

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.M.C. 167/2008 & CrI M A No. 657/2008

Reserved on: 14th May 2009

Decision on: 10th July 2009

PUNEET KUMAR

..... Petitioner

Through: Mr. Brijesh Kalappa with Mr. Gopal
Singh and Ms. Divya Nair, Advocate

versus

VANDANA & ORS

..... Respondents

Through: Mr. Pawan Bahl, APP for State.
Mr. Ashok Sethi with Mr. Rubinder
Ghumman, Mr. Hari Mohan and Ms. Anu
Mehta, Advocates for R-1.

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

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|----|---|-----|
| 1. | Whether Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in Digest? | Yes |

JUDGMENT

10.07.2009

S. Muralidhar, J.

1. The prayer in this petition under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) is for the quashing of the Complaint Case No. 1800/1 titled “*Vandana v. Puneet Kumar*” pending in the Court of the learned Metropolitan Magistrate (MM) and all proceedings consequent thereto including the summoning order dated 6th October 2007.

2. The petitioner is the *nandoi* of the complainant, i.e., the husband of the sister of the complainant's husband. He is a member of the Indian Administrative Service (IAS) in the Kerala cadre. He is presently posted as Agricultural Secretary in the Government of Kerala. The petitioner avers that the marriage of the petitioner's wife brother with the Respondent No.1 Vandana was solemnized in February 2002. A few months thereafter differences arose between the Respondent No.1 and her husband. Consequently, she left the matrimonial home and began living with her parents. On 10th April 2003, the Respondent No.1 got registered FIR No. 263 of 2003 at Police Station (P.S.) Rajouri Garden under Sections 498A/406/34 IPC against her husband, in-laws as well as the petitioner and his wife. That FIR in turn led to a string of series of further complaints by the Respondent No.1. A total of nine criminal cases have been filed by the Respondent No.1 against her husband, in-laws and the petitioner.

3. As far as the present case is concerned, a warrant was issued in FIR No. 263/2003 for search of the petitioner's house. Pursuant thereto on 1st September 2003 at about 5.50 p.m. the Respondent No.1 along with the Investigating Officer (IO) Smt. Kamlesh attached to P.S. Rajouri Garden along with two police constables went to the house of the petitioner at D-1, M.S. Apartments, Tilak Lane. The allegation by the Respondent No.1 is that during the search, which went on till about 9 pm, when she was alone in one of the bed rooms in the said premises, the petitioner entered the room. At that time the back of Respondent No.1 was towards the petitioner. According to Respondent No.1, the petitioner slapped her

buttock, abused her in a filthy language and caught hold of her shirt from the front. When in order to save herself Respondent No.1 moved back, her *chunni* was removed from her body and the petitioner prevented her from proceedings towards the door. Upon Respondent No.1 raising an alarm, IO Kamlesh came there and thereafter the petitioner moved away.

4. According to Respondent No.1, she along with IO Kamlesh went to the P.S. Tilak Marg and lodged a complaint at 9.30 p.m. on 1st September 2003 about the above incident. However, no action was taken by the police. Therefore on 9th October 2003 she filed the aforementioned complaint in the court of the learned MM. The said complaint was accompanied by an application under Section 156(3) CrPC for a direction to the police to register an FIR and investigate the case. By an order dated 14th October 2003 a direction was issued by the learned MM to the SHO, P.S. Tilak Marg to register the case in accordance with law and submit a status or final report by 17th December 2003. This led to the registration of FIR No. 466 of 2003 at P.S.Tilak Marg followed by an investigation.

5. On 16th December 2003, the SHO Tilak Marg submitted a cancellation report in the court of the learned MM stating that no cognizable offence under Sections 354/509/34 IPC was made out and that it would be of no use to further continue the investigation. The Respondent No.1 filed her objection to the cancellation report. On 9th July 2004 the learned MM passed an order listing the complaint on 4th

November 2004 for the evidence of the complainant. In the said order the learned MM observed that he had perused the file including the protest petition and the material on record “and in view of which, finding it expedient in the interest of justice complainant is being afforded opportunity to lead her evidence.....”

6. The complainant/Respondent No.1 examined herself as CW1, Vijay Anand as CW2 and SI Kamlesh as CW3. By the impugned order dated 6th October 2007, the learned MM concluded that a prima facie case was made out against the petitioner as far as the offences under Sections 341/354 and 509 IPC were concerned. However, it was held that no case under Section 506 IPC was made out. The petitioner was summoned accordingly. The present petition was filed on 11th January 2008. By an order dated 18th January 2008 while directing notice to issue to the Respondents, this Court directed that the further proceedings before the trial court shall remain stayed.

7. It is submitted by Mr. Brijesh Kalappa, learned counsel for the petitioner, that the criminal complaint by the Respondent No.1 against the petitioner was activated by malafides as it stemmed from the dispute she was having with her husband and in-laws. The petitioner was not in any way concerned with the personal life of the complainant. The complaint when read as a whole was inherently absurd, improbable and constituted an abuse of the process of law. That the complaint was full of falsehoods was evident from a comparison of the different versions given of the incident by the Respondent No.1 herself at different stages.

