

IN THE HIGH COURT OF DELHI AT NEW DELHI

Crl. M.C. No. 1322/2008

Reserved on : May 16th, 2008

Date of Decision: May 23, 2008

#Shri Puran Mal Gupta & Anr.

.... Petitioners

!

Through Mr. A.K. Singla, Sr. Advocate
with Mr. J.K. Sharma, Advocate

Versus

\$State & Anr.

.... Respondents

Through Mr. Sandeep Malik, APP for
State.
Mr. Vinod Diwakar, Advocate
with Mr. M. Madan, Advocate for
R-2/complainant

CORAM:

*** HON'BLE MR. JUSTICE MANMOHAN**

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|--|------|
| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the Reporter or not? | Yes. |
| 3. Whether the judgment should be reported in the digest? | Yes. |

J U D G M E N T

MANMOHAN, J :

1. The present petition has been filed under Section 482 Code of Criminal Procedure (hereinafter referred to as Cr. P.C.) for setting

aside the order dated 11th March, 2008 passed by Metropolitan Magistrate, New Delhi in as much as it directed registration of FIR against the Petitioners.

2. Briefly stated the material facts of this case are that on 22nd February, 2005 the Complainant alleges that he was restrained by his mother, two brothers and the Petitioners from entering his shop-cum-residence No. 3, Main Market, Lodhi Colony, New Delhi hereinafter referred to as the said premises. The Complainant further states that he reported the matter to the local police, but it took no action. The Complainant also alleges that on 28th February, 2005 he was not only dispossessed from the said premises, but his goods were also removed by the aforesaid relatives and the Petitioners. The Complainant's case is that despite reporting the matter to the police, the local police took no action as it was in hand in glove with the accused persons. It is also Complainant's case that the aforesaid relatives and Petitioners had also prepared forged and fabricated documents to grab the said premises.

3. From the records it seems that on the basis of the above Complaint the police conducted an enquiry, but did not register an FIR as according to them the Complainant could neither satisfactorily

explain the delay of two and a half years in lodging the complaint, nor could he produce the ownership documents of the goods & articles alleged to have been lying in the shop. The police also did not take any further action as they were of the view that the matter was already subjudice in a civil suit filed by the Complainant. The police records further indicate that the Complainant's brother and mother could not be traced for recording their statements.

4. Since the police did not register an FIR, the Complainant approached the Magistrate by filing a complaint under Section 156 (3) of Cr. P.C. in which he prayed for a direction to register an FIR against the accused persons (including the Petitioners) in accordance with law. The relevant paras of the complaint are reproduced hereinbelow for ready reference :-

“4. That on 22nd February, 2005, when the complainant alongwith his wife reached the said premises to conduct their routine business, the respondent no. 1 to 5 restrained them to enter in the premises by putting locks on front as well as the rear gate of the premises. Smelling some foul play the complainant dialed the police control room number and also reported the matter to local police. The local police did not take any appropriate action and reprimanded the complainant for making 100 number call and threatened him to implicate in the false case if he breaks the locks of the shop and put him behind the bar and bear the dire consequences.

5. That on the evening of 28th February 2005 the complainant was dispossessed from the said premises and the accused persons removed his goods. The complainant when visited the premises found his goods comprising of computer, laser printer, CVT, telephone set, double bed, almirahs, dressing table, office furniture, books and other valuable documents etc. were being taken away alongwith other articles lying on both floors of the premises in five trucks.

The complainant could see only two of them bearing registration numbers DL1L-1244 and DL1B-5008. On enquiring the complainant came to know that the trucks were parked in Prem Nagar, a nearby colony. The person who was looking after the goods loaded in the trucks warned and threatened the complainant and his wife to leave the place immediately otherwise he should be ready to bear the dire consequences. The complainant and his wife got scared/horrified and immediately left the spot and reported the matter to the Commissioner of Police and Hon'ble Chief Justice of Hon'ble High Court of Delhi through telegram since local police was working hand in glove with the accused persons.

6. That the all accused persons have forcibly restrained the complainant and his wife to enter into the premises and by the commission of this act all of them have committed the offence.

