

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.15306 OF 2016

ORDER:

This criminal petition is filed by the petitioners/accused under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the proceedings in C.C.No.1223 of 2016 pending on the file of the Additional Chief Metropolitan Magistrate, Nampally, Hyderabad registered for the offence punishable under Sections 427, 448 and 380 of Indian Penal Code (for short "I.P.C.").

The respondent No.2 is the complainant, who filed the complaint dated 09.05.2015 with the police alleging that he is running business in the premises bearing H.No.8-3-217/12-A, Inayath Commercial Center, Block-B, Opposite Maitrivanam, Srinivasanagar, Ammerpet, Hyderabad by paying monthly rent of Rs.1,500/- to landlady Smt.Shajjia Sulthana and her father Mohammed Mohiuddin is looking after the affairs and maintenance of the building, because of rental disputes with landlady, the complainant filed petition before the Rent Controller and the same was pending. While the matters stood thus, the complainant went to Belgium, in the meantime, he received information from his friend Ammaiah that his office doors were broken and some articles were stolen by somebody. Later on his enquiry the complainant, came to know that his landlady Shajjia Sulthana along with her husband Zaheeruddin and her father Mohammed Mohiuddin trespassed and demolished his tenanted premises, committed theft valuables in the premises with an intention to tamper the evidence before the Rent Control Court to evict him illegally from the premises and requested to investigate

into the offences punishable under Sections 427, 448 and 380 of I.P.C.

After investigation, investigating officer filed final report under Section 173 of Cr.P.C. treating the case as “lack of evidence” and notice was issued to the complainant, under proper acknowledgement.

On receipt of notice about closure of case for lack of evidence, a protest petition was filed by the respondent No.2 herein before the Magistrate alleging that he was in occupation of the premises bearing H.No.8-3-217/12-A, Inayath Commercial Center, Block-B, Opposite Maitrivanam, Srinivasanagar, Ammerpet, Hyderabad as a tenant and he filed R.C.No.142 of 2008 on the file of IV Additional Rent Controller at Hyderabad and the same was allowed on merits. Aggrieved by the same, the petitioners herein preferred appeal R.A.No.265 of 2010, wherein the contention of the complainant was upheld. The petitioners/accused also filed two petitions R.C.No.170 of 2010 and 171 of 2010 for fixation of fair rent and for eviction respectively. Eviction petition was dismissed holding that the accused are not entitled to seek eviction of the respondent No.2 herein, later the petitioners preferred an appeal and the same is pending for adjudication. Petition for enhancement of rent is also pending in the appellate Court.

During pendency of the appeal, mulgi was demolished by the accused in pursuance of their pre-plan taking advantage of demolition proceedings initiated by G.H.M.C. and Metro Rail Project, though, the demolition was totally unwarranted to the extent of portion of mulgy, which is in occupation of the respondent No.2. The accused unlawfully entered into the

premises and taken away the equipment, articles, furniture and valuable documents worth Rs.62,00,000/-, thus committed the offence punishable under sections 427, 448 and 380 of I.P.C. Initially when the demolition process was started, the complainant was out of country and one Mr.Ammaiah informed about the demolition and the complainant instructed to give information to the police for taking steps for protection of property as he is out of country. But the police did not take any action on the complaint lodged by Ammaiah. Later, he sent the complaint by post, receipt of the same was acknowledged by police concerned. As soon as the complainant returned from Belgium, a complaint was given to the police, the same was registered as a case in Crime No.357 of 2015 on the file of S.R.Nagar Police Station and police took up investigation. In the meanwhile, the accused completed demolition highhandedly and tampered the evidence available at the premises.

During investigation, the complainant furnished all documents, which clearly shows that the accused demolished the mulgy beyond the limit fixed for demolition and committed theft of the equipment, articles, furniture and valuable documents. In fact, certain admission made by the accused during rent control proceedings are suffice to establish the malafides in causing damage to the interest of the complainant in the premises and the demolition was unwarranted. Thus, the petitioners/accused committed grave offence of demolition taking advantage of his absence and demolition proceedings initiated by G.H.M.C. and Metro Rail Project. The evidence collected by police during investigation is suffice to proceed against the petitioners/accused for the offences punishable under Sections 427, 448 and 380 of

I.P.C., but the police filed final report closing the complaint due to “lack of evidence”.