The version in the written complaint given by her to the police soon after the incident, differed from the one in the application filed by her in FIR No. 263/2003. Further, the version given by her in the complaint was different from the one given by her in the protest petition and in the pre-summoning evidence. It is submitted that no prudent person could ever imagine that an incident of indecent assault of the Respondent No.1 could happen and that too when she was visiting the premises of the petitioner armed with a search warrant and accompanied by a IO and two constables. Moreover, the search warrant was issued in a case where the petitioner was named as an accused. A number of people including the petitioner's wife and aged mother were present in the house when the alleged incident is supposed to have taken place. The *mala fides* of the Respondent No.1 was apparent from the fact that she did not call her parents and maternal grandfather who were at that time standing outside the house. The complaint itself was filed almost forty days after the incident. During these forty days, the Respondent No.1 was continuously in court filing various applications and did not even once mention about the present incident. She was vigorously opposing the bail application of her husband. It is stated that the Respondent No.1 and her family members have filed almost 20-25 applications under the Right to Information Act, 2005 (RTI Act) seeking information about the petitioner, the status of these criminal cases and the stage of investigation. It is submitted that the petitioner's wife and children have had to remain in Delhi to defend the criminal cases while he is presently posted in Kerala. Consequently, his matrimonial life has been badly disrupted. His entire family was undergoing severe mental agony on

account of the mala fides of the Respondent No.1. It is pointed that at the time of the search the Respondent No.1 wrongly claimed that some of the jewellery worn by the petitioner's wife belonged to Respondent No.1 and on that basis she got them removed. Thereafter when it was found that these were not her jewellery, Respondent No.1 attempted to return them. However, on some legal advice she decided to retain them. Even prior to the date of search, Respondent No.1 gave a hand written application on 30th August 2003 at the P.S. Tilak Marg. According to Respondent No.1 during the search that took place on 1st September 2003, the petitioner was talking on phone to someone in Mukerjee Nagar about the quilts and pillow covers and the Respondent No.1's husband Sumit Arora was having tea with two Constables. However in her application in the court of the learned MM made on the next day i.e. 2nd September 2003 for the release to her of the articles seized during the raid, the case made out by the Respondent No.1 was that it was Sumit Arora who was on the phone enquiring about the pillow covers. Her allegation against the IO Kamlesh was also inconsistent. It is submitted that the learned MM erred in ignoring the evidence of the SI Kamlesh who was very much present at the spot. SI Kamlesh did not support the version of the Respondent No.1. Mr. Kalappa places reliance on judgments in *State of Haryana v. Bhajan Lal AIR 1992 SC 604*, *Indian Oil Corporation v. NEPC India Ltd. (2006) 6 SCC 736* and *KLE Society v. Siddalingesh (2008) 4 SCC 541*.

8. Appearing on behalf of Respondent No.1, Mr. Ashok Sethi, learned counsel, submits that the so called investigation by the police of P.S. *Crl.M.C. No. 167/2008*

Tilak Marg into the incident was an eye-wash. In the first place, the complainant herself was never examined by the SHO of P.S. Tilak Marg who was entrusted with the enquiry. The two Constables who supposedly accompanied the search party gave identical statements which when compared showed that they were probably prepared by the SHO himself. The closure report mentioned the watchman of the M.S. Apartments as having been examined. The duty roster of the watchman showed that the said person never on duty at the time the alleged incident took place. It is accordingly submitted that the learned MM was justified in ignoring the cancellation report which was full of contradictions and in basing the impugned order on the pre-summoning evidence.

9. It is further submitted by Mr.Sethi that the issues raised by the petitioner involve disputed questions of fact which cannot be examined in a petition under Section 482 CrPC. It is submitted that the proceedings under Section 498A, 406 IPC were being pursued *bona fide* and the mere pendency of those proceedings cannot be used to impugn *mala fides* to Respondent No.1. It is submitted that the police were clearly acting in connivance with the petitioner and the Respondent No.1 was in fact a victim of the said conspiracy. It is apprehended that in view of the fact that the petitioner was an IAS Officer he was able to wield influence. It is submitted that malafides had to be proved and not merely alleged. Reliance was placed on the judgment in *State of Maharashtra v. Ishwar Piraji Kalpatri (1996) 1 SCC 542* and *State of Karnataka v.*

M. Devendrappa (2002) 3 SCC 89. In support of the proposition that the
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FIR need not be an encyclopedia and give in great detail all that happened, and that by analogy the complaint also need not give the complete details, a reference was made to the judgments in *State of U.P. v. Ballabh Das AIR 1985 SC 1384* and *Surjit Singh v. State of Punjab AIR 1992 SC 1789*.

10. The submissions of the learned counsel have been considered. The law concerning the scope of the powers of this Court under Section 482 CrPC is well settled and requires no reiteration. For the purposes of the present case, some of the illustrative instances, warranting interference by the High Court, as set out in the decision in *Bhajan Lal* may be noticed. These are (AIR, p.629):

“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.

3. Where the uncontroverted 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 F.I.R. 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.

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 Indian Oil Corporation v. NEPC, the law was again explained as under (SCC, p.748):

“(i) A complaint can be quashed where the allegations made in 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 the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.”

11. In FIR No. 263 of 2003 registered at P.S. Rajouri Garden, Respondent No.1 alleged that she had been subjected to cruelty by her in-laws. The allegation *inter alia* was that the in-laws had retained 160 *tolas* of gold given by the parents of Respondent No.1 to her husband at the time of marriage. An application was filed by the Respondent No.1

in the said FIR in the court of the learned MM on 30th August 2003 stating *inter alia* as under:

“1. That the applicant is the complainant in the above FIR and she has been trying since the date of registration of the FIR with the police and I.O. to get her entire Istridhan recovered which includes 160 tolas of gold jewellery and 17 kgs. of silver ware and silver utensils apart from 14 tolas of additional of gold jewellery with the accused Puneet Kumar and Meeta Kumar.

