

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.M.C. 273/2009

% Reserved on: December 17th, 2009
Date of Decision: December 21st, 2009

ARUN KATHURIA Petitioner
! Through Mr. Vipin Kumar Gupta, Adv. with
Mr. Birjesh Singh, Mr. Sichendra Kumar and
Mr. Deepak Gupta, Advocates
versus

\$ STATE & ORS. Respondent
^ Through Mr. Amit Sharma, APP for the State.
Insp. Anil Samota, EOW/Crime Branch
Mr. O.S. Sharma, Advocate for R-2&3

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether the 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

: **V.K. JAIN, J.**

1. This is a petition under Section 482 of the Code of Criminal Procedure, seeking setting aside of the order dated 29.9.2008, whereby the learned ACMM directed further investigation in respect of an Agreement-cum-Receipt dated 20.4.2000, alleged to have been signed by the complainant and also directed the Investigating Agency to ascertain, whether the complainant had prior knowledge

of property No.10/1, DLF Industrial Area, Nazafgarh Road, New Delhi, being mortgaged with Union Bank of India.

2. The respondents No.2 and 3 have been chargesheeted under Section 420/120B of IPC on the allegations that respondent No.2 on behalf of respondent No.3, who is his wife, entered into an Agreement dated 4.4.2000 with the petitioner – Arun Kathuria and his father-in-law late Shri O.P.Khanna, to sell to them, built up property No.10/1, DLF Industrial Area, Nazafgarh Road, New Delhi, and received the entire sale consideration of Rs.5 lakhs from them. They were also put into physical possession of the property. On 29.5.2000, a sale deed was also executed in favour of Shri O.P.Khanna in respect of half undivided portion of the aforesaid property. The sale deed in respect of remaining half portion of the property, however, was not executed, despite demand from the complainant. While executing the sale deed dated 29.5.2000, respondent No.3 specifically averred that the property was free from all encumbrances such as sale, mortgage etc.

3. Since, while seeking bail, the private respondents had claimed that the deal for sale of property in question was struck for a sum of Rs.51 lakhs and they relied upon a document purporting to be a receipt executed by the complainant and late Shri O.P. Khanna for the aforesaid amount, the Investigating Officer sent notice to

respondent No.2 requiring him to produce the receipt relied upon by him. He, however, claimed that the receipt had got misplaced. According to the petitioner, in a criminal complaint filed against respondent No.2 under Section 138 of Negotiable Instruments Act, the complainant sought comparison of the signature on the aforesaid receipt with the signature of the petitioner. That request was, however, declined by the trial court and the order of the trial court was upheld by the Court of Sessions.

4. A perusal of the sale deed executed by respondent – Smt. Neeru Seem in favour of late Shri O.P.Khanna, which is an admitted document, would show that she specifically assured the vendee that the abovementioned property under sale is free from all sorts of encumbrances, lien, liability, attachment, surety and security etc. and that there is no legal defect in the title of the vendor. Admittedly, property in question was lying mortgaged with Union Bank of India, when this sale deed was executed. Prima facie, by making the aforesaid misrepresentation in the sale deed, the vendor cheated the vendee by inducing him to part with the agreed sale consideration. If a misrepresentation was made to the vendee while executing the sale deed and the factum of the property being mortgaged with Union Bank of India was not in his knowledge as is claimed by the complainant, the amount of consideration would be immaterial. The offence of cheating would in that case be made out

irrespective of whether the property was agreed to be sold for Rs.5 lakhs as claimed by the complainant or for Rs.51 lakhs as claimed by the private respondents. Therefore, it is not necessary to go into the amount of consideration, agreed to be paid to the respondents. It can, however, not be disputed that if the complainant knew, at the time of transacting with the respondents, that property in question was already mortgaged with the bank, cheating may not be made out against the respondents, since in that case, correct factual position being in their knowledge, it cannot be said that they were induced to part with money to the respondents. But, for deciding as to whether mortgage was in the knowledge of the complainant or not, one need not necessarily go into the amount, of agreed sale consideration.

5. In any case, it is always open to the accused to confront the complainant with the receipt alleged to have been executed by him, during the course of his cross-examination and subject him to questioning on that aspect. He can also, while leading his defence, prove the disputed signature on this document, by any of the recognised modes of proving signature, including opinion of a handwriting expert as provided in Section 45 of Evidence Act or by examining a person acquainted with the signature of the complainant and/or his deceased father in law, as provided in Section 47 of the Act.