7. That all the accused persons entered into criminal conspiracy to usurp the share of the complainant in the said property and hence dispossessed him and restrained the complainant to enter into the said property. In order to fulfill their ulterior motives they also removed the belongings of the complainant out of his possession without his consent with dishonest intention.”

5. The Metropolitan Magistrate after perusing the status report filed by the police (wherein it has been concluded that the allegations made by the Complainant did not find support from any other statement / document gathered during the police inquiry) directed on 11th April, 2008 registration of FIR. The impugned order dated 11th April, 2008 is re-produced hereinbelow for ready reference :-

“11/4/08

Pr: Ld. Counsel for the complt with complt.

Heard. File Perused.

Having heard the argument, advanced by the counsel for the complt and perused the status report filed by the police officials I am of the opinion that Cognizable offence is made out against the accused. It discloses the cognizable offence as per law laid down by Hon'ble Supreme Court in Ramesh Kumari Vs. State (NCT of Delhi) & Ors. reported as 2006 (1) JCC 468 SC that on receipt of information disclosing cognizable offence registration of FIR is must. Therefore, concerned SHO is directed to register the FIR against the accused, compliance report be filed on or before the next date of hearing i.e. 30/07/08.

*Sd/-
MM/ND
11/4/08”*

6. Mr. A.K. Singla, learned Senior Counsel for the Petitioners submits that there was total abuse of process of power by the Complainant in invoking the process and forum by way of an

application under Section 156 (3) of Cr. P.C. According to him no such petition is maintainable in the absence of a complaint filed under Sections 190 of Cr. P.C. In support of this submission Mr. Singla relied upon ***Aleque Padamsee and Ors. Vs. Union of India and Ors. reported in 2007 (9) SCALE 275.*** In the said judgement it has been held that a person aggrieved by in-action of the police officials in registering an FIR, has to adopt the modalities contained in Section 190 read with Section 200 of Cr. P.C. Mr. Singla further submitted that Metropolitan Magistrate could not have disagreed with the report of the police without giving any reasons. He submitted that in the present case the Metropolitan Magistrate had ordered registration of an FIR in a rather mechanical manner. Mr. Singla also submitted that since the Magistrate had already taken cognizance in the matter, what was the need for him to seek a compliance report from the police. Mr. Singla relied upon the judgment of the Supreme Court in ***Devarapalli Lakshminarayana Reddy & Ors. Vs. V. Narayana Reddy & Anr. reported in (1976) 3 SCC 252, Daulat Radhu Bhatija Vs. State and Anr. reported in DRJ 1994 (29) 557, and S.K. Sinha, Chief Enforcement Officer Vs. M/s. Videocon International Ltd. & Ors. reported in 2008 (2) SCALE page 23,*** to emphasise the concept of cognizance and to show the difference between pre-cognizance and post-cognizance stage.

7. The Counsel for Complainant / Respondent No. 2 after referring to the Impugned Order submitted that the Magistrate has the power to order investigation at pre-cognizance stage and that too without examining the Complainant on oath. In support of his submission Mr. Diwakar, learned Counsel for Complainant/Respondent No. 2 relied upon ***“Mohd. Yousuf Vs. Afaq Jahan (Smt.) and Anr. reported in (2006) 1 SCC 627, Nirmaljit Singh Hoon Vs. The State of West Bengal and Anr. reported in (1973) 3 SCC 753, Narsingh Das Tapadia Vs. Goverdhan Das Partani and Anr. reported in (2000) 7 SCC 183, and Madhu Bala Vs. Suresh Kumar and Ors. reported in (1997) 8 SCC 476.***

8. Before I deal with the rival submissions I would like to refer to the relevant statutory provisions namely Sections 154, 156, 190, 200 & 202. The said Sections are reproduced hereinbelow for ready reference :-

“154. Information in cognizable cases – (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informants and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall

be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer Subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

156. Police officer's power to investigate cognizable cases. – *(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.*

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one, which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above mentioned.

190. Cognizance of offences by Magistrates – (1)

Subject to the provisions of this Chapter, any Magistrate of the first class, and any magistrate of second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

- (a) upon receiving a complaint of facts 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.