Based on the complaint, the III Additional Chief Metropolitan Magistrate, Hyderabad registered the same and took cognizance of the offence against the petitioners punishable under Sections 448 and 427 of I.P.C. by docket order dated 31.08.2016 and issued summons to the accused.

Questioning the order of issue of summons, the present petition is filed under Section 482 of Cr.P.C. and contended that when the police filed final report closing the complaint as “lack of evidence” and served notice on the respondent No.2/complainant enabling him to take appropriate steps to file protest petition, the order of the Court below dated 31.08.2016, is illegal. When the protest petition is filed, without recording statements of complainant and other witnesses cited, taking cognizance is a serious irregularity in the proceedings impugned in the petition. Even if the allegations made in protest petition are accepted on its face value, no offence is made out. The Court below did not comply with the mandatory requirement under Section 200 of Cr.P.C. for issuing summons under Section 204 of Cr.P.C., hence the summons issued are liable to be quashed since taking cognizance and issue of summons compelling the petitioners to appear before the Court is a matter of serious concern and requested to quash the proceedings.

Respondent No.2 filed counter denying material allegations reiterating his contentions raised in the protest petition and rent control proceedings etc. He also denied the alleged information issued by Assistant City Planner, who furnished details of the

demolition in his letter dated 15.04.2015 and the same does not pertain to mulgi and when the facts are in dispute, the Court cannot exercise inherent jurisdiction to quash the proceedings and prayed to dismiss the petition.

Sri P.Gangaiah Naidu, learned senior counsel, contended that when a protest petition is filed, the Court has to follow the procedure prescribed under Section 200 of Cr.P.C. to issue summons under Section 204 of Cr.P.C. for any of the offences. Taking cognizance and issue of summons, without recording statements of complainant and other witnesses, is a serious irregularity, which would vitiate the entire proceedings. He also contended that taking cognizance and issue of summons will have serious consequence and compelling the petitioners to appear before the Court by issuing summons in pursuance of irregular proceedings is sufficient to quash the proceedings.

He further contended that the dispute is with regard to demolition of premises and when the Assistant City Planner issued information stating that the mulgi was demolished by the officials of G.H.M.C. for the purpose of Metro Rail Project, taking cognizance for the offence punishable under Sections 427, 448 and 380 of I.P.C. against the petitioners is a serious illegality, moreover the petitioner No.1 is out of the country on the date of alleged incident. Thereby the order passed by the Court below is erroneous and he placed reliance on “**Pepsi Foods Limited v. Special Judicial Magistrate**”¹, “**M.N.Ojha v. Alok Kumar Srivastav**”²

¹ 1998 (5) SCC 749

² 2009 (9) SCC 682

“Swami Mick Monassan v. Papatlal³” and “Nirod Chandra v. Dijabara⁴”

On the strength of the principles laid down in the above judgments, Sri Gangaiah Naidu, learned senior counsel contended that the proceedings dated 31.08.2016 taking cognizance against the petitioners and ordering summons are liable to be quashed.

Sri Y.V.L.N.V. Prasad Sharma, learned counsel for the respondent No.2 contended that the irregularity pointed out by the learned counsel for the petitioners is curable irregularity and the Court cannot quash the proceedings on technical grounds and placed reliance on the judgment of Apex Court rendered in **“U.P.Pollution Control Board v. Messrs Modi Distillery⁵” “Rafiq Ahmed @ Rafi v. State of U.P.⁶” “Ajameera Hari Naik v. Suman Rathod⁷” “Lal Singh v. State of Gujarat⁸” and “Shivjee Singh v. Nagendra Tiwary⁹”**

On the basis of the law declared by the Apex Court in the judgments referred supra, learned counsel for the respondent No.2 contended that when the complaint disclosed commission of cognizable offence and there is a dispute with regard to certain facts regarding demolition of the premises, the Court cannot exercise its power under Section 482 of Cr.P.C. to quash the proceedings and prayed to dismiss the petition.

Considering rival contentions and perusing the material on record, the point that arises for consideration is:

³ (1983) 1 GLR 185

⁴ 1984 Cr L J (NOC) 42 (Ori.)

