

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.M.C. 6525/2006

DR.RAJNI PALRIWALA Petitioner
Through Mr. Trideep Pais, Advocate.

versus

DR.D.MOHAN & ANR Respondents
Through Mr. V.K. Shukla, Advocate for R-1
Mr. Jaideep Malik, APP.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

- | | |
|--|-----|
| 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 |

ORDER
22.04.2009

1. The challenge in this petition under Section 482 CrPC is to an order dated 24th June 2006 passed by the learned Metropolitan Magistrate (MM) in CC No. 26981/1 of 2005 (renumbered as CC No. 1206/1 of 2005) titled ***Dr. D. Mohan v. Dr. Rajni Palriwala***. It also seeks the quashing of the said criminal complaint and all proceedings consequent thereto.

Background facts

2. The Respondent No.1/Complainant Dr. D. Mohan on 23rd September 2005 filed an application under Section 156 (3) CrPC against the petitioner in the court of the learned Additional Chief Metropolitan Magistrate praying for the registration of an FIR for the offences under Sections 420, 468 and 471 IPC.

It was stated in the said application that Smt. Kamala Mohan, the mother of the applicant (Respondent No.1 herein) was the owner of the property at G-4 Jungpura Extension, New Delhi-14 ('the property'). She had sold the first floor of the property to the petitioner for Rs.18 lakhs through a sale deed executed on 28th May 2003. According to Respondent No.1 while the vendor Smt. Kamala Mohan conveyed along with the proportionate freehold rights inland and the superstructure standing thereon all the right, title and interest in the first floor of the property including the front staircase, the right to use the back staircase was not the subject matter of the sale. It was alleged that in line 8 of page 8 of the draft sale deed finalised prior to the registration, the words "and remains with the vendor" followed the words "with the right to use the Back Staircase, which is not the subject matter of this sale and is marked in blue in the plan annexed." However, it appeared that the said words "and remains with the vendor" had been deleted from the original sale deed as registered and that this had been done by the petitioner, in connivance with two other persons with some ulterior motive for wrongful gain. According to the complainant after the registration process was complete, the agent of the petitioner informed them that while fluid had been applied to line 8 of page 8 on account of some typographical error. The petitioner had deposited the original sale deed with the State Bank of India (SBI), University Branch with whom she had mortgaged the said property and obtained a loan. The applicant had serious apprehension that the sale deed may have been tampered and wrote to the SBI asking if in fact white fluid had been applied to the original

sale deed. The SBI refused to divulge this information as it was against their confidentiality norms. Later when the petitioner approached Smt. Kamala Mohan for executing a sale deed in respect of the barsati portion in the property, the applicant insisted that the attested photocopy of the sale deed executed in respect of the first floor and deposited with the SBI be provided to them. When the photocopy of the said sale deed was provided by the petitioner, the applicant noticed that the aforementioned words “and remains with the vendor” were missing after line 8 in page 8 and only the initials of the petitioner were appended thereto. Noticing this discrepancy a complaint was filed by the applicant with the Economic Offences Wing (EOW) of the Delhi Police on 7th October 2003. According to the applicant the EOW wing refused to register a FIR on the ground that it was for the SBI to lodge a complaint which the latter was unwilling to do. It was then mentioned in the application that the applicant had filed W.P. (Crl.) No. 1542-43 of 2005 in this Court which came to be dismissed on 8th September 2005. Later on 16th September 2005 it was clarified in Crl.M.No. 9322 of 2005 that it would be open for the applicant to avail of other remedies available to him in law. Consequently on 23rd September 2005 the application under Section 156 (3) CrPC was filed by the applicant.

Proceedings before the MM

3. On the said application, the learned Metropolitan Magistrate (MM) asked the police to file a report. Thereafter the proceedings on 18th October 2005

before the learned MM reads as under:

“18.10.2005

Pr. Complainant in person with counsel.

