IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CRIMINAL PROCEDURE

W.P.(Crl.) No. 708/2006

Reserved on: 6.9.2007

Date of Decision: 21.9.2007

Bal Kishan @ Bal Kishan Sewak .....Petitioner
Through : Mr.O.P. Khadaria,Advocate

versus

The State of Delhi & Ors. ..... Respondents
Through : Ms.Mukta Gupta, Advocate

CORAM:
JUSTICE SHIV NARAYAN DHINGRA

JUDGMENT

By this writ petition, the petitioner has prayed for quashing of order of learned Metropolitan Magistrate passed on 25th February, 2006 which reads as under:

NIRMALA DEVI V. BAL KISHAN SEWAK
CC No. 9571/1
25.02.2006
Pr : Complainant in person
Ld. APP for the State

Reply has filed by Ld. APP for the State along with certified copy of order dated 17.9.2005 of Hon'ble High Court of Delhi.

I have gone through the complaint and the reply the complainant has alleged the accused Bal Kishan Sewak had raped her on various occasions and on various dates.

In the complaint she has narrated all the circumstances. In the reply it is stated that on the complaint of complainant some inquiries were made by DCP Public Public Grievances Cell and it was found that complainant herself was involved in a case. She has been defended by accused Bal Kishan Sewak as her advocate. During the inquiry, it was revealed that allegations are false. In view of complaint filed, it discloses commission of cognizable offences and requires through investigation. Therefore, SHO concerned is directed to register FIR and carry out the investigation. Put up on 29.4.2006 for status report.

Sd/-
MM, New Delhi/25.2.2006

2. A little background would be necessary to consider the issue raised in this writ petition. Complainant Smt. Nirmala Devi/respondent no. 2 had filed a writ petition before this Court seeking direction for registration of case on the basis of her complaint. During pendency of her Criminal Writ Petition No. 264/05, this Court had called for Status Report from the police. SHO of the area sent a Status Report that the complaint of Nirmala Devi was enquired into by ACP Public Grievances Cell and it was found that she was arrested in case FIR No. 277/1997. She engaged Mr. Bal Kishan Sewak, the present petitioner, as her counsel to defend her and used to visit his chamber and house. Bal Kishan Sewak was also President of a Political Party viz. United Citizen Party. Nirmala Devi lodged a complaint of her having been raped and sexually exploited by Bal Kishan Sewak. The complaint was enquired into by ACP Public Grievances Cell. It was opined by ACP Public Grievances Cell that the complaint was lodged by Mrs. Nirmala Devi at the behest of Madan Lal Azad, Joint Secretary of the party and it was a baseless complaint. In subsequent Status Report SHO reported that Nirmala Devi had made complaints about her sexual exploitation and rape by Bal Kishan Sewak, Advocate to various authorities and an enquiry into the complaint was conducted and was found that her allegations could not be substantiated.

3. After above report, the counsel for Nirmala Devi withdrew the writ petition no. 264/2005 on 19th September, 2005 with liberty to seek appropriate remedy available to him under law. After withdrawing this writ petition Nirmala Devi filed the criminal complaint before the learned Metropolitan Magistrate and aforesaid order was passed by learned Metropolitan Magistrate on the criminal complaint of Nirmala Devi.

4. The validity of order is challenged on the ground that no such order could have been passed for registration of FIR because the order resulted in double

jeopardy since the investigation has already been carried out into the allegations made by Nirmala Devi, once, on a complaint made to CAW Cell and also during the pendency of the writ petition when Status Report was called. The other ground for challenge is that the learned Metropolitan Magistrate was not competent to pass the impugned order since the offence complained of was triable exclusively by the Court of Sessions. The trial court after receipt of Status Report should have followed the procedure as contained in Section 202 Cr.P.C. and could not have passed the order of registration of FIR and investigation. It is also submitted that the respondent Nimala Devi had filed the complaint to extort/blackmail the petitioner and his family and withheld the true facts. She was a habitual offender and had made false and defamatory statement against the wife of the petitioner.

5. The counsel for the respondent/State took the objection that writ petition was not maintainable for challenging the order of learned Metropolitan Magistrate. The petitioner should have availed the remedy available to him under Cr.P.C. The other objection raised is that this Court cannot take cognizance of any pre-FIR investigation or enquiry done by the police on the complaint of the complainant. An enquiry done by the police on High Court calling Status Report, cannot be considered as investigation. The investigation can take place only if, an FIR is registered.

6. Reliance is placed by the petitioner on 2001 AD (SC) 273 Rosy & Anr. v. State of Kerala & Ors. wherein Supreme Court observed as under:

47. Hence what emerges from the above discussion is:-

I.

(a)Under Section 200 Magistrate has jurisdiction to take cognizance of an offence on the complaint after examining upon oath the complainant and the witnesses present:

(b)When the complaint is made in writing by a public servant acting or purporting to act in discharge of his official duties, the Magistrate need not examine the complainant and the witnesses;

(c)In such case Court may issue process or dismiss the complaint.

II.

(a)The Magistrate instead of following the procedure stated above may, if he thinks fit, postpone the issue of process and hold inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the person accused. Such inquiry can be held by him or by the police officer or by other person authorized by him.

(b)However, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions, the direction of investigation by the police officer is not permissible and he is required to hold inquiry by himself.

During that inquiry he may decide to examine the witnesses on oath. At that stage, proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be committed to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by complainant under Section 204(2) before issuance of the process.