6. In *State of Orissa vs. Debendra Nath Padhi* 2005(1) SCC 568, a Three Judges Bench of the Hon'ble Supreme Court, inter alia, held that at the time of framing charge or taking cognizance the accused has no right to produce any material. The Hon'ble Supreme Court held that its earlier decision in *Satish Mehra case*, (1996) 9 SCC 766 holding that the trial court had powers to consider even materials which the accused may produce at the stage of Section 227 of the Code, had not been correctly decided. After considering a number of decisions on the issue before it, the Hon'ble Supreme Court, inter alia, observed as under:-

“All the decisions, when they hold that there can only be limited evaluation of materials and documents on record and sifting of evidence to prima facie find out whether sufficient ground exists or not for the purpose of proceeding further with the trial, have so held with reference to materials and documents produced by the prosecution and not the accused. The decisions proceed on the basis of settled legal position that the material as produced by the prosecution alone is to be considered and not the one produced by the accused. The latter aspect relating to the accused though has not been specifically stated, yet it is implicit in the decisions. It seems to have not been specifically so stated as it was taken to be well settled proposition.”

7. It was contended before the Hon'ble Supreme Court that the procedure which deprives the accused to seek discharge at the initial stage by filing unimpeachable and unassailable material of

sterling quality would be illegal and violative of Article 21 of the Constitution since that would result in the accused having to face the trial for long number of years despite the fact that he is liable to be discharged if granted an opportunity to produce the material and on perusal thereof by the court.

The contention was rejected by the Hon'ble Supreme Court noticing that if it is accepted there would a mini trial at the stage of framing of charge, which would defeat the object of the Code. The Hon'ble Court observed that it is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth and felt that acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. As regards some observations made in *Minakshi Bala vs. Sudhir Kumar* (1994) 4 SCC 142, the Hon'ble Court noted that in the above referred case the Supreme Court was considering the rare and exceptional cases where the High Court may consider unimpeachable evidence while exercising jurisdiction for quashing under section 482 of the Code of Criminal Procedure. In *State Anti-Corruption Bureau vs. P. Surya Prakashan* 1999 SCC(Cr.) 373, the Hon'ble Supreme Court held

that the only right the accused has at this stage is of being heard and nothing beyond that.

8. In fact, if the defence available to the accused and the documents being relied upon by him are considered by the trial court at this stage, that would be absolutely contrary to the scheme of trial envisaged in the Code of Criminal Procedure. The scheme designed by the Code for trial of warrant cases, instituted on a police report, prescribes charge or discharge, as the case may be, of the accused after considering the charge sheet submitted under section 173 of the Cr.PC, followed by framing of charge in case the accused is not discharged. The next stage prescribed in the Code is recording prosecution evidence, followed by statement of the accused under section 313 of the Cr.PC. It is only thereafter that the accused is called upon to enter upon his defence and produce his evidence as provided in Section 247 of the Code. To consider the defence at the stage of charge will, therefore, not be in consonance with the legislative mandate.

9. This is the defence of the private respondents that property in question was agreed to be sold by them to the complainant and his deceased father-in-law, for a consideration of Rs.51 lakhs and not for Rs.5.00 lakhs as claimed by them. For this purpose

they are relying upon a receipt purported to be executed by the complainant and his father-in-law late Shri O.P. Khanna. By entertaining the receipt being relied upon by the respondents and asking the Investigating Agency to carry out further investigation in respect of that document, the learned ACMM took into consideration the document forming basis of the defence taken by the respondents and thereby acted in complete disregard of the law laid by the Hon'ble Supreme Court in the case of *Debendra Nath Padhi(supra)*. Similarly, this is the defence of the respondents that the factum of property in question being mortgaged with the bank was very much in the knowledge of the complainant and his father-in-law, when they entered into transaction with them. This, of course, has been disputed by the complainant. By directing the investigating agency to ascertain whether the complainant had prior knowledge of property in question being mortgaged with Union Bank, the learned ACMM not only entertained their defence but went far ahead, by asking the investigating agency to verify the defence, thereby relieving the respondents of the onus otherwise placed on them to substantiate the defence being taken by them. The course of action adopted by the learned ACMM is contrary to the settled proposition of law enunciated by the Hon'ble Supreme court and therefore cannot be sustained.