Insp. Bakshi from Economic Offences Wing,

Crime Branch is present.

He has filed the report. It is stated by him that no cognizable offence was made out. Hence complaint of the Complainant was filed.

Argument on the application u/S 156(3) CrPC heard.

Put up for orders on 4.00 p.m.

Sd/- 18.10.05
MM/ND”

4. At 4 p.m. on the same date, the following order was passed:

“18.10.2005

4 p.m.

Pr. Proxy counsel for Complainant.

Put up for clarification on 19.11.05.

Sd/- 18.10.05
MM/ND

At this stage the counsel states that he does not press his application u/s 156(3) CrPC and he would to lead evidence in Court. Application dismissed as withdrawn. Hence, there is no need of orders. Put up for C.E. on 19.11.05.”

5. On 13th February 2006, the applicant examined himself as CW1 and official from the SBI, Delhi University Branch as CW2, the Record in-charge in the

Sub Registrar's office as CW3. The copy of the deposition as recorded by the learned MM shows that is titled "Statement of Complainant u/s Section 200 CrPC." By an order dated 24th June 2006, the learned MM summoned the petitioners under Sections 463 and 465 IPC on the basis of the pre-summoning evidence. Aggrieved by the summoning order, the petitioner has filed the present petition.

Submissions of counsel

6. Mr. Trideep Pais, learned counsel for the petitioner points out that on the complaint dated 7th October 2003 filed by the respondent with the EOW of the police, a detailed inquiry was conducted. A report dated 21st July 2004 prepared by Inspector H.M. Baxi concluded that the allegations made in the complaint could not be substantiated. It is submitted that in response to the orders of the learned MM this report had been submitted by Mr. Baxi to the learned MM on 18th October 2005. However, without discussing the said report or even disagreeing with it, the learned MM not only permitted the applicant to withdraw the application under Section 156 (3) CrPC but further directed the complainant's evidence to be recorded when in fact there was no complaint on file. It was submitted that the learned MM having called for a report from the police, was bound to consider the said report and form an opinion, whether notwithstanding the report, the case should be proceeded with. Without doing so, the learned MM in the instant case proceeded to record the evidence of the complainant. Relying on the judgments in

Abhinandan Jha v. Dinesh Mishra AIR 1968 SC 117, H.S. Bains v. U.T. of Chandigarh (1980) 4 SCC 631 and Hemant Dhasmana v. CBI (2001) 7 SCC 536, it is submitted that this course followed by the learned MM was impermissible in law.

7. Without prejudice to the above submissions, it is submitted that respondent No.1 herein who was the complainant is actually the son of the vendor and in support of his locus standi he produced a General Power of Attorney (GPA) executed by the vendor in his favour. It is contended that the said GPA does not fact authorize him to file any criminal complaint. Likewise, it is contended that the learned MM at a subsequent stage wrongly permitted Respondent No.2 Ritu Mohan, the wife of the Respondent No.1 to substitute Respondent No.2 as a complainant. The GPA issued in favour of Respondent No.2 also did not authorise her to file any complaint. The complaint at her instance was therefore not maintainable.

8. It is then pointed out the Respondents have wilfully suppressed the fact that that an agreement to sell was entered into between the petitioner and the vendor Smt.Kamala Mohan in respect of the second floor of the premises in the said property and even some earnest money was paid by the petitioner to the vendor. However, the sale deed was not executed and in respect thereof, the petitioner has filed a suit for specific performance which is pending in the court of the learned Civil Judge. It is submitted that the present complaint was

filed only with a view to pressurize the petitioner into not pressing for the execution of a sale deed in respect of the second floor premises.

9. It is contended on behalf of the petitioner finally that even on merits not even a prima facie case can be said to be made out against the petitioner for the offences under Sections 463 and 465 IPC. It is pointed out that the last line of page 8 is consistent with what is stated in the last line of page 9 of the sale deed which makes it clear that “the rear staircase of the property shall be for common use and is not part of the present sale” and therefore even assuming some line was deleted from page 8, no loss or injury was caused to the vendor as a result thereof.

