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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: September 16, 2010

Date of Order: October 08, 2010

+ Crl. Rev.P. No.513 of 2009

% **Shankar Adawal** **08.10.2010**
...Petitioner

Versus

C.B.I **...Respondent**

AND

+ Crl. Rev.P. No.515 of 2009

% **V. Balasubramaniam** **08.10.2010**
...Petitioner

Versus

C.B.I **...Respondent**

AND

+ Crl. Rev.P. No.572 of 2009

% **Reliance Industries Ltd.** **08.10.2010**
...Petitioner

Versus

C.B.I **...Respondent**

AND

+ Crl. Rev.P. No.514 of 2009

% **A.N. Sethuraman** **08.10.2010**
...Petitioner

Versus

C.B.I **...Respondent**

Counsels:

Mr. Dinesh Mathur, Sr. Adv. with Mr. Amit Desai Sr. Adv. with Mr. Mahesh Saharsaraman, Mr. Anand A. Raj, Mr. R. Chandrachud and Mr. M.R. Sasiprakash for petitioner.

Mr. S.K. Saxena for respondent/CBI.

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.

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| 2. | To be referred to the reporter or not? | Yes. |
| 3. | Whether judgment should be reported in Digest? | Yes. |

JUDGMENT

1. These revision petitions have been preferred by the petitioners assailing an order dated 22nd May, 2009 passed by learned Chief Metropolitan Magistrate whereby she dismissed an application dated 4th November, 2008 made by the applicant seeking directions to the complainant to produce all its witnesses before sending the case to the Court of Sessions.

2. Brief facts relevant for the purpose of deciding these petitions are that during investigation of an FIR No.799 of 2008 under Sections 365, 302, 506, 323, 384 of Indian Penal Code, search of office premises of Reliance Industries Limited was carried out by the investigating officer of that case in pursuant to a search warrant . During search, from the table drawer of Mr. V. Balasubramaniam, Group President of M/s Reliance Industries, certain photocopies of Secrets documents of Cabinet Secretary Rashtrapati Bhawan were recovered. On recovery of these documents, investigating officer of the case sent information (rukka) to police station Hauz Khaz for registration of a case under Section 3 and 5 of the Official Secrets Act, 1937 on which a case FIR No.496/1998 was registered. Later on, the investigation was transferred from police to CBI and CBI separately registered a case being SI-1998-S/009 dated 13th November, 1998 and completed the investigation. After investigation was complete, the result of investigation was sent to Union of India and in view of Section 13(3) of Official Secrets Act, the Union of India authorized Mr. B.S. Dogra, Deputy Suptd. of Police, CBI to file a complaint. As a result of this, a complaint was filed before the Chief Metropolitan Magistrate under Section 120B IPC read with Sections 5(4), 5(2) and under Section 5(4) and Section 5(2) of Officials Secrets Act. This complaint was filed before the CMM in view of the fact that under Official Secrets Act vide a Gazette Notification dated 6th March, 1998 Union of

India had designated CMM as the Court competent to take cognizance of offences under Official Secrets Act. Subsequently, vide another Gazette Notification dated 21st June, 2006, Union of India rescinded the earlier notification dated 6th March, 1998 withdrawing the special empowerment of CMM under the Officials Secrets Act.

3. The Delhi High Court on Administrative Side addressed a letter dated 7th December 2006 to District and Sessions Judge, Delhi directing that all cases pending under Official Secrets Act be withdrawn from the court of CMM and assigned to Special /Sessions Judge. This decision of Registrar General, Delhi High Court was assailed before a Division Bench of this Court by way of writ petitions being W.P.(Crl.) 312 of 2007 and W.P.(Crl.) 451 of 2008. A Division Bench of this Court vide its judgment dated 11th July, 2008 dismissed both the writ petitions and observed as under:

“20. In this analysis we hold that the Court of Sessions shall ordinarily be competent to try any offences under the OS Act unless an MM or a Magistrate of the First Class is specially empowered to try any offence under the OS Act. This is implicit in the stand of the Union of India which has supported the administrative decision of this High Court since all that has been carried out by the withdrawal of the Notification dated 6.3.1998 by the impugned Notification dated 21.6.2008 is to divest the MM of powers specially conferred on it by the Central Government to try offences under the OS Act.