⁵ (1987) 3 SCC 684

⁶ 2012 (1) ALD (CrI.) 246 (SC)

⁷ 2011 (1) ALD 390

⁸ (1998) 5 SCC 529

⁹ (2010) 7 SCC 578

Whether non compliance of procedure under chapter XV of Cr.P.C. on protest petition filed by the respondent No.2/complainant vitiates the docket order dated 31.08.2016 passed by the III Additional Chief Metropolitan Magistrate, Hyderabad, if so, whether the said proceedings against the petitioners be quashed?

P O I N T:

The prime objection raised by the learned senior counsel for the petitioners is that the statement of complainant was not recorded as required under Section 200 of Cr.P.C. and that the language used in Section 200 of Cr.P.C. is that the Court shall examine the complainant on oath and witnesses present, if any, before taking cognizance of an offence, but the trial Court did not record the sworn statement of complainant or any other witnesses before taking cognizance and issue summons by following the procedure under Section 204 of Cr.P.C.

Learned counsel for the respondent No.2 would contend that the failure of the Magistrate to record sworn statement of the complainant or other witnesses, who are present as required under Section 200 (1) of Cr.P.C. is only a curable irregularity and on account of such curable irregularity, the order passed by the Court below taking cognizance of offence against the petitioners and issue of summons by exercising power under Section 204 of Cr.P.C. cannot be quashed.

Section 200 of Cr.P.C. entitles a Magistrate to take cognizance of an offence on complaint and it further provides

procedure for the Magistrate to follow Chapter XV of the Code. The examination of the complainant is a very valuable safeguard that the Legislature has provided and must be strictly preserved in view of the law declared in “**Emperor v. Hemon**”¹⁰

Section 200 of Cr.p.C. applies where the Magistrate takes cognizance of an offence on a complaint under Section 190 (1) (a) and not when under Section 156 (3) he sends the case to the police for further investigation or when he takes cognizance of an offence under Clause (b) or Clause (c) of Section 190 (1) of Cr.P.C.

Sections 200 and 202 of Cr.P.C., which impose upon the Magistrate the duty of examining the complainant on oath are only applicable where the Magistrate proposes to take proceedings upon the information supplied by the complainant. If he intends to issue process on that basis, it is incumbent upon him to examine the complainant on oath, but not otherwise as held in “**Bharat Kishore v. Judhister**”¹¹

The provisions of Sections 200 to 203 of Cr.P.C. should be read together. The procedure laid down by these sections must be strictly followed. A complaint properly instituted under the provisions of Indian Penal Code should be investigated even if the case be one in which a civil action will lie. But where the complaint discloses an offence purely of a civil nature, the Magistrate may refuse to entertain it. A protest petition is really a petition of complaint and must be dealt with in accordance with the

¹⁰ 1920 Pat 232

¹¹ 1929 Pat 473, 474 (FB)

provisions of Chapter XV Cr.P.C. as held in “**Sukhadeva v. Hamid**¹²” and “**Saidu v. Gaya**¹³”

Thus, in view of the judgments referred supra, the procedure to be followed in the present case is prescribed under Chapter XV Cr.P.C.

The object of examination under Section 200 is to ascertain whether there is a prima facie case against the person accused of the offence in the complaint, and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such a person. Such examination is provided to find out whether there is or not sufficient ground for proceeding. The examination of the complainant under Section 200 adds to the credibility of the complaint at the initial stage as held in “**Ratish v. Mohesh**¹⁴”

There are two contradictory views expressed by different High Courts regarding examination of complainant and witnesses present in the Court.

One view is clear that Section 200 of Cr.P.C. is mandatory, it is obligatory on the part of the Magistrate to examine not only the complainant but also the witnesses who are present in Court as held by the Apex Court in “**Tula v. Kishore**¹⁵”. Where the Magistrate chooses to take cognizance, before he issues process to the accused, he must comply with the requirements of Section 200 of Cr.P.C. and record the evidence of the complainant of his

¹² 1928 P 585: 29 Cr.L.J. 942

¹³ 1941 Pat 395 : 42 Cr.L.J 504

¹⁴ 1985 Cr.L.J 94 (Gau.)