10. On behalf of the respondent, Mr.V.K.Shukla, learned counsel submits that in view of the judgment of the Allahabad High Court in ***Sukhwasi v. State of Uttar Pradesh [2007 (59) ACC 739]***, a petition under Section 156(3) CrPC could well be considered to be a complaint and proceeded with on that basis. Reliance is placed upon the judgment of the Supreme Court in ***Tapinder Singh v. State of Punjab AIR 1970 SC 1566*** to contend that no enquiry or investigation can be undertaken by the police without the prior registration of an FIR. Admittedly in the present case no such FIR was registered and the report submitted by the Inspector Baxi of the EOW to the learned MM was not pursuant to the registration of an FIR. Therefore the said report was not a report of investigation in terms of Section 173 (1) CrPC. It was in the nature

of a report of preliminary enquiry or a status report only to enable the learned MM to form a prima facie view whether any cognizable offence is made out. It was submitted that the report dated 21st July 2004 submitted by Mr. Baxi was not a cancellation report. Relying upon the judgment in ***Madhu Bala v. Suresh Kumar (1997) 8 SCC 476***, it was submitted that the application under Section 156(3) CrPC could be treated as a complaint. If the learned MM differed with the view expressed by the police in the status report, he could proceed to record the complainant's evidence. It is further contended that under Section 460 CrPC, the irregularity in the magistrate taking cognizance under Section 190(1)(a) or (b) is a curable one and the criminal proceedings do not get vitiated on that score. On merits it is submitted that the contentions advanced by the petitioner raised triable issues which could not be examined in a petition under Section 482 CrPC.

The nature of the report submitted by the police

11. The first issue to be considered is whether the report dated 21st July 2004 submitted by the police to the learned. The admitted position is that a report was indeed called for from the police by the learned MM. Such a direction could have been issued only in terms of Section 156(3) CrPC. It is not possible to accept the submission of the learned counsel for the respondent that the learned MM could have called for a "status report" which is even prior to calling for a report of investigation pursuant to the registration of an FIR. Although the Supreme Court has in ***P. Sirajuddin v. State of Madras AIR***

1970 SC 520 held that it is permissible for the police to conduct a preliminary enquiry even before the registration of an FIR, those observations were not in the context of the order passed by the a Magistrate while exercising powers under Section 156 (3) CrPC. That section makes it clear that the only option available thereunder to the Magistrate is to order “an investigation.” There is nothing in Section 156 (3) CrPC to suggest that a Magistrate can ask for a ‘status report’ from the police which is not meant to be a report of investigation in terms of Section 173 (1) CrPC. Even if the Magistrate does not expressly pass an order to that effect, when pursuant to an application under Section 156 (3) CrPC he asks for a report from the police, the police has to register an FIR and submit a report of investigation. Even if no FIR is formally registered but a detailed investigation is carried out and a report submitted, the learned Magistrate is bound to apply his mind to such report and discuss its contents before proceeding to the next stage.

12. In ***Madhu Bala v. Suresh Kumar***, the Supreme Court in para 10 observed as under:

“From the foregoing discussion it is evident that whenever a Magistrate directs an investigation on a complaint the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the above Rules. It, therefore, passes our comprehension as to how the direction of a Magistrate asking, the police to 'register a case' makes an order of investigation under Section 156(3) legally unsustainable. **Indeed, even if a Magistrate does not pass a**

direction to register a case, still in view of the provisions of Section 156(1) of the Code which empowers the Police to Investigate into a cognizable 'case' and the Rules framed under the Indian Police Act, 1861 it (the police) is duty bound to formally register a case and then investigate into the same. The provisions of the Code, therefore, does not in any way stand in the way of a Magistrate to direct the police to register a case at the police station and then investigate into the same. In our opinion when an order for investigation under Section 156(3) of the Code is to be made the proper direction to the Police would be 'to register a case at the police station treating the complaint as the First Information Report and investigate into the same.' (emphasis supplied)