10. It was also contended by the learned counsel for the petitioner that the learned ACMM had no power to direct further investigation after he had taken cognizance on the basis of the charge sheet submitted by the police. In support of his contention the learned counsel has relied upon the decision of the Hon'ble Supreme Court in *Randhir Singh Rana vs. The State* AIR 1997 SC 639. In the case before the Hon'ble Supreme Court, the learned Magistrate ordered further investigation after accused had made his appearance and the case was at the stage of considering whether charge should be framed or he should be discharged. The Hon'ble Supreme Court held that the Magistrate on his own cannot order further investigation. The learned counsel has also relied upon the decision of the Hon'ble Supreme Court in *Rajesh and Ors. Vs. SHO, Ist Town, Kadappa* 2001 (10) SCC 759, where the order passed by the High Court directing a fresh and further investigation was set aside by the Hon'ble Supreme Court holding that the High Court had overstepped its jurisdiction by directing further investigation. He has further referred to *Reeta Nag vs. State of West Bengal* 2009(4) LRC 11(SC), where the Hon'ble Supreme Court, inter alia, held as under:-

“19. What emerges from the above-mentioned decisions of this Court is that once a charge-sheet is filed under

Section 173(2) Cr.P.C. and either charge is framed or the accused are discharged, the Magistrate may, on the basis of a protest petition, take cognizance of the offence complained of or on the application made by the investigating authorities permit further investigation under Section 173(8). The Magistrate cannot suo moto direct a further investigation under Section 173(8) Cr.P.C. or direct a re-investigation into a case on account of the bar of Section 167(2) of the Code.

20. In the instant case, the investigating authorities did not apply for further investigation and it was only upon the application filed by the *de facto* complainant under Section 173(8), was a direction given by the learned Magistrate to re-investigate the matter. As we have already indicated above, such a course of action was beyond the jurisdictional competence of the Magistrate. Not only was the Magistrate wrong in directing a re-investigation on the application made by the *de facto* complainant, but he also exceeded his jurisdiction in entertaining the said application filed by the *de facto* complainant."

11. The learned counsel for the petitioner has also referred to *Kulbhushan Sharma vs. State* 2005(4) Recent Criminal Reports (Crl.)408(Delhi); *Pramod Kumar Saini and Anr. vs. State of Rajasthan and Anr.* 2007(5) Recent Criminal Reports (Crl.)530(AP); *Mitesh Kumar Ramesh Bhai Patel and Anr. vs. State of Gujarat and Anr.* 2006 Crl. L.J. 3198(Gujarat); *Dara Singh alias Rabindra Kumar Pal and Ors. Vs. Republic of India* 2002 Crl. L.J.

1754(Orissa); *Harmel Singh and Anr.vs.State of UT, Chandigarh and Anr.* 2007(1) RCR (CrI.) 789 (Pb&Hr); *Dr. P. Das Gupta vs. The State and Anr.* 2007(1) CC Cases (HC) 190(Delhi); and *B. Jagdish & anr. vs. State of A.P. & Anr.* 2009 (1) RCR (CrI.) 447. I, however, need not consider these decisions in view of the authoritative pronouncements of the Hon'ble Supreme Court being available on the subject.

12. As against this learned counsel for the private respondents has relied upon *Kishan Lal vs. Dharminder Bafna & Ors.* 2009 (3) JCC 2273, and the decision of a Full Bench of this Court in *Rajneesh Kumar Singhal vs. The State(NCT of Delhi)* 2001 Cr.R.446 (Del.). Learned APP for the State has also relied upon *Hasan Bhai & Vali Bhai Quareshi vs. State of Gujarat* AIR 2004 SC 2078. In the case of *Rajneesh Kumar Singhal (supra)*, further investigation was directed on an application filed by the complainant Mahesh Kumar brother of deceased Gita. The Full Bench of this Court noted that during the hearing of Writ Petition(CrI.) No.359/1996, which was registered as a writ petition on the basis of a letter sent by the brother of the deceased to the Hon'ble Chief Justice of this Court, the learned counsel for the accused persons had taken the stand that the grievance which the petitioner wanted to place before this Court could very well be brought by him to the notice of the learned MM who was fully