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33. In these circumstances, we do not find merit in the Petitions. The cumulative effect of the impugned Notification is that the CMM has ceased to have jurisdiction to try the criminal cases pending before him. Consequent upon the withdrawal or rescission of the special empowerment the Court of Sessions would have jurisdiction to try the cases. The impugned administrative decision of this Court, therefore, validly transfers the pending cases from the Court of CMM to the Court of Sessions. The Petitions are dismissed but in view of the complexity of the contentions raised before us imposition of costs would be totally unjustified.”

4. The learned CMM, vide her order dated 22nd May, 2009 disposed of the application made by the petitioners under Sections 208/209 of Cr.P.C whereunder petitioners had raised contention that compliance of Section 208 and 209 Cr.P.C was

mandatory before the case could be committed to Sessions. The learned CMM observed that case filed against the accused persons on a complaint from Deputy Superintendent of Police, CBI in pursuance of authorization given to him by Union of India would not fall in the category of cases instituted other than on a police report as the case was filed after extensive investigation. The accused persons were entitled to the copies of charge sheet filed after investigation and same has been given to them. The case was not a complaint case within the meaning of Section 190(1) (a) Cr.P.C as argued by the counsel for the petitioners.

5. In the grounds of revision, the basic contention raised by the counsel for petitioners is that CMM was under an obligation to direct the complainant to produce all its witnesses, examine them on oath before committing /sending it to the Court of Sessions and the accused persons were to be furnished copies of those statements and examination of witnesses as recorded by the court of CMM free of costs. It was submitted that compliance of Section 208 Cr.P.C was mandatory. Reliance was placed on *Rosy and another v State of Kerala and Ors. AIR 2000 SC 367*, wherein the Supreme Court observed as under:

"17 If a magistrate is to comply with the aforesaid requirements in Section 208 of the Code (which he cannot obviate as the language used in the sub-section is of any indication) what is that manner in which he can do it in a case where he failed to examine the witnesses before issuing process to the accused? The mere fact that the word "or" is employed in clause (1) of Section 208 is not to be understood as an indication that the magistrate is given the freedom to dispense with the inquiry if he has already examined the complainant under Section 200. A case can be visualized in which the complainant is the only eye witness or in which all the eye witnesses were also present when the complaint was filed and they were all examined as required by Section 200. In such a case the complainant, when asked to produce all his witnesses under Section 202 of the Code, is at liberty to report to the magistrate that he has no other witness than those who were already examined under Section 200 of the Code. When such type of cases are borne in the mind it is quite possible to grasp the utility of the word "or" which is employed in the first clause of Section 208 of the Code. So the intention is not to indicate that the inquiry is only optional in the cases mentioned in Section 208.

18. It is pertinent to consider yet another aspect. It is of

importance from practical point of view also. Section 209 of the Code enjoins on the magistrate to commit the case to the Court of Session after complying with the provisions in Section 208 of the Code. Once the case is committed it proceeds to the next stage for which the venue is the Court of Session. The trial in the Court of Session is envisaged in Chapter XVIII. It must be borne in mind that in the Sessions Court a public Prosecutor alone can conduct prosecution, whether the case was instituted on police report or on complaint. Section 226, falling within the aforesaid Chapter, requires the public prosecutor to make the open address to the Sessions Court. That section reads thus :

"226. Opening case for prosecution. - When the accused appears or is brought before the Court in pursuance of a commitment of the case by describing the charge brought under section 209, the prosecutor shall open his case against the accused and stating by what evidence he proposes to prove the guilt of the accused,"

19. If a case instituted on complaint is committed to the Court of Session without complying with the requirements in clause (I) of Section 208 of the Code how is it possible for the public prosecutor to know in advance what evidence he can adduce to prove the guilt of the accused? If no inquiry under Section 202 in to be conducted, a magistrate who decides to proceed only on the averments contained in the complaint filed by a public servant (who is not a witness to the core allegation) and such a case is committed to the Court of Session, its inevitable consequence would be that the Sessions Judge has to axe down the case at the stage of Section 226 itself as the public prosecutor would then be helpless to state "by what evidence he proposes to prove the guilt of the accused". If the offence is of a serious nature or is of public importance the consequence then would be miscarriage of justice."

