

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON : 07.12.2018

ORDER PRONOUNCED ON : 06.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.O.P.No.13769 of 2011

and

M.P.No.1 of 2011

Thangaraj : Petitioner / Accused No.4

Vs.

Banumathi : Respondent / Petitioner

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C., to call for the records and to quash the complaint in C.C.No.399 of 2009, on the file of the Judicial Magistrate III, Erode.

For Petitioner : Mr.V.Ragavachari

For Respondent : Mr.M.Guruprasad

ORDER

This Criminal Original Petition has been filed by the accused No.4 in C.C.No.399 of 2009, on the file of the learned Judicial Magistrate No.III, Erode, to quash the complaint, pending against him.

2. The case of the complainant is that the accused are tenants in her husband's house at Elumathur Village, Thottipalayam Pudur, Erode, and when they requested the accused to vacate the premises, the second accused instead of vacating the premises, had insisted that it must be given to him. In this regard, the complainant's husband had issued a legal notice to the second accused through his Advocate on 15.03.2008 and in this regard, a suit is also pending between the parties in O.S.No.648 of 2008.

3. While so, on 27.06.2008, at about 05.30 p.m., a neighbour to that property, one Kulanthaisamy, had contacted the complainant through phone and informed that the accused are cutting the trees in the backyard of their house. On getting this information, her husband viz., Subramanian, went to the Advocate's house and also directed his brother-in-law viz.,

Ramachandran to get the photograph of the incident. The complainant had also went along with her brother. The first accused had prevented them from entering into the premises and the accused 2 to 5 were cutting the trees in the backyard of their house. When the complainant and her brother questioned their acts, the first accused abused the complainant with filthy words and also pulled her hair and blouse. The second and third accused have attacked the complainant with hands. The accused Nos.1 and 2 have pulled the camera from the complainant's brother and also damaged it. The accused Nos.2 and 3 have also intimidated the complainant with a crowbar. The accused Nos.1 and 5 have pulled the complainant's blouse and also her Mangalsutra and they have also stripped of her saree. The complainant sustained injuries in that incident, admitted in the Erode Government Hospital and lodged a complaint before the Modakurichi Police Station in Crime No.183 of 2008, against the accused, for the offences punishable under Sections 147, 294(b), 323 and 506 (ii) I.P.C. The accused have also lodged a complaint before the respondent Police in Crime No.182 of 2008. On 12.08.2008, the respondent Police referred the complaint in Crime No.183 of 2008 as "Mistake of Fact". A Referred Charge Sheet No.16 of 2008, was also affixed in their house on 23.08.2008 and thereafter, the complainant had filed the present complaint.

4. Learned counsel appearing for the petitioner / Accused No.4 contended that the complaint of the complainant in Crime No.183 of 2008 has been duly enquired by the Police and referred as "Mistake of fact" and the same was also accepted by the Court. While so, entertaining the second complaint in the absence of a Protest Petition is not legally sustainable.

5. In support of his contention, the learned counsel appearing for the petitioner relied upon the decision of this Court in A.Krishna Rao Vs. L.S.Kumar reported in 1998 (1) CTC 329, wherein this Court has held that when the Magistrate has accepted the Referred Charge Sheet, the second complaint, without setting aside the order passed by the learned Magistrate in the referred charge sheet, is not maintainable.

6. The learned counsel appearing for the petitioner had also relied upon another decision of this Court reported in MANU/TN/0358/1969-in the case of Murugesan and Others Vs. Kothandam, wherein this Court has held that the learned Magistrate, without there being a final report filed by the Police under Section 173 Cr.P.C in the Police complaint, ought not to have taken cognizance on the second complaint / private complaint. Instead, the learned Magistrate should have directed the Police to expedite the investigation and file the report and after the filing of the final report, it is for the learned Magistrate to either accept or differ from the same and to take

further action.