empowered to give appropriate direction to the police. The Division Bench hearing Writ Petition(Crl.) No.359/1996 concluded that the Magistrate before whom the trial was pending had the power to order further investigation even after charge was filed by the investigating agency. The Full Bench felt that the decision of the Division Bench could only be challenged by way of a Special Leave Petition and not in the proceedings before it. It would be pertinent to note here that in the case before the Full Bench, the learned Magistrate had passed an order entrusting investigation to the Deputy Commissioner of Police(Crime) in view of decision of the Division Bench in Writ Petition(Crl.) No.359/1996. The order passed by the learned Magistrate was challenged by the accused before a learned Single Judge of this Court, who referred the matter for consideration of a Full Bench since he felt that the decision of the Division Bench in Writ Petition(Crl.) No.359/1996 was contrary to the decision of the Hon'ble Supreme Court in the case of *Randhir Singh Rana (Supra)*. However, the Full Bench did examine the legal issue referred to it and took the view that the Magistrate, by asking the police to further investigate the matter, was in a sense directing it to exercise the jurisdiction which had been conferred on the police under section 173(8) of the Code of Criminal Procedure. The decision of the Hon'ble Supreme Court in the case of *Randhir*

Singh Rana (Supra) was distinguished on the ground that it did not deal with a situation where an application is made to the Magistrate for direction of further investigation of the matter, by the complaint or the police.

13. In the case of *Kishan Lal (supra)* after taking of evidence against accused No.1&2 a petition under section 482 of Cr.PC was filed by the complainant before the High Court pointing out lapses on the part of the investigating agency and seeking further investigation in the case. The High Court took the view that he was at liberty to file appropriate petition before the Metropolitan Magistrate, incorporating his grievances and the Magistrate was entitled to invoke power under section 173 (8) of Cr.PC to direct further investigation into the matter. Pursuant thereto the Magistrate passed an order for further investigation which was challenged by accused No.2 before the High Court. The petition filed by accused No.2 having been allowed, the complainant came by way of appeal before the Hon'ble Supreme Court. During the course of discussion, the Hon'ble Supreme Court observed that an order of further investigation can be made on various stages including the stage of trial, i.e., after taking cognizance of the offence. In taking this view, the Hon'ble Supreme Court relied upon its earlier decision in the case of *Mithabhai Pashabhai Patel & Ors. Vs. State of Gujarat {2009 (7) SCALE 559}* where the

Hon'ble Supreme Court had noted that the investigating agency in terms of Section 173(8) could pray before the court and can be granted permission to investigate further into the matter and there were certain situation where such a formal request may not be insisted upon. Thus, neither in the case of *Kishan Lal (supra)* nor in the case of *Rajneesh Kumar Singhal (supra)* further investigation was ordered by the Court on the request of the accused. By distinguishing the case of *Randhir Singh Rana vs. The State (supra)* on the ground that it did not deal with a situation where an application was made for further investigation by the complainant or the police, the Full Bench took the view that re-investigation could be ordered if such a request was made either by the police or by the complainant. In neither case re-investigation had been directed on the basis of a request made by the accused. Therefore, without going into the question as to whether re-investigation can be ordered on a request made by the complaint or not, I hold that re-investigation cannot be directed on a request made by the accused.

14. As far as the case of *Hasan Bhai & Vali Bhai Qureshi(supra)* is concerned, that is of no help to the respondents as in that case the Hon'ble Supreme Court while considering an appeal filed by the complainant took the view that hands of the investigating agency or the court in the matter of further investigation need

not be tied down on the ground that it may delay the investigation. The Hon'ble Supreme Court in that case held that even de hors any direction from the court, the police can conduct proper investigation under section 173(8) of the Cr.PC even if the court took cognizance of any offence on the strength of a police report earlier submitted to it . This judgment does not deal with re-investigation on the request of an accused and, therefore, does not apply to the facts and circumstances of this case.

15. For the reasons given in the preceding paragraphs the impugned order dated 23rd October, 2009 is hereby set aside. The learned ACMM is directed to proceed further with the trial of the case in accordance with the scheme prescribed by the Code of Criminal Procedure.

V.K. JAIN,J

DECEMBER 21, 2009
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