6. The arguments advanced by learned senior counsels for the petitioners is fallacious on the face of it and the same is evident from the judgment relied upon by the petitioners. There is no doubt that where a complaint case is filed by a person before the Court of MM, the court has to go through the complaint and if the court considers that police investigation was necessary, the Court may direct police to investigate the matter and submit a report. However, in such a case where court considers that police investigation was not necessary, the court may proceed to record the statements of witnesses of the complainant and after recording statements of witnesses of complainant, the court may, in the light of evidence which has come on record, take

cognizance of the offence committed by the respondents/accused persons. If the court of MM finds that the offences committed by the accused persons were triable by the Court of Sessions, he has to comply with the provisions of Section 208 Cr.P.C and supply copies of statements recorded by him to the accused persons and commit the matter for trial to the Court of Sessions. However, Section 208 Cr.P.C is applicable in those cases where the Magistrate proceeds to record evidence of the witnesses of complainant and has not referred the matter to police for investigation. Such a case which is instituted before the Magistrate is a complaint case. Merely because of the fact that under Official Secrets Act a complaint is to be filed would not mean a case instituted before the Magistrate after thorough investigation and after collection of evidence, would become a complaint case and the Magistrate necessarily has to proceed to record evidence of complainant and his witnesses as envisaged under Section 200 Cr.P.C. This issue has been extensively dealt with by the Supreme Court in catena of judgments. In *Satya Narain Musadi and others v State of Bihar (1980) 3 SCC 152*; in a case under Essential Commodities Act, the Supreme Court considered the requirement of a report in writing to be made by a public servant to the Magistrate for taking cognizance of offence under the Act. The provisions of Section 11 of Essential Commodities Act are akin to the Section 13(3) of the Officials Secrets Act. The Supreme Court observed that a police officer submitting his report would be a public servant within the meaning of Section 11 of Essential Commodities Act. Since the offences under Essential Commodities Act were cognizable offences, therefore, a police official would be entitled to investigate into such offences without order of a Magistrate and if the police officer proceeds to investigate into the offences, it is obligatory upon him to submit a report under Section 173(2) of Cr.P.C and such a report would be a police report for the purpose of Section 190(1)(b) Cr.P.C and if the Magistrate takes cognizance of offences under the Act upon such a report of police officer under Section 11 of the Essential Commodities Act would be complied with in its entirety. The Supreme Court further observed that a report under

Section 173 Cr.P.C purports to be an opinion of an investigating officer that he has been able to gather sufficient evidence for trial of the accused by the court and in his report he has to state the names of accused persons, names of witnesses, nature of offence and he requests that the case should be tried.

7. Section 11 of the Essential Commodities Act reads as under:

“11. Cognizance or offences: No court shall take cognizance of any offence punishable under this Act except on a report in writing of the fact constituting such offence made by a person who is a public servant as defined in section 21 of the Indian Penal Code (35 of 1860).”

8. Section 13(3) of the Official Secrets Act reads as under:

(3) No Court shall take cognizance of any offence under this Act unless upon complaint made by order of, or under authority from, the 1[appropriate Government] 2* * * or some officer empowered by they 3*[appropriate Government] in this behalf: 4* * * * (4) For the purposes of the trial of a person for an offence under this Act, the offence may be deemed to have been committed either at the place in which the same actually was committed or at any place in 5*[India] in which the offender may be found. 6*(5) In this section, the appropriate Government means- (a) in relation to any offences under section 5 not connected with a prohibited place or with a foreign power, the State Government; and (b) in relation to any other offence, the Central Government.]”*

9. A perusal of above two sections would make it clear that both sections require making of a report /complaint by a specified person. In *Pravin Chandra Mody v State of Andhra Pradesh, 1965 (2) Cr.L. J. 250 (Vol.71)*, the Supreme Court dealt with the contentions raised by appellant that a report under Section 11 of the Essential Commodities Act was not a charge-sheet under Section 173 of the Criminal Procedure Code and it must be equated to be a complaint of facts under Section 190(1) (a) of the Code and observed as under:

“4. Contention of the appellant is that by the words 'police report' in 251A of the Code of Criminal Procedure, is meant the report mentioned in s. 173 which the police officer makes to a Magistrate in respect of offenses investigated by him under Chapter XIV. The investigation is in respect of cognizable offences because non-cognizable offenses may only be investigated by police officers after being authorised in that behalf by a competent Magistrate. It is pointed out that under s. 190 cognizance of an offence is taken in different ways : (a) upon receiving a complaint of facts which constitute an offence; (b) upon a report in writing of such fact made by any officer; and (c) upon information received from any person other than a police officer, or upon the Magistrate's own knowledge

