

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CRIMINAL PETITION No.1617 OF 2017

ORDER:

The present petition is filed under Section 482 of the Code of Criminal Procedure, 1973 (for short 'the Code') to quash the proceedings in Calendar Case No.305 of 2016 on the file of the Judicial Magistrate of First Class, Udayagiri, SPSR Nellore District.

2. The petitioners herein are arraigned as accused Nos.1 and 2 in the aforesaid Calendar Case and they alleged to have committed the offences punishable under Sections 420 and 506 IPC read with 34 IPC.

3. Heard Sri V. Sudhakar Reddy, learned counsel for the petitioners and the learned Additional Public Prosecutor for the State of Andhra Pradesh.

4. The learned counsel pleaded innocence and false implication of the petitioners. The submissions of the learned counsel are that the husband of respondent No.2 - *de facto* complainant is relation of the petitioners and, therefore, they knew the correct names of petitioners and their fathers' name, more particularly, they knew petitioner No.2 as Brahmaiah, but as per records, his name is Naraiah; petitioner No.1 is settled in Cherlopalli village, Tirupati Rural Mandal in Chittoor District, whereas petitioner No.2 is residing in Chennai from the year 1982 as he was in Military Engineering Service at Tambaram,

Chennai; the allegation of *de facto* complainant that they approached her on 06.12.2014 for money is incorrect; petitioner No.2 never accompanied petitioner No.1, much less on 06.12.2014, and if it is true, the *de facto* complainant would have insisted petitioner No.2 to execute promissory note.

i) The learned counsel also referred to the concluding portion of the charge sheet filed with the Judicial Magistrate of First Class, Udayagiri. It is his submission that it is a civil dispute for recovery of money if at all the allegations levelled are true, that too against petitioner No.1 but not against petitioner No.2; though, there is no sufficient material before the Magistrate to file charge sheet against petitioner Nos.1 and 2, the learned Magistrate did not follow the procedure contemplated under Section 240 of the Code in framing the charge and has no jurisdiction to take cognizance and, therefore, sought to quash the proceedings in Calendar Case No.305 of 2016.

5. The learned Additional Public Prosecutor would resist the request referring to the statements.

6. Irrespective of going into the merits, what requires to be examined is to the extent of taking cognizance against accused No.2 by the learned Magistrate. The cognizance taken by the learned Magistrate would read thus:

“ Office Note:

The S.I. of police, Udayagiri Police Station filed charge sheet in his station Cr.No.08/2016 for the offence under section 420 IPC against accused No.1.

Accused No.1 complied Section 41 Cr.P.C. Notice.

The name of Accused No.2 was given in report by de facto complainant as Brahmaiah instead of Naraiah. LWs.1 and 2 in their 161 Cr.P.C. statement spoke about the presence of Accused No.2 but deleted by Station House Officer.

No material objects are seized.

Section 406 IPC is also attracted.

Submitted.

Perused. There is material against accused No.2 also. Cognizance is taken under Sections 420 and 506 IPC against accused Nos.1 and 2.

Sd/- 25.11.16.”

The Investigating officer in the concluding portion of the charge sheet, as regards statements of LWs. 1 to 4 recorded under Section 161 of the Code, arrived at the conclusion that LWs.3 and 4 are independent witnesses and as per their statements, the allegations against accused No.2 are not proved, and thereby deleted the name of accused No.2 and the said paragraph reads thus:

“As per the evidence of LWs.1 to 4, the prima-face case has been made against the accused A1 under the sec.420 IPC only. As per the evidence of the direct independent witnesses LWs.3 & 4 the participation of the alleged accused A2 Darapaneni Naraiah was not proved. Hence LW.5 deleted the name of the alleged accused

Darapaneni Naraiah from the list of the accused and deleted the sec.34 IPC from the sec.420 r/w 34 IPC and filed a memo in the hon'ble court."