¹⁵ 1977 SC 2401

witnesses. The Magistrate, shall, however, examine the complainant or the witnesses only after he has taken cognizance of the offence. Where the Magistrate proceeds to examine the complainant or the witnesses without taking cognizance of the case, and issues process against the accused, the procedure adopted by the Magistrate is illegal and the process issued against the accused is liable to be set aside as held in “**Ravanappa v. S.N.Raghunath**¹⁶” and “**State of West Bengal v. Bejoy**¹⁷”

In the present case, the order under challenge is issue of summons after taking cognizance by the Magistrate, but it appears from the Docket order dated 31.08.2016, the Magistrate recorded the sworn statement of complainant and two witnesses, who are examined as L.Ws.1 to 3 and marked Exs.P.1 to P.22 and recorded satisfaction that there appears to be a civil dispute between landlord and tenant, but evidence *prima facie* disclosed the commission of offence under Sections 448 and 427 of I.P.C., thereby taken cognizance for the offence punishable under Sections 448 and 472 of I.P.C. based on the sworn statements and documents marked and issued summons under Section 204 of Cr.P.C.

If the law laid down by the Apex Court in **State of West Bengal v. Bejoy**” (referred supra) is applied to the present facts of the case, the procedure adopted by the Magistrate in taking cognizance and issue of summons on examination of complainant and the witnesses present on oath, duly signed by the complainant and witnesses is in accordance with law.

¹⁶ 1983 Cr.L.J. 321

¹⁷ 1978 SC 188

The procedure to be followed in the case of protest petition is contemplated under Chapter XV of Cr.P.C. Therefore, the contention that the Magistrate failed to follow the procedure contemplated under Section 200 to 203 of Cr.P.C. is without any substance.

Even assuming for a moment that sworn statements of witnesses were not recorded or examined the complaint and other witnesses improperly, such non-compliance would not vitiate the entire proceedings. There is difference of opinion amongst the various High Courts on this point. One line of decisions lays down that failure to examine the complainant or the improper examination of the complainant is mere irregularity curable under Section 465 of Code not vitiated the trial, unless the accused has been prejudiced in any manner as held in “**Frank Dalton Larkins v. State**”¹⁸

The other view is that the examination of the complaint is mandatory and order of investigation under Section 202 or dismissal of the complaint under Section 203 of the Code without examining the complaint is illegal and fatal as held in “**Shyama v. State**”¹⁹

What has to be considered in each case is whether the illegality or the irregularity complained of affected the competency of the Court or whether it had occasioned or must be taken to have occasioned a failure of justice (In re Subramania Achari 1955 Mad 129). Whether accused has been prejudiced by the improper or

¹⁸ 1985 Cr.L.J. 377 (D)

¹⁹ 1976 Cr.L.J. 1599

non-examination of the complaint depends upon the facts of each case. (In re Remaswami Iyenger, 1922 M 443).

The omission to examine the complainant on solemn affirmation under Section 200 may prejudice the complainant, but it cannot prejudice the accused, hence accused cannot complain the same as held in “**Bharat Kishore v. Judhister**” (referred supra).

Therefore, the allegation that the Magistrate did not comply with the requirement under Section 200 of Cr.P.C. i.e. examination of complainant and other witnesses, who are present, would not cause any prejudice. Therefore, the objection as to non-examination of complainant and other witnesses cannot be allowed to quash the proceedings at this stage for the reason that the accused will have an opportunity to cross-examine the complainant and the witnesses before and after discharge and no prejudice is caused to the accused and trial is not vitiated. Therefore, the alleged non-examination of complainant in compliance of Section 200 of Cr.P.C. is without any merit and on the other hand, the order itself discloses that sworn statements of complainant and two witnesses were recorded and considered.

The Apex Court in “**Shivjee Singh v. Nagendra Tiwary**” (referred supra) considered the scope of Sections 200 and 202 of Cr.P.C. and held that non-examination of any or some of the witnesses cited by complainant is, by itself, not sufficient to denude Magistrate of jurisdiction to take cognizance and issue of process provided he is satisfied that *prima facie case* is made out for doing so.