7. Per contra, the learned counsel appearing for the respondent / complainant would submit that as against the final report dated 23.08.2008, a Protest Petition was filed before the concerned Magistrate on 27.08.2008. But the learned Magistrate, without passing any order on the Protest Petition, has directed the complainant to present this complaint. Accordingly, this complaint was filed on 20.01.2009 and the learned Magistrate, after taking the sworn statement of the complaint and the witnesses produced in support of the complaint, hold that a prima facie case is made out and had taken cognizance on the complaint.

8. Relying upon the decision of the Hon'ble Supreme Court reported in (2012) 1 SCC 130, in the case of Shivsankar Singh Vs. State of Bihar and Another, the learned counsel for the complainant contended that if complete facts could not be placed while deciding the first complaint or if the complainant came to know certain facts after the disposal of the first complaint, then the second complaint on the same set of facts is maintainable.

9. Heard the learned counsel appearing for the respective parties.

10. According to the complainant, the accused 1 and 2 are tenants and her husband had also issued a legal notice on 15.03.2008, cancelling the lease agreement with effect from 30.04.2008 and to hand over the possession of the property. But the accused have cut down the trees from their premises on 27.06.2008 and on information from one Kulanthaisamy, she along with her brother went to the place of occurrence, where, she was assaulted and in order to escape from the accused, she had also bite one of the accused. Admittedly, both sides have sustained injuries and a case and a counter case were also registered in Crime Nos.182 of 2008 and 183 of 2008, on the file of the respondent Police.

11. The Sub Inspector of Police, who conducted the investigation, in both these cases, referred the case of the complainant in Crime No.183 of 2008 as "Mistake of fact" and filed a final report in Crime No.182 of 2008, as against this complainant and her brother. The complainant refused to receive the Referred Charge Sheet Notice No.16 of 2008, dated 23.08.2008, which, was affixed on the complainant's house. The complainant is also aware of the Referred Charge Sheet Notice and also filed a Protest Petition before the learned Judicial Magistrate on 27.08.2008. But, no orders are passed on the Protest Petition. In the meantime, this private complaint was

filed by the complainant on 20.01.2009 and the sworn statement of the complainant was taken on 08.09.2009 and the witnesses viz., Ramachandran, Kulanthaisamy and Selvam, were examined on 17.09.2009. Thereafter, the learned Judicial Magistrate had taken the complaint on file in C.C.No.399 of 2009, as against the petitioner and three others.

12. The petitioner / accused No.4 is the son-in-law of the accused Nos.1 and 2. The accused No.2 is the brother of the complainant's husband Subramanian. They are having a civil dispute in O.S.No.648 of 2008, with regard to the right over the property in dispute. The second accused had also obtained an order of injunction. With regard to the decisions referred to by the learned counsel appearing for the petitioner that once the case was referred as "Mistake of fact" and accepted by the learned Magistrate, the learned Magistrate cannot entertain the second complaint on the very same set of facts without setting aside the earlier order, it will be relevant to refer to the decision of the Hon'ble Supreme Court reported in (1985) 2 SCC 537-(Bhagawant Singh Vs. Commissioner of Police and Another) wherein, it is has held as follows:-

"4. ...When the report forwarded by the officer-in charge of a police station to the Magistrate under sub-section (2)(i) of Section 173 comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things: (1) he may accept the report and take cognizance of the offence and issue process or (2) he may disagree with the report and drop the proceeding or (3) he may direct further investigation under sub-section (3) of Section 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses: (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under sub-section (3) of Section 156.

...

We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for

proceeding against some of the persons mentioned in the First Information Report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report."

13. In the decision referred to by the learned counsel appearing for the respondent / complainant in (2012) 1 SCC 130- in the case of Shivsankar Singh Vs. State of Bihar and Another), it has been held as follows:-

"18. Thus, it is evident that the law does not prohibit filing or entertaining of the second complaint even on the same facts, provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the Court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, the second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant or merit.

