

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.REV. P. No. 571 of 2008 & CRL M A 12229/2008

Reserved on: February 12, 2009

Date of decision: March 25, 2009

GOPAL KRISHAN DUA

..... Petitioner

Through: Mr. Vijay Aggarwal with Mr. Vishal
Garg and Ms. Aanchal, Advocates

versus

STATE

..... Respondent

Through: Mr. Asim Naeem, Advocate for the
complainant.

Mr. Jaideep Malik, APP for State.

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 |

J U D G M E N T

1. This revision petition under Section 397 read with Sections 401/482 and 483 of the Code of Criminal Procedure, 1973 ('CrPC') and Article 227 of the Constitution of India is directed against the order dated 14th August 2008 passed by the learned Metropolitan Magistrate ('MM'), New Delhi rejecting the application filed by the Petitioner under Section 156 (3) CrPC.

2. The background to the filing of the aforementioned case is that FIR No. 356 of 2007 was registered against the Petitioner under Sections 406/498A/506 of the

Indian Penal Code ('IPC') at the instance of the Petitioner's wife, pursuant to an application filed by her under Section 156 (3) CrPC. It is stated that pursuant to the registration of the said FIR the Petitioner filed an application for anticipatory bail which came to be dismissed by this Court on 14th May 2008. Aggrieved by the said order the Petitioner filed a Special Leave Petition (Crl) No. 4222 of 2008. While directing notice to issue in the SLP the Supreme Court directed that the Petitioner will not be arrested.

3. According to the Petitioner, after the dismissal of the bail application by this Court he ceased to stay at the matrimonial home at W-108, Greater Kailash-II, New Delhi where his wife and two children were residing. The Petitioner states that on 29th May 2008 he reached the aforementioned premises at about 7.30 pm and was sitting in the lobby when his wife called the police asking the Petitioner to be arrested. Thereafter the Petitioner was taken to the police station. After the police was shown the stay order dated 27th May 2008 by the Petitioner's lawyer, the Petitioner was released on the same day. When he returned to the premises at about 10.10 pm, he was restrained by his wife from entering the house. He immediately informed the police about this incident, but no action was taken. Thereafter on 17th June 2008 when he visited the house, he was shocked to see that all his belongings had already been removed by his wife. On the above averments the Petitioner filed a complaint with the police on 23rd July 2008. When no action was taken by the police the Petitioner filed a Complaint Case against his wife in the court of the learned MM under Section 200 CrPC together with an application under Section 156 (3) CrPC.

4. Dismissing the application under Section 156 (3) CrPC, the learned MM passed the following order on 14th August 2008:

“14.08.2008

Present: Complainant with counsel.

SI K.P. Singh, PS C.R. Park present. He filed the status report. I have heard the argument on the application moved u/s 156 (3) CrPC.

As per the status report the Accused No.1 Rajni Dua is not allowing her husband to enter into his own house.

Having heard the submissions of the complainant, I observe that the allegations leveled against the accused are outcome of the matrimonial dispute arisen between the complainant and accused No.1. No specific allegations have been leveled against the accused No.2. Matter seems to be purely of civil nature. Already several complaints are pending for and against the parties. I am of the considered view that no investigation is required to be conducted in this case. No recovery is to be effected. Therefore, I feel that there is no need to pass an order for registration of F.I.R. under Section 156 (3). Hence the application is dismissed.

Matter is fixed for C.E. on 20.10.2008.”

5. During the pendency of this petition, a status report was filed by the police in this Court on 24th November 2008 which it was stated that during the investigation in FIR No. 356 of 2007 under Sections 498-A/406/506 IPC the wife remained in the same house with two kids. However, the petitioner absconded with a view to

avoiding arrest. He returned after the order staying his arrest was passed by the Supreme Court but was taken away by the police at the instance of the wife. The status report recorded that the complainant has thereafter been residing in a guest house and that his wife Respondent was not allowing him to enter the house.

6. It appears that subsequently the wife filed a petition under Section 12 of the Protection of Women from Domestic Violence Act 2005 ('PWDV Act') alleging that she and the two children had been forcibly dispossessed of the house in question by the Petitioner along with 6 or 7 persons. This Court has been shown a copy of an order dated 14th January 2009 passed by the learned MM in the said petition directing that the wife and the two children should be given "safe re-entry and repossession" of the house by the SHO, Chittaranjan Park and directing removal of all persons, other than the Petitioner herein, from the said house.

7. Mr. Vijay Aggarwal, learned counsel appearing for the Petitioner submits that given the nature of the allegations made by the petitioner in his complaint, an order ought to have been passed under Section 156 (3) CrPC by the learned MM directing the police to register a case and investigate the crime. It is pointed out that the learned MM erred in observing that no recovery is to be effected since there are specific allegations in the complaint that the Petitioner found his personal belongings missing when he went back to the matrimonial home. Reliance is placed upon the judgments of the Supreme Court in *Suresh Chand v. State of Madhya Pradesh* (2001) 1 AD (Crl) SC 34, *Chitra Narain v. M/s. NDTV* 2004 Crl LJ 2818, *Anil Bhardwaj v. The State* 1985 Crl L J 613 and *Ram Babu Gupta*

v. State of Uttar Pradesh 2001 CrL L J 3363 to contend that it is obligatory on the police to investigate cognizable offences. The gist of the above decisions is this. When the Magistrate receives a complaint and the facts alleged therein disclose the commission of an offence, the learned MM is not always bound to take cognizance. He may either take cognizance under Section 190 or may forward the complaint under Section 156 (3) to the police for investigation. If on a reading of the complaint the Magistrate finds that the allegations therein disclose the commission of a cognizable offence, he should forward the complaint under Section 156 (3) CrPC to the police for investigation as that will be conducive to justice and the valuable time of Magistrate will be saved in inquiring into the matter.