13. In the instant case it was open to the learned MM not to have entertained the application under Section 156 (3) CrPC if it was felt that the nature of the allegations did not require investigation by the police. However, the learned MM decided to call for a report from the police and such a direction required the police to register a FIR and thereafter submit a report of investigation. Even if formally the learned MM did not ask the police to register the case prior to taking up the investigation, in view of the clear enunciation in ***Madhu Bala***, the police was bound to do so. However, the failure by the police to register an FIR would not wipe away the detailed investigation that it had already undertaken in the case.

14. A perusal of the report dated 21st July 2004 of the police submitted to the learned MM reveals that it was based on the detailed enquiry made by it into

Crl.MC. No. 6525/06 ***Page 10 of 18***

the complainant dated 7th October 2003 of the Respondent No.1. This included examining the documents in question as well as witnesses. The report concluded that the complaint was not substantiated inter alia on account of the complainant/applicant not being consistent on the exact words of the allegedly deleted portion of the sale deed. Moreover the original sale deed in the Sub Registrar's office was examined. The Sub Registrar informed the police that "there is no application of fluid on page 8 at the last line." Further, the second copy deposited with the Sub Registrar "shows that the fluid was not applied." The said report of the police cannot be said to be a mere 'status report' consequent upon a preliminary investigation and nothing more.

15. The fact that the investigation report dated 21st July 2004 of the EOW of the Police was not pursuant to the registration of an FIR consequent upon the order of the learned MM in the application of the Respondent No.1 under Section 156 (3) CrPC will not make a difference to the nature of the report. The fact is that this was the report submitted by the police pursuant to the order of the learned MM. Again conducting a detailed enquiry would be a futile exercise since the previous one preceding the said report was a detailed one. This Court holds that in the facts of the present case, the report dated 21st July 2004 submitted by the EOW of the Police to the learned MM should be treated as a cancellation report filed by the police in terms of Section 173 (1) CrPC pursuant to the investigation carried by it on the direction issued by the learned MM in the application under Section 156(3) CrPC.

The courses available to the Magistrate

16. The next issue concerns the legality of what the learned MM did on receiving the said report from the police. As already noticed he permitted Respondent No.1 to withdraw the application under Section 156 (3) CrPC and proceeded to set the case down for the recording of the complainant's evidence. The question is whether it was permissible for the learned MM to do so.

17. In the considered view of this Court, having called for a report of investigation from the police in an application under Section 156 (3) CrPC, it was not open to the learned MM to permit withdrawal of such application by the respondent thereafter. Such a course again was impermissible in law. What the learned MM should have and could have done is explained by the Supreme Court in *H.S. Bains v. U.T. of Chandigarh* (supra). There the Supreme Court explained the courses open to the learned MM to follow upon receipt of such report by the police as under (SCC @ p. 634-35):

“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 conclusion 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 the above decision in *H.S. Bains*, the Supreme Court noticed its earlier judgment in *Abhinandan Jha v. Dinesh Mishra* (supra).

18. More recently in *Hemant Dhasmana v. CBI* (supra) the Supreme Court revisited the law on the topic and in para 15, it was observed as under (SCC @ p. 542-43):

“15. When the report is filed under the Sub-section the magistrate (in this case the Special Judge) has to deal with it by bestowing his judicial consideration. If the report is to the effect that the allegations in the original complaint were found true in the investigation, or that some other accused and/or some other offence were also detected, the Court has to decide whether

cognizance of the offences should be taken or not on the strength of that report. We do not think that it is necessary for us to vex our mind, in this case, regarding that aspect when the report points to the offences committed by some persons. But when the report is against the allegations contained in the complaint and concluded that no offence has been committed by any person it is open to the Court to accept the report after hearing the complainant at whose behest the investigation had commenced. If the Court feels, on a perusal of such a report that the alleged offences have in fact been committed by some persons the Court has the power to ignore the contract conclusions made by the investigating officer in the final report. Then it is open to the Court to independently apply its mind to the facts emerging there from and can even take cognizance of the offences which appear to him to have been committed, in exercise of his power under Section 190(1)(b) of the Code. The third option is the one adumbrated in Section 173(8) of the Code.”

