

THE HONOURABLE SRI JUSTICE T. VINOD KUMAR

WRIT PETITION NO.21235 OF 2019

ORDER:

The present Writ Petition is filed by the petitioner herein seeking a writ of mandamus to declare the action of the 4th respondent in including the name of the petitioner in the FIR, in Crime No.548 of 2019 without any complaint and *prima facie* evidence and consequently to declare the said action of the 4th respondent, as being illegal and violative of Articles 14 and 21 of the Constitution of India.

The case of the petitioner is that he is a contract employee in GHMC and became aware that the police are searching for the petitioner in connection with the case in Crime No.548 of 2019 on the file of the 4th respondent and on being contacted, the police authorities have suggested him to come to police station and give the recovery amount in a theft case, and they are going to remand the petitioner to judicial custody. The petitioner claims that he is not connected with the alleged offence and he is innocent and the police are trying to implicate him falsely in the case. It is also the case of the petitioner that if there is any case registered against the petitioner and if the authorities have any grievance, the authorities are required to follow the due process of law by issuing notice under Section 41-A of Criminal Procedure Code (for short 'the Cr.P.C.) to enable the petitioner to give proper

reply as laid down by the Hon'ble Supreme Court in the case of **Arnesh Kumar v. State of Bihar**¹. The petitioner also contends that as on today the police authorities have not issued any notice under Section 41-A Cr.P.C. and are merely calling upon the petitioner to the police station. In the mean time, the petitioner chose to surrender himself before the Magistrate concerned vide CrI.M.P. No.1020 of 2019 in Crime No.548 of 2019 of Uppal police station. The said surrender petition was dismissed by the III Metropolitan Magistrate at L.B. Nagar observing as under:

“On perusal of the record the name of the accused not tallied with the name of the Remand Case Diary. Even the particulars of the accused were also not mentioned in Remand Case Diary except the name as “KAPIL”.

Hence the surrender of the petitioner/accused is not accepted and dismissed”.

Heard the learned counsel for the petitioner and the learned Government Pleader for Home.

As seen from the material on record, a complainant was received by the 4th respondent-SHO on 22.06.2019 from one S. Shekar Reddy wherein he had stated that he visited Shilpa Ramam situated at Nagole for the opening ceremony and while leaving from the said place after the opening ceremony at about 5:20 p.m, he found that net cash of Rs.46,000/- was missing from his pocket and upon his efforts being proved

¹ (2014) 8 SCC 273

futile, he approached the 4th respondent and lodged a complaint for theft of cash from his pocket and requested for taking necessary action and also suspect that the two unknown persons moving around him may have committed the theft, whereupon the 4th respondent took up investigation and arrested one Md. Rizwan, who discharged the involvement of the petitioner in the said crime.

Learned Counsel for the petitioner submits that the petitioner whose name is given as Upadhye Kapil Lal is no way connected with the offence registered on the basis of the complaint from one Sunku Shekar Reddy as FIR in No.548 of 2019 dated 22.06.2019. It is his further case that the person named by one of the accused to the police is 'Kapil' and the petitioner is not the said person as his name is 'Upadhye Kapil Lal'.

Learned Government Pleader for Home, on written instructions, submitted that upon receipt of the said complaint, the police made a G.D. entry and took up investigation into the matter. During the course of investigation, on credible information, the 4th respondent arrested one Md. Rizwan @ Veer on 25.06.2019, who confessed that on 22.06.2019, he along with Kapil went to Uppal area to commit theft of any pick pocketing offence and reached Shilpa Ramam. On finding public gathering thereat on account of opening ceremony, went there, found one

person standing in public gathering and taking advantage committed theft of pick pocketing and fled away from there. On the basis the said statement made by Md. Rizwan @ Veer, the name of 'Kapil' is added as accused No.3 in the above case.

Learned Counsel for the petitioner strenuously urged that the police cannot arrest the petitioner as he is not the 'Kapil' as noted by the Magistrate when he chose to surrender himself before the Court. Further, he would also submit that police authorities cannot array him as accused on the basis of the confessional statement given by Md. Rizwan who is a co-accused in the complaint. He would also submit that if the police authorities have any grievance against the petitioner, they are required to act in accordance with law and issue notice to the petitioner under Section 41-A Cr.P.C. to enable the petitioner to give reply thereto and thereafter only necessary steps can be taken by the authorities concerned. Learned Counsel for the petitioner in support of his submission that based on the confessional statement of the co-accused, his name could not be included in the FIR, places reliance on the judgment of the Supreme Court in **Dipakbhai Jagdishchandra Patel v. State of Gujarat**². Placing reliance on the aforesaid judgment, the Counsel for the petitioner would submit that the confession which is made to a police

² 2019 CrI.L.J. 3763 (Criminal Appeal No.714 of 2019)

officer would be inadmissible, having regard to Section 25 of the Evidence Act and thus the confession statement of Md. Rizwan giving the name of the petitioner cannot form the basis for arraying him as A-3 in the above crime.

The said submission of the Learned Counsel for the petitioner is without merit for the reason that as the Hon'ble Supreme Court in the case relied upon by the Counsel for the petitioner, was dealing with a confessional statement recorded by the police authorities being used in a Court of law and in the course of trial. The Supreme Court was thus having regard to the provisions of the Evidence Act had held that the confession made to a police officer which is initiated under Section 24 of the Evidence Act would be inadmissible unless it fulfils the test laid down in *Pakala Narayana Swami v. Emperor* and accepted by the Apex Court, may be used as an admission under Section 21 of the Evidence Act. This Court is at a loss to understand how the said preposition of law laid down by the Supreme Court would advance the case of the petitioner inasmuch as the petitioner's name has been added as accused No.3 by the 4th respondent who is investigating into the complaint on the basis of a confession made by an accomplice of the petitioner. If the said argument of the petitioner is to be accepted, in no case the police authorities would be able to apprehend the accomplices in a crime based on a statement of co-accused. Thus, the reliance placed on the judgment of the Supreme Court and the

submission made by the Counsel for the petitioner in this regard is liable to be rejected.

With regard to the other submission that the petitioner is not the one who is named in the crime as accused No.3, there is no reason for the petitioner to apprehend any arrest by the Investigating Officer, if in real, the petitioner is not the said named 'Kapil'. During the course of hearing when enquired as to whether the petitioner knows Md. Rizwan @ Veer at all or not, the answer is in affirmative. However, it is stated that he is only his neighbour and the petitioner is not an accomplice. The 4th respondent could not have made the petitioner A-3 in the complaint if he is stranger to the incident occurred nor did the 4th respondent bore any grudge against the petitioner previously to implicate him falsely in the present crime. Therefore, the defence put forth by the petitioner on this count is also liable to be rejected.

With regard to the authorities not issuing any notice under Section 41-A Cr.P.C. indicating the involvement of the petitioner in any crime to enable him to reply thereto, the learned Government Pleader for Home submits that the petitioner had been avoiding service of notice under Section 41-A Cr.P.C. and has approached this Court by filing the present Writ Petition only to prevent the 4th respondent from investigating into the matter.

Considered from any angle, the innocent face sought to be put up by the petitioner with regard to his involvement in the crime registered cannot be accepted and it is not as if there is no *prima facie* case that is made out against the petitioner as one of the accused. Thus, having regard to the facts and circumstances of the case, the Writ Petition is liable to be dismissed.

Accordingly, the Writ Petition is dismissed. No order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

JUSTICE T. VINOD KUMAR

Date:15.11.2019
MRKR