8. It is further submitted that in *Ram Babu Gupta* it was held by the Supreme Court that the power to order investigation under Section 156 (3) is different from the power under Section 202 (1) CrPC to direct investigation. The two operate in distinct spheres and at different stages. The power under Section 156 (3) is exercisable at a pre-cognizance stage whereas the power under Section 202 (1) CrPC is at the post-cognizance stage. Once the Magistrate has taken cognizance of the offence, it is not within his competence to revert to the pre-cognizance stage and invoke Section 156 (3) CrPC. It is therefore submitted that it would be no answer to the complainant that the learned MM can always invoke the powers under Section 202 CrPC if he requires any inquiry to be undertaken by the police at the post-cognizance stage. It is further submitted that the accused cannot be compelled to make any statement at even the post-cognizance stage which is self-

incriminating. It is submitted that given the nature of the complaint, the recovery of the stolen goods will not be possible unless the FIR is registered, the respondent is made an accused and subject to custodial interrogation.

9. The submissions of learned counsel for the Petitioner have been considered. The background to the present case reveals that the Petitioner is facing criminal proceedings instituted against him by his wife for the offences under Sections 498A/406/506 IPC. The Supreme Court granted a stay of arrest of the Petitioner by its order dated 27th May 2008. The incident leading to the present complaint by the husband took place two days thereafter. It is plain that given the fact that the parties were already at loggerheads, there were bound to be conflicting versions of the incident of 29th May 2008 as well as the subsequent events. The police therefore understandably stayed their hands at that stage. Although in the status report filed before this Court it is mentioned that the wife was not permitting the petitioner to enter the house in question, the orders passed by the learned MM in the petition filed by the wife under Section 12 PWDV Act shows that, according to her, she and the children were forcibly from the house by the Petitioner and some other persons. While this Court is not pronouncing on the correctness of either version, since in any event that would be subject matter of the proceedings under the PWDV Act, the reluctance of the police to immediately register an FIR in the matter is understandable.

10. The contention of learned counsel for the Petitioner that it was obligatory for the police to straightaway register an FIR and thereafter investigate the cognizable

offence, does not account for the decisions of the Supreme Court which permit to the police to conduct a preliminary inquiry before proceeding to register an FIR. The observations of the Supreme Court, in the context of complaints against public servants, in *P.Sirajuddin v. State of Madras (1970) 1 SCC 595 (at p.602)* was cited with approval in *State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335*. Further the Supreme Court referred to an earlier decision with approval in the following passage in *Bhajan Lal* (SCC, p.371):

“Mudholkar, J. in a separate judgment in *State of Uttar Pradesh v. Bhagwant Kishore Joshi (1964)3 SCR 71* at p. 86 while agreeing with the conclusion of Subba Rao, J. (as he then was) has expressed his opinion stating: (SCR pp. 86-87)

“In the absence of any prohibition in the Code, express or implied, I am of opinion that it is open to a police officer to make preliminary enquiries before registering an offence and making a full scale investigation into it.”

79. We are in agreement with the views, expressed by Mitter, J. and Mudholkar, J. in the above two decisions.”

11. Particularly in the context of matrimonial disputes, it is an accepted practice for the police to conduct a preliminary inquiry before proceeding to register an FIR. The Crimes Against Women Cell (CAW) does precisely that. Although the offences are cognizable in nature, it is only after a stage is reached when either no reconciliation is possible or it is not possible to make any headway due to non-cooperation of the party against whom the complaint has been made that an FIR is registered.

12. The decision of the learned MM in the present case declining to issue a

direction to the police under Section 156 (3) CrPC and instead fixing the case for the recording of the complainant's evidence, reflects the cautious approach that is necessary in matrimonial disputes. The judgments cited by learned counsel for the Petitioner in fact require the learned MM to be cautious while taking proceeding to take cognizance of an offence on a complaint. The learned MM had the discretion to either forward the complaint to the police for registering an FIR or decide to direct the complainant's evidence to be recorded. The decision of the learned MM to opt for the latter course cannot, in the facts of the present case, be held to be erroneous or illegal.

13. Learned counsel for the Petitioner repeatedly urged that given the allegations of theft and criminal misappropriation by the wife of the husband's goods the coercive process of law required to be invoked. Shorn the legal nicety, the purport of this submission was that the wife should be arrested and subjected to custodial interrogation for recovering the husband's goods. Given the background of the case, if the learned MM in his discretion decided not to permit the husband to use the coercive process of the criminal law to get back at his wife, it cannot be said that his decision was illegal.

14. It is needless to state that if the learned MM after considering the pre-summoning evidence, proceeds to take cognisance, and at the post-cognizance stage considers it necessary to require further investigation or inquiry to be undertaken before issuing process to the accused, it would be open to the learned MM to invoke the powers under Section 202 CrPC. However, since the instant

case is still at the pre-cognizance stage it is premature to speculate about the course that the learned MM should adopt.

15. For the aforementioned reasons this Court finds no illegality in the impugned order dated 14th August 2008 passed by the learned MM. The petition is, accordingly, dismissed. The pending application also stands dismissed.

S. MURALIDHAR, J.

MARCH 25, 2009
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