2. That since 10th April 2003 i.e. from the date of registration of FIR the complainant has time and again requesting the police concerned to do the recovery and the complainant has been opposing the anticipatory bail aforesaid accused persons and Hon’ble Sessions Courts has dismissed the anticipatory bail of all accused persons and they applied to the Hon’ble High Court of Delhi for their anticipatory bail and they got interim protection but during the continuancy (*sic*) of the interim protection time and again the complainant requested the I.O. to conduct the raid to recover the Istridhan but nothing moved and there was zero recovery.”

12. It was further contended in the said application that on 28th July 2003 the High Court had granted anticipatory bail to the other accused but declined the application of the husband Sumit Arora since the *stridhan* articles were yet to be recovered. The police were delaying the arrest of the husband. It was alleged that in para 4 of the application as under:

“On 30.8.2003 the complainant has come to know that her Istridhan is being hidden at premises No.D1 M.S. Apartment Tilak Lane, New Delhi and then immediately the complainant submitted a complainant to SHO/IO concerned and requested to conduct the raid at premises No.D1, M.S. Apartment, Tilak Lane and similar application also submitted to D.C.P. concerned but till

now police has done nothing and they are killing time that there is no police force and it will take time to arrange police force on one pretext or the other. The police is doing to help the accused persons to remove and hide the Istridhan hence this application for proper direction.

It is, therefore, prayed that in view of the above direction be issued to the concerned I.O./S.H.O. to conduct raid simultaneously at the premises of the accused Puneet Kumar, Meeta Kumar at D-1 M.S. Apartment, Tilak Lane, New Delhi and the residence of the accused T.R. Arora and Mrs. Vanita Arota at 1361, Dr. Mukherjee Nagar, so as no shifting of goods/Istridhan takes place and I.O. also be directed to find out the details of lockers be also searched and all articles of complainant be seized as the complainant is having apprehension and police is helping the accused persons.”

13. On the same day an application was filed by Sumit Arora that he may be allowed to surrender before the learned MM. It was mentioned that he and the other accused had joined the investigation and cooperated with police officials (at the CAW Cell) and had tried their level best to return such of the dowry articles which were with them, but no action was taken on such request.

14. In the application of the Respondent No.1 the learned MM ordered a warrant to be issued for the search of the petitioner's premises at D-1 M.S. Apartment, Tilak Lane, New Delhi. It appears that prior to proceeding to the petitioner's premises along with the police party on 1st September 2003, Respondent No.1 gave a letter to the SHO PS Tilak Lane in Hindi, the English Translation of which reads as under:

“Sir

I, Vandana complainant in FIR No. 263/03, today dated ***** 01/9 time around 5.50 PM to 9.30 PM today I went to my Nandoi, Mrs Meeta Kumar and Mr Puneet Kumar’s residence D-1, M.S. Apartments, Tilak Lane, New Delhi along with the copy of search warrant from the court and I.O. went to their residence, I along with I.O. Kamlesh went to the recovery. I have to go alone although I have requested repeatedly that my Nanaji who is an advocate and is 76 years old to be permitted along with me but Police did not give permission. During the search I found some gold jewellery and an old suit which they permitted me to pick and other gold jewellery and other articles which I wanted to pick was not permitted by Mr. Puneet Kumar and Mrs Meeta Kumar. During the search in one of the room in which Mr Puneet Kumar and I.O were along with me, then I.O. went out of the room for some time and I was alone then Puneet Kumar humiliated me using obscene words and actions and I cried aloud and called the police and I started crying and my legs were trembling and my health started deteriorating and then search was stopped and we came out. I am filing this report so that an appropriate action could be taken.

Thanking you

Vandana

(Complainant)

R/o 28/3A,

Rajouri Garden

New Delhi-110 027”

15. It requires to be noticed that the date 1st September 2003 appearing in the above letter appears to be an overwriting with the earlier date

written as 30th August 2003. The search took place in the premises of the petitioner up to 9 pm on 1st September 2003. As already noticed, Respondent No.1 was accompanied by two Constables as well as IO Kamlesh. The English translation of the seizure memo drawn up by IO Kamlesh in the presence of the witnesses and Respondent No.1 reads as under:

“Seizure Memo of Stridhan

In the presence of witnesses, the complainant in the above case got the house of sister-in-law Smt. Meeta Kumar D-1, M.S. Apartment, Tilak Lane searched in the presence of Smt. Meeta Kumar and Sh. Punit Kumar and Sumit Kumar Arora and on identification of articles claimed by the complainant were taken into police custody and possession as evidence through seizure memo and deposited in the Malkhana, which are as under:

1. One necklace yellow colour.
2. One chain yellow colour.
3. One ear Kante (Jarkan) 8 small jerkins one big jarkan.
4. One pair ear Kante(Jarkan) single jarkan.
5. One pair coca (Tops) yellow colour.
6. One old suit Mauve colour.
7. One C.D. in search of love.

Sd/- Sunit Arora Sd/- Meeta Arora

1.9.03, 9.00 PM

Sd/- Vandana
01.9.03

Time 9.00 P.M.

Sd/- Ct.Narender No. 1850 W CAW Cell

Attested

Sd/- Kamlesh, SI
CAW Cell/West
01.9.03

Note : Packet has been sealed with seal I.S.c.

