

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **Cr1.Rev.P.573/2009**

%

Date of Decision: 27.10.2009

DR. V.P. SHARMA Petitioner.

!

Through: Mr. Ajay Rai, Adv.

Versus

\$ THE STATE (N.C.T. OF DELHI) & ORS. Respondents

 $\wedge$

Through: None.

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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

: MOOL CHAND GARG, I (Oral)

1. This Criminal Revision Petition has been filed by the petitioner against the order dated 12.08.2009 passed by Learned Metropolitan Magistrate, New Delhi in C.C. No.97/2009 whereby an application filed by the petitioner under Section 156(3) of the Code of Criminal Procedure (Cr.P.C.) has been dismissed vide order dated 12.08.2009.
2. Briefly stating the facts of this case are that the petitioner came to know that respondent No.3, who is a builder had been constructing an Apartment block namely Gaffar Apartments block in Village Satbari, Mehrauli, New Delhi and that those flats were

nearing completion and were available for sale. In these circumstances, the petitioner entered into an agreement to purchase a flat from respondent No. 3 through respondent No. 4 for a total consideration of Rs.16,00,000/-. An amount of Rs.1,50,000/- was paid by the petitioner in advance. He also paid some more money to respondent No.3 towards commission etc. It is his case that later on the petitioner came to know that the said flat was sold by respondent No.3 to some other person. Thus, he wanted refund of his payment, which was not done by respondents No.3 & 4.

3. In these circumstances, the petitioner is stated to have filed a complaint before the S.H.O., P.S., Malviya Nagar for taking necessary action against respondents No.3 and 4. However, no action was taken. Thereafter, the petitioner filed an application under Section 156(3) Cr.P.C. before the learned ACMM, New Delhi for directing registration of a case and for investigating the circumstances alleging conspiracy between respondents No.3 and 4 in illegally detaining hard-earned money of the petitioner. The said application was dismissed by the learned Magistrate vide its order dated 12.08.2009.

4. I have gone through the order passed by the M.M. concerned. Some of the observations made by the trial Court in the impugned order read as under:

“Ld. Counsel for the complainant argued that to effect

the recovery of the amount police investigation is required in this case hence this case is sent for investigation u/s 156(3) Cr.P.C.

Admittedly wife of the complainant Mrs. Geeta Bhatt filed the complaint before SHO concerned but this complaint has been filed by her husband Dr. V.P. Sharma. Record reveals that neither the complainant in the present complaint nor his wife Mrs. Geeta Bhatt in complaint to SHO has disclosed in whose name the flat was going to purchase from Abdul Gaffar. Admittedly payment through cheque was made from the account of the wife of complainant Mrs. Geeta Bhatt. Further agreement to sell has not been executed. The complainant also not specified the date when he had to get executed the sale deed. The amount paid by the complainant is of earnest money. The complainant has the witness and the documents in his possession. In my view the application seeking direction for police investigation is not entertainable, since applicant is possessed all the evidence and material to be produced in support of his complaint and for which I am placing reliance upon the authority in the matter M/s Skipper Briverage Pvt. Ltd. Vs. State cited in 2001 IV AD Delhi 265, rendered by our own High Court. Further reliance can also be placed on the authority in the matter of Gulab Chand Upadhyay Vs. State of U.P. and others cited in 2002 (2) Crimes 488 and further in judgment held in Baldev Thukral Vs. State of Uttranchal cited in 2006 (1) Crimes 239.

Accordingly application of the complainant u/s 156(3) Cr.P.C. is disposed of. Complainant is directed to lead C.E. for 14.10.2009."

5. I have heard the submissions made by the petitioner and find that there is no infirmity in the order passed by the Magistrate because by filing this application the petitioner wanted bypassing the process prescribed in the Cr.P.C. of moving a complaint under Section 200 Cr.P.C. and leading his evidence.

6. As per Section 190 of the Cr.P.C. there are three modes of taking cognizance of a criminal offence. The said provision is

reproduced hereunder:

“190. Cognizance of offences by Magistrates:-

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

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.”

7. The second mode provides filing of a complaint under Section 200 Cr.P.C. Then the complainant is required to lead his evidence and if the Magistrate is satisfied, after recording pre-summoning evidence, that a case is made out then the Magistrate can summon the accused. No doubt, there is a power available to the Magistrate to direct investigation under Section 156(3) Cr.P.C. during the course of the pendency of such a complaint so as to enable the investigating agency to collect the evidence which may not be possible for the accused to lead. However, such power is not to be exercised enabling the complainant to misuse the provisions by seeking registration of FIR, which has not been registered on a complaint made to the S.H.O. by complainant himself.

8. The insistence to direct the Magistrate to take the other course

of exercise of directing registration of FIR by calling for an investigation under Section 156(3) Cr.P.C. is putting the entire Cr.P.C. on a different pedestal. It is being raised by people who does not want to lead evidence or who does not have evidence to substantiate the complaint in accordance with law. In the present case also, the petitioner has not chosen to file a complaint under Section 200 Cr.P.C. and he wanted to adopt a shortcut. More so, when the allegation *prima facie* reveals that it is a civil matter.

9. It would be appropriate to take note of a judgment delivered by the Apex Court in the case of Maksud Saiyed Vs. State of Gujarat & Ors., 2008 5 SCC 668:

13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section [156\(3\)](#) or Section [200](#) of the Code of Criminal Procedure, the Magistrate is required to apply his mind. Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

10. In a similar case while deciding *Crl. Rev. P. 571/2008* titled as *Gopal Krishan Dua Vs. State* vide order dated 25.03.2009, this Court has

held as under:

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 cognizance, 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.

11. It would also be appropriate to take note of the judgment

delivered by the Apex Court in Raghu Raj Singh Rousha Vs. Shivam Sundaram Promoters (P) Ltd. & Anr. (2009) 2 SCC 363. where it was held:

5. It is not necessary for us to deal with the allegations made in the said complaint petition in details. Suffice it to say that by reason of an order dated 7.02.2008, the Metropolitan Magistrate, New Delhi in whose court the aforementioned complaint petition was transferred, refused to direct investigation in the matter by the Station House Officer in terms of Section [156\(3\)](#) of the Code, stating:

In the present case all the facts and circumstances of the case are within the knowledge of the complainant. Both the complainant and the accused company have been dealing with one another by way of contractual agreement and a MOU dt. 05/08/05 was entered between them as alleged in the complaint. From the complaint and the documents placed on record, it appears that there is some dispute between the parties in respect of immovable property and the payments pertaining to the sale of the same. The complainant submits that the accused had cheated him. In the facts and circumstances of the case there is no requirement of collection of evidence by the police at this stage as the complainant can lead his evidence. In view of this, present application under Section [156\(3\)](#) CrPC is dismissed. The complaint can be conveniently dealt with Under Section [200](#) CrPC and subsequent provisions. If there is necessity however of police that shall be taken under Section [202](#) Cr.P.C.

On the aforementioned premise, the complainant was asked to lead pre-summoning evidence. It was directed to furnish list of witnesses, if any.

12. In the light of the aforesaid judgments, order passed by the Magistrate is justified and the order shows that the Magistrate has

applied its mind and has felt it appropriate to call for the petitioner to lead his evidence before the police can be directed to register an FIR. Thus, I do not find any infirmity with the order passed by the Magistrate.

13. The petition is accordingly dismissed. It is, however, observed that nothing stated herein will have any effect on the merits of the case.

MOOL CHAND GARG,J

OCTOBER 27, 2009
anb