19. A reference was made to the judgment of the three-Judge Bench in ***Bhagwant Singh v. Commissioner of Police (1985) 2 SCC 537*** where again the three options open to the court on a receipt of the report under Section 173(2) CrPC were discussed. Those three options read as under (SCC @ p. 543):

“(1) The court may accept the report and drop the proceedings; or

(2) the court may disagree with the report and take cognizance of the offence and issue process if it takes the

view that there is sufficient ground for proceeding further; or
(3) the court may direct further investigation to be made by the police.”

20. In the instant case, the learned MM was bound in law to apply his mind to report filed by the police, and to opt for any one of the three courses of action available to him in terms of the judgment of the Supreme Court in ***H.S. Bains*** and ***Hemant Dhasmana***. However, the learned MM did not do so. He permitted the complainant to withdraw the application under Section 156 (3) CrPC and straightway proceeded to list the case for the complainant’s evidence. This course was erroneous. The learned MM was bound to discuss the police report and come to a definite conclusion that it was or was not acceptable and follow the course explained in the above decisions.

Can the application under Section 156 (3) CrPC be treated as a complaint?

21. The contention on behalf of the petitioner that once the application under Section 156(3) CrPC stood withdrawn by the respondent No.1, no complaint remained before the learned MM does not appear to be the correct position in law. The Full Bench of the Allahabad High Court in ***Sukhwasi v. State of Uttar Pradesh*** (supra) referred to the judgment of the Supreme Court in ***Madhu Bala v. Suresh Kumar*** (supra), and observed that “this is wrong notion that (when) an application has been moved under Section 156(3) CrPC, the only order (that) can be passed is for registration (of an FIR) in the matter.

The Magistrate has got discretion under Section 190 CrPC to take the cognizance directly or to pass an order that the police to investigate and then take cognizance on the submission of the report under Section 173 CrPC.” It was further observed that “it is not possible to hold that where an application is moved before the court only for exercise of power under Section 156(3) CrPC it will remain an application only and would not be in the nature of a complaint..... such an application will not cease to be a complaint nor can the Magistrate refuse to treat it as a complaint even there would be no prayer seeking trial of the known or unknown accused.”

22. In the instant case, therefore, the application under Section 156(3) CrPC could have been treated as a complaint by the learned MM once the learned MM found the police report to be not acceptable for valid reasons.

Consequential orders

23. The petition, therefore, succeeds. The orders dated 18th October 2005 passed by the learned MM, permitting the withdrawal of the application under Section 156(3) CrPC and proceeding to list the case for complainant's evidence is hereby set aside. Consequently all further proceedings and orders passed thereafter in the complaint case by the learned MM are also hereby set aside.

24. The case will now be listed before the learned MM at the stage it was when the orders dated 18th October 2005 were passed by the learned MM. It is

stated that the case is listed next before the learned MM on 22nd May 2009. On that date, or soon thereafter, the learned MM will consider the report dated 21st July 2004 filed by the police and proceed in accordance with the law as explained by the Supreme Court in the above decisions.

25. It is clarified that all the other contentions raised by the petitioner on merits or otherwise in the present petition are left open to be considered at an appropriate stage. Since the matter is remanded to the learned MM at the pre-cognizance stage there is no question of permitting the petitioner to be heard before the learned MM at this stage.

26. The petition is accordingly disposed of. A certified copy of this order be sent to the learned MM concerned forthwith.

S. MURALIDHAR, J.

APRIL 22, 2009
ak