Sd/ Kamlesh.SI
CAW Cell/West
1.9.03”

16. On 1st September 2003 itself at around 9.30 p.m., the complainant gave the following complaint in writing to the SHO, Tilak Lane in Hindi, the English translation of which reads:

“To

The SHO
Police Station
Tilak Lane
New Delhi

Sub: FIR No. 263/03, P.S. Rajouri Garden u/s 498A, 406, 34 IPC.

Sir

I, Vandana complainant in FIR No. 263/03, today dated ***** 01/9 time around 5.50 PM to 9.30 PM today I went to my Nandoi, Mrs Meeta Kumar and Mr Puneet Kumar's residence D-1, M.S. Apartments, Tilak Lane, New Delhi along with the copy of search warrant from the court and I.O. went to their residence, I along with I.O. Kamlesh went to the recovery. I have to go alone although I have requested repeatedly that my Nanaji who is an advocate and is 76 years old to be permitted along with me but Police did not give permission. During the search I found some gold jewellery and an old suit which they permitted me to pick and other gold jewellery and other articles which I wanted to pick was not permitted by Mr. Puneet Kumar and Mrs Meeta Kumar. During the search in one of the room in which Mr Puneet Kumar and I.O were along with me, then I.O. went out of the room for some time and I was alone then Puneet Kumar humiliated me using obscene words and actions and I cried aloud and called the police and I started crying and my legs were trembling and my health started deteriorating and then search was stopped and we came out. I am filing this report so that an appropriate action could be taken.

Thanking you

Vandana

(Complainant)
R/o 28/3A, Rajouri Garden
New Delhi-110 027”

17. On 2nd September 2003 an application was filed by the petitioner's wife in the Court of the learned MM seeking release of the said articles on *superdari* in which it was inter alia stated as under:

“1. That applicant is one of the co-accused in the above noted case and yesterday this Hon'ble Court was pleased to grant one day P.C. remand of accused above named when he himself surrendered before the court and during the course of P.C. remand applicant's house was searched for more than 3 hours by the Complainant in the presence of I.O. and 7 items in number were recovered but however except an item No.6 according to the seizure memo, all the articles belong to applicant. The details of which are as under:-

1. One necklace of yellow colour.
2. One chain of yellow colour.
3. One pair of ear rings.(Jerkin)
4. One pair of tops.
5. One C.D. “In search of love.”

2. That the above said articles which were seized by the seizure memo dated 1.09.03 belongs to the applicant and her family and does not belong to the Complainant as the same were not mentioned in the list of articles by the complainant to the police officials. Hence this application.”

18. In opposing this application, Respondent No.1 also filed on 2nd September 2003 a separate application stating that the *stridhan* articles recovered by the IO except the silvery jewellery be released to her on *superdari*. In this application it was inter alia stated as under:

“2. That when the search started, the complainant identified certain articles i.e. 6 pillow covers, two quilts, one computer set including printer, keyboard, Mouse Scanner etc. and one pair of gold ear tops and asked the I.O. to see and recover the same, but the accused Puneet Kumar and Meeta Kumar who were also present at that time at the premises along with accused Sumit Arora in custody, the accused persons did not allow the complainant to take custody of these articles. Even I.O. did not make efforts to recover these articles despite repeated requests of the complainant. The complainant also asked them to show receipt of the articles if the (*sic they*) claim the articles belonging to them but they failed to produce any receipt. The accused persons deliberately had got prepared silver jewellery of similar design and replaced with the original gold jewellery of the complainant. The complainant believing them as to be the genuine gold jewellery identified them for recovery. They were recovered apart from other articles. The said jewellery was examined in the morning and doubted about their being of gold. Hence the complainant accompanied the I.O. as per her instructions to goldsmith where it transpired that one pair of ear tops weighing 6 Gms. One pair of ear tops with zircon weighing 1.55 Gms. One pair of nose pins/Tops 300 Gms. were found to be of gold and rest jewellery was found to be gold plated silver jewellery.

3. That while the search was going on the accused Sumit Arora was constant in touch on telephone to some person and also with Tilak Raj Arora who used to say that not to allow the complainant to take quilts, 6 pillow covers as same are lying at Mukherjee Nagar house and accordingly accused Sumit Arora interfere in the recovery and quilts and pillow covers were not recovered. Whereas when Mukherjee Nagar house was searched out two quilts out of four were not recovered. Whereas when Mukherjee Nagar house was searched out two quilts out of four were recovered but no pillow cover was recovered.

4. That the accused persons have deliberately had removed the

articles and got hidden somewhere else and even admitted articles have not been received. The accused Sumit Arora has also not cooperated and/or disclosed the name and address of the Bank where they had kept their lockers and complainant is of the confirm belief that her remaining gold and silver jewellery has been kept by the accused persons.”

19. The petitioner is right in pointing out that the Respondent No.1 did not follow up her complaint about the incident of 1st September 2003 till she filed a complaint in the Court of the learned MM on 9th October 2003. From her opposition filed in the court of the learned MM on the very next day, i.e. 2nd September 2003 to the release of the goods to the wife of the petitioner, and while staking a claim to some of the articles seized on 1st September 2003, Respondent No.1 was totally silent about any act done by the petitioner during the search. This is indeed most unusual. No explanation is offered as to why on the very next day when she was before the court, Respondent No.1 made no statement implicating the petitioner.

20. Further in para 3 of the application filed by her before the learned MM, Respondent No.1 stated that the “accused Sumit Arora was in constant touch on telephone to some person and also with Tilak Raj Arora who used to say that not to allow the complainant to take quilts, 6 pillow covers as same are lying at Mukherjee Nagar house and accordingly accused Sumit Arora interfered in the recovery and quilts and pillow covers were not recovers.” This is in contrast with her version in the pre-summoning evidence where she states “that it was the

petitioner who was calling up on his mobile and giving instructions.”