7. Now, the question is:

Whether the learned Magistrate has applied his mind while taking cognizance against accused No.2, or whether the learned Magistrate has taken cognizance in a mechanical manner?

8. It appears that the office has put up a note stating that the name of accused No.2 was given by the *de facto* complainant as 'Brahmaiah' instead of 'Naraiah', and the statements of LWs.1 and 2 recorded under Section 161 of the Code would show that they have spoken about the presence of accused No.2, but the name of accused No.2 was deleted. Basing on the said note, the learned Magistrate recorded the mind application in taking cognizance as mentioned in the above i.e., concluding portion of the extracted portion. In fact, cogent reasons are to be assigned by examining the statements of witnesses when cognizance is taken against accused No.2 also. But, it is obvious from the order passed by the learned Magistrate that such reasons are not finding place and his mind application is not there but barrowing the mind of the concerned staff member, who has put up the note, cognizance was taken. Such should not be the way in which the learned Magistrate ought to have acted while taking cognizance.

The law is well-settled and the Hon'ble Supreme Court in **M.N. Ojha v. Alok Kumar Srivastav**¹, held in paragraph No.27 as under:

“21. In our considered view, criminal law has been set in motion by the complainant to harass the bank officers needlessly and to wreak personal vengeance in order to bring them under pressure not to further prosecute the proceedings already initiated by the appellants against the complainant on behalf of the Bank.

22. In our considered opinion, the learned SDJM set the criminal law in motion against the appellants without even examining the allegations and averments made in the complaint filed by the respondent-complainant. The learned SDJM took cognizance of the case without considering the allegations on merits.

23. Had the learned SDJM perused the complaint properly he would have realized that the complainant himself had made a mention about the lodging of the FIR for criminal breach of trust and other offences against the respondent-complainant and others. Had he looked into the complaint properly, he would have certainly asked the complainant to furnish the copy of the said FIR.

24. A copy of the legal notice issued on behalf of the respondent- complainant to the appellants was filed along with the complaint and a mention is made about it in the order passed by the learned SDJM. Had the learned SDJM perused the said legal notice, he would have realized that the

¹ (2009) 9 SCC 682

complainant himself admitted about his execution of agreement of guarantee and other documents unconditionally agreeing to discharge the loan amount in case of failure of the principal borrower to pay the said amount to the bank.

25. Had the learned SDJM applied his mind to the facts and circumstances and sequence of events and as well as the documents filed by the complainant himself along with the complaint, surely he would have dismissed the complaint. He would have realized that the complaint was only a counter blast to the FIR lodged by the Bank against the complainant and others with regard to same transaction.

26. This Court in *Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate* ((1998)5 SCC 749 ; 1998 SCC (Cri) 1400) held: (SCC p.760, para 28)

“28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support

thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

27. The case on hand is a classic illustration of non-application of mind by the learned Magistrate. The learned Magistrate did not scrutinize even the contents of the complaint, leave aside the material documents available on record. The learned Magistrate truly was a silent spectator at the time of recording of preliminary evidence before summoning the appellants."

9. In the present case, as extracted in the above, on an office note made by the staff, the learned Magistrate without assigning any reasons, believed the note and taken cognizance against accused No.2, who is petitioner No.2 herein, though, there is no material worth the name to show his complicity, for commission of the offences alleged against him.

10. So far as petitioner No.1 is concerned, the request cannot be acceded to, in view of the discussion made hereinabove.

11. Therefore, the Criminal Petition is allowed in part, at the admission stage itself, quashing the proceedings against petitioner No.2 - accused No.2 - Darapaneni Naraiah alone in Calendar Case No.305 of 2016 on the file of the Judicial Magistrate of First Class, Udayagiri, SPSR Nellore District, while dismissing the Criminal Petition against petitioner No.1 - accused No.1.

As a sequel thereto, Miscellaneous Petitions, if any, pending in the Criminal Petition stand closed.

A. SHANKAR NARAYANA, J

March 15, 2017.
Mgr/pv