(c)The irregularity or non-compliance thereof would not vitiate the further proceeding in all cases. A person complaining of such irregularity should raise objection at the earliest stage and he should not point out how prejudice is caused or is likely to be caused by not following the proviso. If he fails to raise such objection at the earliest stage, he is precluded from raising such objection later.

7. It is argued by the counsel that in view of above decision of Supreme Court, since the offence complained of was triable exclusively by the Court of Sessions, the learned Metropolitan Magistrate could not have given directions to police for investigation and he was supposed to hold enquiry himself. It is submitted that order dated 25.2.2006 of the learned Metropolitan Magistrate was, therefore, bad.

8. A perusal of the judgment relied upon by the petitioner would show that the Supreme Court was considering scope of Section 202 Cr.P.C. and had not considered the comparative scope of Section 156(3) and Chapter 15 of Cr.P.C. The Court had only considered the procedure to be adopted by a Metropolitan Magistrate where cognizance is taken by the Metropolitan Magistrate under Section 200 Cr.P.C. and Metropolitan Magistrate conducts an enquiry. The question - whether a Magistrate can order investigation under Section 156(3) Cr.P.C. in respect of an offence triable exclusively by the Court of Sessions - was specifically considered by Supreme Court in AIR 1976 SC 1672 Devarapalli Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors., wherein the specific question raised by Supreme Court is as under:

"Whether in view of Clause (a) of first proviso to Section 202(1) of Code of Cr.P.C. 1973, a magistrate, who receives a complaint disclosing offence exclusively triable by the Court of Sessions, is debarred from sending the same to the police for investigation under Section 156(3) of the Code is the short question that falls to be determined in this appeal by special leave".

The Supreme Court after framing above question in the very first paragraph of judgment dismissed the appeal answering the questions in negative i.e. Magistrate was not debarred from sending the complaint to the police for investigation under

Section 156(3) of the Code. In this case, the Supreme Court had compared the provisions of Section 156, Section 200 and Section 202 of the Code and after comparing the provisions codes Supreme Court observed as under:

14. This raises the incidental question: What is meant by "taking cognizance of an offence" by the Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in clauses (a), (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If, instead of proceeding under Chapter XV, he, has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence.

15. This position of law has been explained in several cases by this Court, the latest being Narmaljit Singh Hoon v. State of West Bengal (AIR 1972 SC 2639).

16. The position under the Code of 1898 with regard to the powers of a Magistrate having jurisdiction to send a complaint disclosing a cognizable offence – whether or not triable exclusively by the Court of Sessions – to the police for investigation under Section 153(3), remains unchanged under the Code of 1973. The distinction between a police investigation ordered under Section 156(3) and the one directed under Section 202, has also been maintained under the new Code: but a rider has been clamped by the 1st Proviso to Section 202(1) that if it appears to the Magistrate that an offence triable exclusively by the Court of Session has been committed, he shall not make any direction for investigation.

17. Section 156(3) occurs in Chapter XII, under the caption: "Information to the Police and their powers to investigate"; while Section 202 is in Chapter XV which bears the heading "Of complaints to Magistrate". The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Sec. 202 (1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under

Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). It may be noted further that an order made under sub-Section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence, has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding." Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him.
19. This being the position Section 202 (1), 1st Proviso was not attracted. Indeed, it is not necessary for the decision of this case to express any final opinion on the ambit and scope of the 1st Proviso to Section 202(1) of the Code of 1973. Suffice it to say, the stage at which Section 202 could become operative was never reached in this case. We have therefore, in keeping with the well established practice of the Court, decided only that much which was essential for the disposal of this appeal, and no more.

9. The above judgment of Supreme Court (delivered by Full Bench) was not overruled by the latter judgment of Division Bench of the Supreme Court cited by the petitioner, neither the earlier judgment was distinguished. In 2000(1) AD SC 273 Supreme Court only considered the scope of Chapter 15 of Cr.P.C. and had not considered the scope of Section 156(3) of Cr.P.C. I, therefore, consider that Magistrate has power to pass an order under Section 156(3) even if, the complaint discloses offence triable exclusively by the Sessions Court. The order of the learned Metropolitan Magistrate is, therefore, not without jurisdiction.

10. The question of double jeopardy does not arise in this case. Provisions of double jeopardy are contained in Section 300 Cr.P.C. and it is provided that a person once been tried by a competent Court for an offence and convicted or acquitted of such an offence shall not be liable to be tried again for the same offence. It is not the case of the petitioner that he was tried by a Court of competent jurisdiction for the offence reported in the complaint of the complainant and

convicted or acquitted. Calling of Status Report does not amount to trial of the petitioner. Therefore, the plea taken by the petitioner of double jeopardy also must fail.

11. While exercising powers under Section 482 Cr.P.C. the Court has not to consider the improbability of conviction at the end of trial neither the mala-fides of the complainant are relevant. Supreme Court in 2002 (1) AD (SC) 217 State of Karnataka v. M. Devendrappa & Anr. observed as under:

It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case 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 has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint if mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in Court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by itself be the basis for quashing the proceeding.

12. I consider that this writ petition is otherwise also not maintainable, it having been filed against order of Metropolitan Magistrate. Order of a Metropolitan Magistrate passed in exercise of jurisdiction under Section 156(3) Cr.P.C. cannot be challenged by way of writ petition. Remedy of Article 226 of the Constitution of India is not meant for challenging juridical orders.

13. I find no force in the writ petition. The writ petition is hereby dismissed.

Sd/-

SHIV NARAYAN DHINGRA,J.