21. On the incident itself, the complainant Respondent No.1 appears to be incrementally improving and changing her versions. In her complaint to the SHO P.S.Tilak Lane on 1st September 2003 before the learned MM she stated “during the search in one of the rooms in which Mr. Puneet Kumar and I.O. were along with me, then I.O. went out of the room for some time and I was alone then Puneet Kumar humiliated me using obscene words and actions and I cried aloud and called the police and I started crying and my legs were tumbling and my health started deteriorating and then search was stopped and we came out.” In her complaint filed before the learned MM more than forty-five days later on 9th October 2003, she purportedly to give a more detailed version of the incident in para 3 as under:

“3. That during the search when the complainant was in the second room on the left hand side from the back entrance of the residence of the accused the I.O. Smt. Kamlesh went to the first room in the same side the accused Puneet Kumar taking the benefit of the complainant being alone in the room entered the room from the complainant’s back when the complainant’s back was towards the door and slapped on the buttock of the complainant and the complainant immediately turned back and saw that it was the accused Puneet Kumar who had slapped the complainant on her buttock and the complainant got shocked by this behavior and the accused Puneet Kumar said “saali tu mere ghar par search warrant lekar aayee hai main tujhe kahin ka nahin chhodhoonga yahan se beizzat kar ke aaj chhodhoonga” and by saying so he started abusing in filthy languages and caught hold of the shirt of the complainant from the front of her neck and she immediately to prevent him from doing so and to protect her she moved back and due to some movement the accused could catch her chunni and by catching the chunni of the complainant the accused removed the chuuni from the person/body of the complainant and thus the complainant’s chunni which was the pardah of the chest/mammary glands, was removed by the accused and the accused abused the complainant in filthy languages intending to insult the modesty of the complainant and

he made certain gestures and actions by using filthy words which cannot be tolerated by a woman. Not only that when the complainant tried to proceed out of the room and shouted for the help of the I.O. who was in the other room the accused Puneet Kumar stood in front of the complainant and deliberately prevented the complainant to proceed towards the door as the complainant wanted to go out of the room. Then also the accused made certain obscene gesture by waving his hand and fist. By these actions of the accused the complainant shouted in loud voice and called for the I.O.(police) and started weeping and her legs started trembling and the complainant was shocked and intimidated (*sic intimidated*) and then the I.O. Smt. Kamlesh reached the room where the complainant was wrongfully restrained by the accused. Seeing the I.O. Puneet Kumar moved away and the I.O. inquired from the complainant the reason for her shouting and weeping and the complainant narrated the incident. The search was immediately stopped. It was about 9 P.M. The I.O. then prepared the seizure memo and signed the same. On coming out from there the I.O. and the complainant narrated the incident to her parents and grandfather who were waiting for a little bit away from there. The complainant along with her parents went to the Police Station Tilak Marg and lodged the complaint at 9.30 P.M. on 1st September'03 and the complainant has not been called for inquiry/investigation by the Police and no case has been registered till date.”

22. We have yet another version in her protest petition filed on 12th January 2004, where Respondent No.1 made further improvements to her version:

“In the meantime accused Puneet Kumar taking the benefit of the complainant being alone in the room entered the room from the complainant’s back when the complainant’s back was towards the door and slapped on the buttock of the complainant and the complainant immediately turned back and saw that it was the accused Puneet Kumar who had slapped the complainant on her buttock and the complainant got shocked by this behavior and the accused Puneet Kumar said “saali tu mere ghar par search warrant lekar aayee hai main tujhe kahin ka nahin chhodhoonga yahan se beizzat kar ke aaj choodhoonga” and by saying so he started abusing in filthy languages and tried to catch hold of the shirt of the complainant from the front of her neck and she immediately to prevent him from doing so and to protect her she moved back and due to such movement the accused could catch her chunni and by catching the chunni of the complainant the accused removed the chunni from the person/body of the complainant and thus the complainant’s chunni which was t he pardah of the chest/mammary glands, was removed by the accused and the

accused abused the complainant in filthy languages intending to insult the modesty of the complainant and he made certain gestures and actions by using filthy words which cannot be tolerated by a woman. Not only that when the complainant tried to proceed out of the room and shouted for the help of the I.O. who was in the other room the accused Puneet Kumar stood in front of the complainant and deliberately prevented the complainant to proceed towards the door as the complainant wanted to go out of the room. Then also the accused made certain obscene gesture by waiving his hand and fist. By these actions of the accused the complainant shouted in loud voice and called for the I.O.(police) and started weeping and her legs started trembling and the complainant was shocked and intimidated and then the I.O. Smt. Kamlesh reached the room where the complainant was wrongfully restrained by the accused. Seeing the I.O. Puneet Kumar moved away and the I.O. inquired from the complainant the reason for her shouting and weeping and the complainant narrated the incident. The search was immediately stopped. It was about 9 P.M. The I.O. then prepared the seizure memo and signed the same and from her mobile she called up the father of the complainant on his mobile phone and informed him that “your daughter is weeping and we have stopped the search and we are coming out”. Then the father of the complainant asked the I.O. as to why his daughter is weeping what has happened to her? Thereupon, the I.O. said that she will tell after coming there. And after few minutes she again called up the father of the complainant and asked him to reach the Police Station Tilak Marg and accordingly the I.O. along with the complainant reached the police station where the parents of the complainant and her grandfather had reached. The I.O. S.I. Smt. Kamlesh narrated the incident to the parents particularly the mother of the complainant. The mother of the complainant after hearing the incident from the I.O. and the complainant, requested the I.O. to take the action against Puneet Kumar but she kept on consoling her by saying that “bahar chalkar tumhare parents se baat karte hain aur phir action ka sochenge”. Before arrival of the complainant and the I.O. to the police station, the mother of the complainant got worried after hearing that the complainant was weeping, she went to the police station alongwith the father and grandfather of the complainant and requested the duty officer to phone at phone no. 23381515 (which is the phone number at the residence of the accused Puneet Kumar) and to find out that what had happened to her daughter who had gone on search alongwith S.I. Kamlesh and requested by saying “pata karo ki kya baat hui hai kyunki S.I. Kamleshka phone aaya hai ki meri ladki bahut ro rahi hai”. The duty officer phoned and got back the reply that the S.I. Kamlesh has gone back alongwith the complainant. Sarcastically, it was said on the phone from the other side, “Kamlesh apne rishtedaaron ke saath chali gayee hai”. The parents and grandfather of the complainant after hearing this came out of the police station and were waiting outside the police station when the