If the said principle laid down by the Apex Court is applied to the present facts of the case, failure to record sworn statement of complainant or any of the witnesses is not a ground to quash the proceedings.

Thus, the order passed by the Magistrate is strictly in compliance of Chapter XV of Cr.P.C. i.e. Section 200 to 203 of Cr.P.C.

In “***Shivjee Singh v. Nagendra Tiwary***” (referred supra) the facts are different. In the said judgment, in a case to be tried by the Sessions Court, a private complaint was filed and the Magistrate took cognizance and failed to record evidence of other witnesses produced before the Court and issued process for securing the presence of the accused to comply with the requirement under Section 207 and 209 of Cr.P.C. The question in the said judgment was that non compliance of Section 200 (2) of Cr.P.C. is fatal. But the Apex Court after elaborate consideration of various provisions of Cr.P.C. adverting to the law laid down by the Apex Court in long line of decisions concluded that it is not fatal. The facts in the present case are less serious than the facts in “***Shivjee Singh v. Nagendra Tiwary***” (referred supra).

In “***Rakesh v. State of Uttar Pradesh***²⁰” the Apex Court discussed about the power of Magistrate to take cognizance after accepting negative final police report and held that Magistrate by accepting final report under Section 173 did not become functus officio and had power to take cognizance under Section 190 (1) (a) on the basis of protest petition filed by complainant/first informant

²⁰ (2014) 13 SCC 133

and proceed under Sections 200 and 202 of Cr.P.C. The law is very clear that even if the final report under Section 173 of Cr.P.C. is accepted, still the Magistrate can take cognizance on the basis of protest petition by following necessary procedure. But in the present facts of the case, the Magistrate did not accept the final report filed by the police. Therefore, by applying the principle laid down in the above judgment, there is no error in taking cognizance by the Magistrate in view of the final report filed by the police under Section 173 of Cr.P.C.

In “**Lal Singh v. State of Gujarat**” (referred supra), the Apex Court held that taking cognizance on a defective sanction order is not a ground to quash the proceedings as the same is curable defect. But the said judgment relied on by the learned counsel for the respondent No.2 has no application to the facts of the present case.

In “**U.P.Pollution Control Board v. Messrs Modi Distillery**” (referred supra) the Apex Court held that prosecution and trial against accused cannot be allowed to be defeated merely because of a technical and curable defect in the complaint.

If the principle laid down in the above judgment is applied to the facts of the present case, the defect, if any, found in recording satisfaction, it is curable under Section 465 of Cr.P.C., hence the same is not a ground to quash the proceedings.

Hence, non-compliance of Section 200 of Cr.P.C. and issue of process under Section 204 of Cr.P.C. is not a ground to quash

the proceedings as the petitioners failed to bring to the notice of this Court as to any prejudice being caused to them.

The other ground urged before this Court is that the petitioner Nos.1 and 2 are away to the place of offence and they are in Arab Country on the date of alleged offence. Virtually, learned counsel for the petitioners raised a plea of *alibi*. According to Section 11 of Indian Evidence Act, the facts, which are not relevant otherwise become relevant. Section 11 of Indian Evidence Act, reads thus:

“11. When facts not otherwise relevant become relevant :-- Facts not otherwise relevant are relevant --

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.”

In view of Section 11 of Indian Evidence Act, the petitioners are entitled to produce evidence to prove that the petitioner Nos.1 and 2 were away to the scene of offence on the date of occurrence and there was no possibility for them to participate in the offence at a particular date and time, though it is not relevant fact, but it will become relevant. Therefore, the plea of *alibi* is a question of fact to be decided only at the end of trial and the burden is on the petitioner Nos.1 and 2 to substantiate the same. Hence, the plea of *alibi* is not a ground to quash the proceedings at this stage.

The other contention raised by the learned senior counsel for the petitioner is that after filing final report by the police, no notice was served to the petitioners.

No notice is contemplated under Section 200 of Cr.P.C. to the accused before taking cognizance. On close scrutiny of entire procedure under Chapter XV of Cr.P.C., I find that no such obligation is cast on the Magistrate to issue notice to the accused before taking cognizance.

