Today (11.04.2016)

To,
1. The Judicial Magistrate No.1,
Salem.

R.SUBBIAH, J.
SSV

Pre-delivery order
in

Crl.O.P.No.3298 of 2014 and
Crl.O.P.No.28671 of 2015

.03.2016