200. Examination of complainant –

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

- (a) If a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or*
- (b) If the Magistrate makes over the case for inquiry, or trial to another Magistrate under section 192:*

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after

examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

202. Postponement of issue of process – (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by, a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made, -

- (a) *Where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions or*
- (b) *Where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.*

(2) *In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:*

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) *If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this*

code on an officer in charge of a police station except the power to arrest without warrant.”

9. On a combined reading of the provisions it is abundantly clear that when a written complaint filed before a Magistrate discloses a cognizable offence, the Magistrate may take cognizance upon the same under Section 190 of Cr. P.C. and proceed with the same in accordance with the provisions of Chapter XV. The other option available to a Magistrate, in such a case, is to send the complaint to the appropriate police station under Section 156 (3) of Cr. P.C. for investigation. Once such a direction is given under Section 156 (3) of Cr. P.C., the police is required to investigate into the complaint and on completion of the same, submit a police report in accordance with Section 173 (2) of Cr. P.C., on which a Magistrate may or may not take cognizance under Section 190 of Cr. P.C. In fact as soon as order under Section 156 (3) of Cr. P.C. is passed, the complaint transforms itself into a report given in writing within a meaning of Section 154 of Cr. P.C. which is known as First Information Report.

10. From the facts stated hereinabove, it is apparent that Complainant's complaint discloses commission of alleged cognizable offences. It is settled law that whenever a complaint discloses

commission of a cognizable offence, it is mandatory for the police to register an FIR. In the present case the police did not register an FIR and consequently the Magistrate was well within its power to order its registration under Section 156 (3) of Cr. P.C.

11. On reading of complaint as well as Impugned Order, I am of the view that the Magistrate has, in the present case, not taken cognizance of the offences with a view to commence a trial. In ***Nirmaljit Singh Hoon Vs. The State of West Bengal and Anr., Mohd. Yousuf Vs. Afaq Jahan (Smt.) and Anr.*** and ***Narsingh Das Tapadia Vs. Goverdhan Das Partani and Anr.***, referred to hereinabove, the Apex Court has consistently held that where a Magistrate has applied his mind only for ordering an investigation under Section 156 (3) of Cr. P.C., he cannot be said to have taken cognizance of the offence. In fact before taking cognizance of an offence, Magistrate can order investigation under Section 156 (3) of Cr. P.C. It has further been held that if a Magistrate directs investigation by the police, he is not to examine the complainant on oath because he has not taken cognizance of any offence therein.

12. In ***Aleque Padamsee and Ors. Vs. Union of India and Ors.*** the Supreme Court has only reiterated the law laid down in ***All India***

Institute of Medical Sciences Employees' Union (Regd.) Vs. Union of India & Ors. reported in (1996) 11 SCC 582. In the said two cases the Apex Court has held that if the grievance of the Petitioner is that though offences punishable under IPC have been disclosed in a complaint but the police officials did not register an FIR, then a writ petition is not the remedy; but the aggrieved persons have to adopt the procedure mentioned in Section 190 read with Section 200 of Cr. P.C. On a reading of these two judgments, I am of the opinion that Complainant in the present case should have filed his complaint under Section 190 of Cr. P.C. But it is a settled law that nomenclature under which a petition is filed is not relevant. In ***Pepsi Foods Ltd. Vs. Special Judicial Magistrate reported in 1998 5 SCC 759*** it has been held, *"Nomenclature under which petition is filed is not quite relevant and that does not debar the court from exercising its jurisdiction which otherwise it possesses unless there is special procedure prescribed which procedure is mandatory"*.

13. Consequently, in my view, filing of the petition by Complainant in the present case under a wrong section would not debar the Magistrate from exercising power that is otherwise available to him under Cr. P.C. Since in the present case the complaint filed by Complainant discloses commission of cognizable offence, registration

of an FIR was mandatory and the Magistrate by directing its registration at pre-cognizance stage has rightly exercised the power vested in him. Since I have already held that a Magistrate has power to order registration of an FIR without examining Complainant on oath, the Magistrate has committed no illegality.

14. The present petition being devoid of merits is dismissed but with no order as to costs. However, it is clarified that the police shall carry out its investigation without being influenced by any observation in the present case and the Magistrate would also apply its mind independently at the time of taking a decision as to whether to take cognizance or not.

[MANMOHAN]
Judge.

May 23, 2008
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