19. The protest petition can always be treated as a complaint and proceeded with in terms of Chapter XV CR.P.C. Therefore, in case there is no bar to entertain a second complaint on the same facts, in exceptional circumstances, the second protest petition can also similarly be entertained only under exceptional circumstances. In case the first protest petition has been filed without furnishing the full facts / particulars necessary to decide the case, and prior to its entertainment by the Court, a fresh protest petition is filed giving full details, we fail to understand as to why it should not be maintainable.

14. In view of the aforesaid decisions rendered by the Hon'ble Supreme Court, this Court is of the view that even though, the Police referred the case as "Mistake of fact", the Court can treat the Protest Petition as that of a complaint and can take cognizance of the offences and issue process.

15. In this case, according to the complainant, the complainant was aware of the referred charge sheet and has filed a Protest Petition, but, without passing any final order on the Protest Petition, the present complaint has been taken on file.

16. The learned Magistrate while closing the complaint based on the final report, is taking the decision with the available

materials placed before the Court by the Investigation Officer. When the complainant produce sufficient materials either by way of a protest petition or by a private complaint, if the Court satisfies that a prima facie case is made out as against the accused, the Court can take cognizance on the complaint. In this case, the case of the complainant registered in Crime No.183 of 2008 was referred as "Mistake of fact" by the respondent Police on 23.08.2008 and the Referred Charge Sheet was also served upon the complainant and was also affixed on the complainant's house on 23.08.2008. Even according to the complainant, the complainant had also filed a Protest Petition on 27.08.2008, before the filing of the present complaint. The learned Judicial Magistrate had examined the complainant on 08.09.2009 and the other witness on 17.09.2009 and after satisfying with their sworn statement hold that a prima facie case is made out and had issued the summons against the accused persons. But the perusal of the entire complaint as well as the sworn statement does not disclose any offences as against this petitioner / accused No.4.

17. The averments in the complaint and in the sworn statement are not sufficient to arrive at a conclusion that prima facie material is available as against this petitioner / A4, warranting issue of summons.

18. The petitioner/ accused No.4, who is the Son-in-law of the accused Nos.1 and 2 has been roped in with an omnibus allegation as if all the accused have assaulted. The averment in the complaint as against this petitioner is that he was present in the place of occurrence and was cutting the trees along with the other accused. In the complainant's statement also, it is stated that all the accused including this petitioner have questioned why they came there. There is no reference about this petitioner in the sworn statement of the other witness viz., Ramachandran, Kulanthaisamy and Selvam. Admittedly, the second accused is the brother of the complainant's husband and the accused Nos.1 and 2 are living in the house at the place of occurrence. Whether they are residing as a tenant or not is the subject matter of the suit before the District Munsif Court, Erode in O.S.No.648 of 2008. It is the case of the complainant also that her husband unilaterally cancelled the lease agreement by a legal notice dated 15.03.2008 and directed the accused Nos.1 and 2 to vacate the premise on or before 01.05.2008. In these circumstances, the presence of the petitioner in his father-in-law's house is not an offence per se. In the absence of any specific overt act as against this petitioner, it is not proper for the learned Magistrate to take cognizance on the complaint as against this petitioner also and issue the process. In the facts and circumstances of the case,

the complaint as against this petitioner is not legally sustainable and it is liable to be quashed.

19. In view of the foregoing discussions, this Court is inclined to quash the proceedings pending as against this petitioner / Accused No.4 in C.C.No.399 of 2009, on the file of the Judicial Magistrate III, Erode and the same is accordingly, quashed. In fine, this Criminal Original Petition stands allowed and consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

tsg

To

1.The Judicial Magistrate III, Erode.

2.The Chief Judicial Magistrate, Erode.

+lcc to Mr.M.Guruprasad, Advocate sr.21169

+lcc to Mr.V.Ragavachari, Advocate sr.20630

CrI.O.P.No.13769 of 2011

rv(co)
nr 03/05/2019