I.O. and the complainant came there on foot. The mother of the complainant asked as to what had happened, the complainant explained to her mother in the presence of her father and grandfather and the I.O. The mother of the complainant asked the I.O. “bahenji aapke hote hue oosne (Puneet Kumar) meri ladki ke saath yeh sab kaise kar diya”. Thereupon S.I. Kamlesh said to the mother of the complainant “maen toh sirf paanch saat minute ke liye phone sunnay kamre say baahar gayi thi aur oosi dauraan yeh ghatna ho gayi aur aapki ladki badi zor say cheekhi aur cheekh sunkar maen phauran ladki (complainant) kay pass chali gayi aur aapki ladki ne mujhe Puneet ke dwara kari gayi harkaton ke bare mein bataaya hai aur tabhi say yeh (complainant) roye ja rahi hai”. After hearing this the parents of the complainant requested her to take action against the accused Puneet Kumar. Thereupon the I.O. asked the father of the complainant to bring white paper from the police station and accordingly the father of the complainant went to the police station and met the reader Sh. Matinder Singh and requested for the paper who directed to take the paper from the duty officer and accordingly the father of the complainant took few sheets of paper from him and the I.O. asked the complaint (*sic complainant*) to write the complaint in breif (*sic brief*) and she provided carbon also and accordingly the complainant wrote the complaint by sitting in the car alongwith the parents and grandfather of the complainant. By the time it became 9.30 P.M. and the I.O. asked the complainant to get the complaint lodged at the police station and accordingly the complaint was submitted and the receipt was taken and the I.O. said “yeh nayi ghatna hai aur hamare thane kay area say baahar hui hai ispar action isi thane (P.S. Tilak Marg) ke log laenge”.

23. Then we have a statement of Respondent No.1 recorded at the pre-summoning stage before the learned MM where she stated:

“In the room I, IO, and Puneet Kumar and his mother were left behind and search was started and IO asked Puneet Kumar to open the locker of the almiraha. On this Puneet Kumar called his wife along with keys of the locker and after opening the locker, jewellery box was searched and complainant identified some of the jewellery which belong to her and remaining jewellery was kept again inside the locker. The complainant jewellery was seized by the IO. I also identified the quilts and pillow covers and I requested the IO to seize them also. On this Puneet Kumar objected that those did not belong to me and stated that her Pillow covers and quilts are at Mukherjee Nagar which is the house of in-laws. He further stated that he clarified this about the pillow covers and quilts by making phone calls to Sh. T.R. Arora. IO asked him to make a phone call and in the meanwhile I along with IO went to the third room adjoining, colour yellow in the site plan EXCW1/B and Mark(Y) and search was started. In the meanwhile

Puneet Kumar shouted from the first room and called the IO to attend the phone call and to clarify from T.R. Arora about the Pillow covers and quilts. IO went to the first accused entered to the room marked (Y), in which I was present. My back was towards the door from where accused entered and he slapped on my buttock and I immediately turned back and got shocked to see that it was Puneet Kumar who slapped me. The accused Puneet Kumar abused me that *“Saali Tu Mere Ghar Search Warrant Lay Ke Aae Hai Mai Tujhe Kahanhi Ka Nahee Chhodonga,” Mein Tujhe Beizzat Kar Kay Hee Aaj Chhodonga,”* by saying this accused started filthy language and abused me. The accused tried to caught hold of my shirt (kurta) from front side and I immediately moved back and he was able to hold my chunni and he removed it. I tried to move out of the room but accused tried to stop me by obstructing me and also shown certain gestures and actions by moving his hand and wrist. I shouted and called the IO started weeping. I started shaking and trembling. I again shouted for help to the IO who was inside the room and on seeing the IO accused moved away from me and IO started inquiry.”

24. In the further statement of Respondent No.1 recorded on 17th December 2007 she added:

“When I was weeping then IO Kamlesh reached in the room where I was wrongfully restrained by the accused Puneet. Seeing the IO Puneet Kumar moved away and the IO inquired from me that what was the reason of shouting and weeping and I narrated the whole incident. The search was immediately stopped. It was about 9 PM thereafter IO prepared the seizure memo and seized the same. My parents were standing outside the house as they were not allowed inside the house. Me and the IO came out and narrated the whole incident to my parents and grandfather (Nanaji). Even IO called up my father on his mobile at about 9.00 PM and told about the incident but we fully narrated the incident when we came out. Then I was accompanied by my parents and grandfather went to the Police Station Tilak Marg and lodged the complaint at about 9.30 PM.”