As discussed above, no notice is contemplated to the accused under Sections 200 to 204 of Cr.P.C. before taking cognizance, but when the Magistrate postpone the issue of process by exercising power under Section 202 of Cr.P.C., the Magistrate may issue notice to the accused and afford an opportunity to cross-examine the witnesses before issue of process under Section 204 of Cr.P.C. The Magistrate did not exercise power under Section 202 of Cr.P.C., who took cognizance and issued process by exercising power under Section 200 and 204 of Cr.P.C. Therefore, on the ground of failure to issue notice before taking cognizance and issue of process, the proceedings against the petitioners cannot be quashed.

Learned senior counsel for the petitioners mainly contended that when the Magistrate intends to take cognizance of the offence, then the Magistrate has to consider the final report filed by the investigating authority and the material produced along with the report to record satisfaction of the Magistrate that there are grounds to proceed against the petitioners.

The Magistrate passed the order on 31.08.2016, which reads thus:

“Heard. Perused the sworn statement of the complainant and his two witnesses who are examined as P.Ws.1 to 3 and also

Exs.P.1 to P.22. No doubt, there appears to be a civil dispute between the landlord and tenant in the Civil Court, but their evidence *prima facie* disclose the offence under sections 448 and 427 IPC. Hence, cognizance is taken as C.C.1223/2016 under sections 448 and 427 IPC in view of the positive statements of Pws.1 to 3 and Exs.P1 to P22. Case is registered as C.C.1223/2016 under sections 448 and 427 IPC. Issue summons to the accused.”

In the order passed by the Magistrate, the Magistrate though not recorded satisfaction made an observation that the dispute is purely civil in nature between the landlord and tenant in the Civil Court, but their evidence *prima facie* disclosed the offence under Sections 448 and 427 of I.P.C. Recording such satisfaction that there is *prima facie* material to proceed against the petitioner is sufficient compliance of requirement under Section 200 of Cr.P.C.,

One of the contentions raised by the learned Senior Counsel Sri Gangaiah Naidu, is that, the Magistrate did not take into consideration the final report submitted by the Investigating Officer along with its annexures, including the letters furnished by the Chief Town Planner, while taking cognizance for the offences mentioned supra.

This contention is without any substance, for the reason that, when a protest petition is filed, the Magistrate has to apply his/her mind to material on record, ignoring the final report filed by the Investigating Officer under Section 173 Cr.P.C.

Section 190 Cr.P.C deals with cognizance of offences by Magistrates and according to it,

(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 acts 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.

The word 'cognizance' is not defined anywhere, but it is nothing but taking detailed notice of the offence with a view to initiate proceedings with respect to such offence said to have been committed by someone. While taking cognizance, 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. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or

Section 202 also (vide **M/s. India Carat Pvt. Ltd. v. State of Karnataka and another**²¹).

If, this principle is applied to the present facts of the case, the contention that Magistrate did not apply his/her mind to the final report submitted by the Investigating Agency under Section 173 Cr.P.C shall be rejected. When the Magistrate took cognizance of the offence, irrespective of the conclusions arrived by the Investigating Officer and even he did not follow the procedure under Sections 200 & 220 Cr.P.C.

Here, it is not the case of following procedure either under Section 200 or Section 202 Cr.P.C. But, in view of sending report to the defacto complainant by exercising power by the Investigating officer for non-compliance of Section 173(2)(ii) Cr.P.C to the informant. Apart from that, per A.P. Police Manual, Volume II, Pt.1, Order 487(3) contemplates that, when a final report is sent to the Magistrate, the Station House Officer shall inform the complainant about the action. The Magistrate also sent notice to the complainant directing him to show as to why the report should not be accepted. Before acting on the referred report, the Magistrate shall hear both the police and complainant. On the orders of Magistrate, the aggrieved party can go to the higher Courts for revision. Notice in Form No.52 is prescribed under Section 173 & 202 Cr.P.C to be issued to the complainant when a report is filed. Therefore, the Magistrate is not required to look into the conclusions arrived by the Investigating Officer while dealing with the protest petition and he is entitled to independently apply his/her mind and take cognizance.