or suspicion that such affiance has been committed. It is argued on the basis of this three-fold distinction that by the police report' in s. 190(1)(b) is meant the charge-sheet of the police officer under s. 173 of the Code, and since the report in writing which the police officer makes under s. 11 of the Essential Commodities Act, 1955 is not a charge-sheet under s. 173 of the Code it must be equated to a complaint of facts under s. 190(1)(a). In view of this distinction it is contended that while the offence under s. [420](#), Indian Penal Code is triable under the procedure laid down in s. 251A, Criminal Procedure Code, the offence under s. 7 of the Essential Commodities Act is triable under the procedure laid down under s. 252, Criminal Procedure Code. The appellant submit that either the two charges should be split up or the two offences should be tried under the procedure laid down by s. 252 of the Code of Criminal Procedure as the procedure under s. 251A, Criminal Procedure Code, does not afford the accused the chance of a second cross-examination which s. 252 of the Code gives, and there is prejudice to him in the trial of the offence under s. 7 of the Essential Commodities Act.

5. In our judgment the meaning which is sought to be given to a 'police report' is not correct. In s. 190, a distinction is made between the classes of persons who can start a criminal prosecution. Under the three classes of s. 190(1), to which we have already referred, criminal prosecution can be initiated (i) by a police officer by a report in writing, (ii) upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion, and (iii) upon receiving a complaint of fact. If the report in this case falls within (i) above, then the procedure under s. 251A, Criminal Procedure Code, must be followed. If it falls in (ii) or (iii) then the procedure under s. 252, Criminal Procedure Code, must be followed. We are thus concerned to find out whether the report of the police officer in writing in this case can be described as a "complaint of fact" or as "information received from, any person other than a police officer." That it cannot be the latter is obvious enough because the information is from a police officer. The term "complaint" in this connection has been defined by the Code of Criminal Procedure and it "means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer." [See s. 4(1) (h)].

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6. It, therefore, follows that s. 252, Criminal Procedure Code, can only apply to those cases which are instituted otherwise than on a police report, that is to say, upon complaints which are not reports of a police officer or upon information received from persons other than a police officer. The initiation of the prosecution in this case was upon a report in writing by the police officer. Section 11 of the Essential Commodities Act, 1955 reads as follows :-

"11. Cognizance of offences. - No Court shall take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such offence made by a person who is a public servant as defined in section [21](#) of the Indian Penal Code."

7. In *Bhagwati Saran v. State of U.P.* [MANU/SC/0127/1961](#) : [1961]3SCR563 this Court explained the nature of a report under s. 11 of the Essential Supplies (Temporary Powers) Act, 1946 which was a provision in the same words. This Court has held that the function of the report under s. 11 is not to serve as a charge-sheet against the accused, and that the purpose of s. 11 is to eliminate private individuals such as rival traders or general public from initiating the prosecution and to insist that before cognizance is taken the complaint must emanate from a public servant. The police officer is a public servant and this was not denied before us. The requirements of s. 11 are, therefore, satisfied, though

s. 11 does not make the report, if filed by a police officer, into a charge-sheet. It is then contended that the report under s. 11 cannot be treated as a report under s. 173 but only as a complaint under s. 190(1)(a). The police officer was investigating under s. 156(1) of the Code of Criminal Procedure an offence under s. 420, Indian Penal Code which was based on the same fact as the offence under s. 7 of the Essential Commodities Act. He investigated the latter offence along with the former and joined it with the former in the charge-sheet which he presented."

10. After *Praveen Chandra Mody (supra)*, in *Satya Narain Mussadi (supra)*, Supreme Court categorically held that court can take cognizance of offence on such a report and it would be sufficient compliance of Section 11 of Essential Commodities Act.

11. I consider that once detailed investigation into an offence has been conducted by investigating agency and material showing commission of offence by accused is on record and it is this material which is relied upon by prosecution, there is no requirement of recording statements under Section 208 Cr.P.C by a Magistrate and supply of copies under Section 208 Cr.P.C.

12. I, therefore, find no force in the contention of the petitioners that the CMM was supposed to record testimony of witnesses of the complainant before sending the case to the Court of Sessions. Even otherwise, I find that this argument is devoid of merits as in this case, the court of CM M had not committed the case to the court of Sessions. In fact, the powers of CMM to try the case under Official Secrets Act has been withdrawn in view of withdrawal of notification by Union of India and only the Sessions Judge now has the power to conduct trial in view of transfer of cases pending before CMM to the Sessions Judge vide an administrative order of this Court upheld by a Division Bench of this Court.

12. In view of above discussion, the above petitions are hereby dismissed with no orders to costs.

October 08, 2010
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SHIV NARAYAN DHINGRA, J