25. A plain reading of the four versions shows that Respondent No.1 has kept improving her version of what happened in the evening of 1st September 2003 at the petitioner’s residence. If these differing versions are viewed collectively, it would be unsafe to place reliance on any of the statements of Respondent No.1 to arrive at the truth. The mere fact

that the complaint is at the stage of pre-summoning stage and therefore not amenable to be tested by cross-examination, does not obviate a careful scrutiny of such evidence by a court called upon to form even a prima facie opinion. Having gone to the police with a complaint and thereafter to the court, on more than one occasion, it was imperative for the Respondent No.1 to come clean with the full facts even in the first instance. It is not possible to accept the submission that at the time of filing the complaint, Respondent No.1 was not expected to give the full details. In the facts of the present case, where the Respondent No.1 waited for over forty days to file a complaint before the learned MM there was no reason for her not to give the full particulars in the complaint in the first instance.

26. In the considered view of this Court, the learned MM was, in the facts and circumstances of the present case, not right in failing to consider the entire pre-summoning evidence for ascertaining if a prima facie case was made out by the complainant. The learned MM was duty bound to examine all the statements of all the witnesses at the pre-summoning stage and examine if they did not contradict each other. In this context, a reference may be made to the statement of IO Kamlesh before the learned MM as under:

“I was the investigating officer in case FIR No. 263/03 of Police Station Rajouri Garden (CAW Cell Kirti Nagar). The case was u/s 498A/406/34 IPC. Pursuant to this investigation and after taking the search warrants issued by the then Metropolitan Magistrate Ms. Sukhwinder Kaur. I searched the house on 1-9-2003. I have seen the search warrant which is lying on the judicial file and is marked as CW3/A. I have seen the Daily Diary page which is lying on the judicial file and is marked as CW3/B and C where at Item no. 14 and Item no. 27 my departure and arrival has been

shown. I was having the mobile phone number 9811977126 and I was using the same during the period 01-8-2003 to 01-10-2003. I was using the phone. During the raid some articles were recovered from the house of Puneet Kumar. During the search of the house the parents of the complainant and the maternal grandfather of the complainant were present but they were sitting out and the complainant was present with me inside the house during search. I was accompanied by two constables. The search was completed at about 9.30 PM on 01/9/2003 at the residence of Puneet Kumar at D-1-MS Apartments Tilak Lane New Delhi. I have seen the site plan which is EXCW1/B. This is the correct site plan with the statement of Ms. Vandana D/o Mr. Vijay Anand, R/o GH-10/80-B, Paschim Vihar, New Delhi.”

27. In a statement under Section 161 CrPC recorded by the police at the time of investigating FIR No. 466 of 2003, IO Kamlesh had categorically stated that the incident had not happened in the manner alleged by the complainant. She told the IO as under:

“During search, I, SI remained with the complainant all the time. I did not leave her even for a moment. When search was going on wife and mother of Puneet Kumar were also present in the house. Before me, no member of the family misbehaved in any manner whatsoever and nor any quarrel took place. When search memo was being prepared, that time claiming the ear tops which wife of Puneet Kumar was wearing as her tops, the complainant got those tops removed but even at that time also Puneet Kumar and his wife did not use any abusive filthy language. Before me, no one misbehaved and nor insulted. It is incorrect to say that Puneet Kumar used abusive filthy language and held from the neck and caught Chinni and nor the complainant called me by crying loudly. No such incident occurred before me, SI entire house was got searched and after search, signature of both the parties were obtained on the search memo. Thereafter, I, SI with staff in my vehicle went to CAW Cell and complainant with her parents and maternal grand father separately went for their house. The incident and time which the complainant is stating during which time I, SI remained with the complainant. Had any such incident occurred, the complainant should have first of all told to me, SI. I would have myself taken her to police station to get the report registered or bring the same to the notice of my senior officers or her family members would have at that very moment told to go to police station.”

28. Considering the fact that the learned MM had, at the time of

recording the above statement, the entire record before him, it was perhaps necessary for him to further put questions to this witness to clarify if she had made any of the statements attributed to her by the complainant in her pre-summoning evidence. That was unfortunately not done. This witness is supposed to be a disinterested eye-witness to the actual incident and therefore her evidence was critical for forming even a prima facie opinion on whether the petitioner should be summoned.

29. The criticism of the cancellation report of the police on the ground that the complainant was not examined by the police may not also be fully justified in the facts of the present case. While it is true that it would have been better if the complainant had been examined, it is significant that no questions were asked of the petitioner against whom the accusation was made. Further, this Court finds that the learned MM before whom said closure report was filed, did not even discuss its contents. The learned MM did not therefore, follow the course of action as laid down in *H.S. Bains v. The State AIR 1980 SC 1883*. There it was explained as under (AIR SC @ 1885):