²¹ AIR 1989 SC 885

The offences allegedly committed by the petitioners are punishable under Section 448 and 427 of I.P.C., but the contention of the petitioners is that premises was demolished by the G.H.M.C. for the purpose of Metro Rail Project by issuing necessary proceedings and the documents produced before the Court along with final report disclosed that the land acquisition proceedings under Section 4 (1) of the Land Acquisition Act were issued and enquiry was held on 06.03.2014, and award was passed on 22.01.2015 and on 01.03.2015 G.H.M.C. demolished part of the premises and in support his contentions, the petitioners produced certain documents i.e. letter issued by G.H.M.C. dated 15.04.2015, letters of the police to G.H.M.C. dated 30.03.2015, 03.10.2015, 05.10.2015 and letter of the Hyderabad Metro Rail Limited dated 08.10.2015 and letter of the G.H.M.C. to police along with plan dated 02.11.2015.

Based on these documents, learned senior counsel for the petitioners contended that the premise was demolished by G.H.M.C. after acquiring the property under Land Acquisition Act and on account of demolition of building as per the plan annexed to the letter dated 02.11.2015, the possibility of causing damage to other part of the building depending upon the nature of the construction, cannot be ruled out. Merely because part of the building was demolished by G.H.M.C. the Court cannot take cognizance for the offence punishable under Sections 448 and 427 of I.P.C. based on the material available on record.

Section 448 of I.P.C. deals with punishment for house-trespass. The word "House trespass" is defined under Section 442 of I.P.C., which reads thus:

"442. House trespass:- Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit "house trespass".

Explanation to Section 442 of I.P.C. says that the introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

To constitute an offence punishable under Section 442 of I.P.C., there must be criminal trespass as defined under Section 441 of I.P.C. The word 'criminal trespass' is defined under Section 441 of I.P.C., which reads thus:

"441. Criminal trespass:-a> Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains therewith intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass".

Therefore, to constitute offence punishable under Section 448 of I.P.C., the prosecution has to *prima facie* establish that there was criminal trespass and house trespass as defined under Section 441 and 442 of I.P.C. A trespass becomes a criminal trespass if it is with an intention to annoy or to do something

illegal as held by the Apex Court in “**Noorul Huda Maqbool Ahmed v. Ram Deo Tyagi**”²²”

In “**Vidyadharan v. State of Kerala**”²³ the Apex Court held as follows:

“Section 448 provides for punishment relating to house trespass. In order to sustain the conviction under Section 448 I.P.C. it must be found that the intention of the accused was to commit an offence or to intimidate, insult or annoy the complainant. There must be unlawful entry and there must be proof of one or other of the intentions mentioned in Section 441 IPC. In the case at hand evidence clearly establishes the commission of offence punishable under Section 448 of I.P.C.”

Here, the allegation made against the petitioners is that they demolished the building and committed theft of articles, furniture and other documents worth Rs.62,00,000/-, but strangely the Court did not take cognizance for the offence punishable under Section 379 or Section 380 of I.P.C. and it is not the case of the complainant that the petitioners entered into the premises and remained in the said premises, but they allegedly demolished the premises and entered into the premises and committed theft. When the Magistrate failed to take cognizance under Section 379 or 380 of I.P.C., without any *prima facie* material to conclude that the petitioners entered into the property, which is in the possession of the complainant, taking cognizance for the offence punishable under Section 448 of I.P.C. is grave illegality and the satisfaction recorded by the Magistrate is not based on any material. Therefore, the allegations made in the protest petition do not constitute any offence punishable under Section 448 of I.P.C.

²² (2011) 7 SCC 95

²³ (2004) 1 SCC 215

The other offence allegedly committed by the petitioner is punishable under Section 427 of I.P.C.

Section 427 of I.P.C. deals with punishment for mischief. The word 'mischief' is defined under Section 425 of I.P.C., which reads thus:

"425. Mischief:- Whoever with intent to cause, or knowing that he is likely to causes, wrongful loss or damage to the public or to any person, cause the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".

Explanation (1) further says that it is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2:- Mischief may be committed by an act affecting property belonging to the person who commits the act, or to the person and other jointly."

Therefore, to constitute offence, there must be a *prima facie* evidence that the petitioners caused destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or it affects injuriously the person in occupation. But the protest petition is silent as to the ingredients of Section 427 of I.P.C.