“6. It is seen from the provisions to which we have referred in the preceding paragraphs that on receipt of a complaint a Magistrate has several courses open to him. He may take cognizance of the offence and proceed to record the statements of the complainant and the witnesses present under Section 200. Thereafter, if in his opinion there is no sufficient ground for proceeding he may dismiss the complaint under Section 203. If in his opinion there is sufficient ground for proceeding he may issue process under Section 204. However, if he thinks fit, he may postpone the issue of process and either enquire into the case himself or direct an investigation to be made by a Police Officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. On the

other hand, in the first instance, on receipt of a complaint, the Magistrate may, instead of taking cognizance of the offence, order an investigation under Section 156(3). The police will then investigate and submit a report under Section 173(1). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and straightaway issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The Police report under Section 173 will contain the facts discovered or unearthed by the police and the conclusions drawn by the police therefrom. The Magistrate is not bound by the conclusions drawn by the Police and he may decide to issue process even if the Police recommend that there is no sufficient ground for proceeding further. The Magistrate after receiving the Police report, may, without issuing process or dropping the proceeding decide to take cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statements upon oath of the complainant and the witnesses present under Section 200 Criminal Procedure Code and thereafter decide whether to dismiss the complaint or issue process. The mere fact that he had earlier ordered an investigation under Section 156(3) and received a report under Section 173 will not have the effect of total effacement of the complaint and therefore the Magistrate will not be barred from proceeding under Sections 200, 203 and 204. Thus, a Magistrate who on receipt of a complaint, orders an investigation under Section 156(3) and receives a police report under Section 173(1), may, thereafter, do one of three things : (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence under Section 190(1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report : (3) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.”

In this context the observation of the Supreme Court in para 28 of the decision in *Rupan Deol Bajaj v. K.P.S. Gill AIR 1996 SC 309* are also relevant.

30. A perusal of the record reveals that the learned MM did not pass any

order stating that he disagreed with the findings of the police in the cancellation report. He also did not discuss the contents of the protest petition. He simply stated that it was in the interests of justice that the complainant should be asked to lead her evidence. In the considered view of this Court this was not the proper course for the learned MM to follow.

31. Be that as it may, merely because the cancellation report was prepared without examining the complainant did not mean that the learned MM was not required to ascertain if a prima facie case as made out against the petitioner. The learned MM also appears not to have noticed the nature of the offences with which the petitioner was being charged. Section 354 IPC talks of assault or criminal force to woman with intent to outrage her modesty. The term “assault” has been defined in Section 351 IPC. The Explanation to the provision reads: “mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.” The punishment for an assault is only imprisonment for three months. This is both bailable and non-cognizable. No FIR thereof could have been directed to be registered for mere assault. Unless the Respondent No.1 made out a case under Section 354 IPC which was “assault or criminal force to woman with intent to outrage her modesty”, the offence was not cognizable. It appears that the improvement in the complaint was made only to somehow bring the case under Section 354 IPC. With IO Kamlesh not corroborating the version of the complainant the learned MM could not

have proceeded to hold that a prima facie case was made out for the offence under Section 354 IPC.

32. The summoning order significantly states that no offence under Section 506 IPC is made out and yet it proceeds on the footing that the offence under Section 509 IPC, which is the utterance word, gesture or act intended to insult the modesty of a woman, stands attracted. The learned MM himself states that the words uttered do not amount to criminal intimidation. The words attributed to the petitioner do not find mention in the first complaint made by the petitioner. This has also not been corroborated by the eye-witness IO Kamlesh. It was therefore unsafe for the learned MM to proceed on the footing that a prima facie case for the offence under Section 509 IPC stood attracted. The offence under Section 341 IPC is of wrongful restraint. It must be remembered that it was the complainant who entered the premises with the help of police and she was accompanied by IO Kamlesh and the two constables, none of whom has supported her version. Given the sequence of events and the description of what happened, it is highly improbable that the complainant was restrained by the petitioner. The offence under Section 341 IPC does not appear to be even prima facie made out.

33. There is merit in the contention that the complaint is vitiated by mala fides. It may be recalled that initially there was no role attributed to the petitioner by Respondent No.1 when she appeared before the learned MM on 2nd September 2003. The telephone records also do not bear out the allegation. The calls made by the father of the Respondent No.1 to

the police and the duration of those calls indicate that no attempt was made to give any complaint to the police of the incident soon after it happened. This is unnatural. If in fact the parents and the grandfather of the Respondent No.1 were waiting outside the house it is unusual for the complainant not to have called them on the mobile phone and narrated the incident. It would be unusual for Respondent No.1 not to go to the police station with her parents to lodge a complaint regarding this incident. The calls records, therefore, raise more questions, and cast considerable doubts on the veracity of the differing versions of the incident by Respondent No.1.

34. The counsel for the petitioner is also right in his submission that Sumit Arora had not got bail as on 1st September 2003. He was on interim bail as on 7th September 2003. The other co-accused had just got anticipatory bail. It was highly unlikely therefore that the petitioner would attempt to commit any further offence while on anticipatory bail. Significantly on the basis of the alleged incident in the present case, the complainant never filed an application for cancellation of the bail of the petitioner. Then there are the numerous other cases against the petitioner and the other family members at the instance of Respondent No.1, not accounting for the numerous queries made under the RTI. All these factors taken cumulatively support the contention of the petitioner that the complaint is vitiated by mala fides. Also, the petitioner has been able to establish that the complaint of Respondent No.1 before the learned MM when read as a whole is inherently absurd, improbable and constitutes an abuse of the process of law.

35. For the aforementioned reasons, Complaint Case No. 1800/1 titled “*Vandana v. Puneet Kumar*” in the Court of the learned MM and all proceedings consequent thereto including the summoning order dated 6th October 2007 are hereby quashed.

36. The petition stands allowed and disposed of accordingly.
Application stands disposed of.

37. A certified copy of this order be sent to the learned MM concerned forthwith together with trial court records.

S. MURALIDHAR, J.

JULY 10, 2009

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