Section 482 of Cr.P.C saves the inherent powers of the High Court to make such orders as may be necessary to give effect to

any order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is an obvious proposition that when a Court has authority to make an order, it must have also power to carry that order into effect. If an order can lawfully be made, it must be carried out; otherwise it would be useless to make it. The authority of the Court exists for the advancement of justice, and if any attempt is made to abuse that authority so as to produce injustice, the Court must have power to prevent that abuse. In the absence of such power the administration of law would fail to serve the purpose for which alone the Court exists, namely to promote justice and to prevent injustice. Section 482 of Cr.P.C confers no new powers but merely safeguards existing powers possessed by the High Court. Such power has to be exercised sparingly in exceptional cases and this power is external in nature to meet the ends of justice.

In “***R.P. Kapur v. State of Punjab***²⁴”, the Apex Court laid down the following principles:

- (i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
- (ii) where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
- (iii) where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and
- (iv) where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

Section 482 of the Code of Criminal Procedure empowers the High Court to exercise its inherent power to prevent abuse of the

²⁴ AIR 1960 SC 866

process of Court. In proceedings instituted on complaint exercise of the inherent power to quash the proceedings is called for only in cases where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance is taken by the Magistrate it is open to the High Court to quash the same in exercise of the inherent powers under Section 482. It is not, however, necessary that there should be a meticulous analysis of the case, before the trial to find out whether the case would end in conviction or not. The complaint has to be read as a whole. If it appears on a consideration of the allegations, in the light of the statement on oath of the complainant that ingredients of the offence/offences are disclosed, and there is no material to show that the complaint is mala fide, frivolous or vexatious. In that event there would be no justification for interference by the High Court as held by the Apex Court in ***“Mrs.Dhanalakshmi v. R.Prasanna Kumar²⁵”***

In ***“State of Haryana v. Bhajan Lal²⁶”*** the Apex Court considered in detail the powers of High Court under Section 482 and the power of the High Court to quash criminal proceedings or FIR. The Apex Court summarized the legal position by laying down the following guidelines to be followed by High Courts in exercise of their inherent powers to quash a criminal complaint:

- (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

²⁵ AIR 1990 SC 494

²⁶ 1992 Supp (1) SCC 335

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non- cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

In view of guideline No.3 when the allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence, the Court can

exercise its inherent jurisdiction under Section 482 of Cr.P.C. to quash the proceedings.

Before taking cognizance of any offence, the Court must consider the effect of issue of summons since issue of summons will have serious impact. In “**Pepsi Foods Limited v. Special Judicial Magistrate**²⁷” the Supreme Court held that “Summoning of an accused in criminal cases 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. Magistrate has to carefully scrutinize 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.”

In “**M.N.Ojha v. Alok Kumar Srivastav**²⁸” the Apex Court held that “it is well settled and needs no restatement that the saving of inherent power of the High Court in criminal matters is intended to achieve a salutary public purpose "which is that a

²⁷ 1998 (5) SCC 749

²⁸ 2009 (9) SCC 682

court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. If such power is not conceded, it may even lead to injustice". [Vide: State of **Karnataka v. L. Muniswamy** : (1977) 2 SCC 699)]”

In view of the law declared by the Apex Court in the judgments referred supra, when the allegations made in the complaint do not constitute any offence punishable under Section 427 and 448 of I.P.C., this Court can exercise inherent power under Section 482 of Cr.P.C.

Therefore, the order taking cognizance against the petitioners on the protest petition for the offences punishable under Sections 448 and 427 of I.P.C. is illegal for the simple reason that none of the allegations would constitute offence punishable under Sections 448 and 427 of I.P.C. as discussed in the earlier paragraphs.

In view of my foregoing discussion, I find that it is a fit case to quash the proceedings in C.C.No.1223 of 2016 on the file of Additional Chief Metropolitan Magistrate, Nampally, Hyderabad against the petitioners herein. The point is answered accordingly.

In the result, the criminal petition is allowed. The proceedings in C.C.No.1223 of 2016 on the file of Additional Chief Metropolitan Magistrate, Nampally, Hyderabad, are hereby quashed against the petitioners herein. No costs.

The miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

27.06.2018
Ksp