

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

+ **Crl.M.C.No. 3601/2009**

% Reserved on: 25th February, 2010
Date of Decision: 10th March, 2010

MOHD. SALIM Petitioner
! Through: Mr. R.N. Mittal, Sr. Adv. with
Mr. Manoj Kumar, Adv.

versus

\$ STATE Respondent
^ Through: Mr. Jaideep Malik, APP.
Mr. Vijay Aggarwal and
Mr. Vishal Garg, Advs. for the
complainant.

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

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

: V.K. JAIN, J.

1. This is a petition under Section 482 of the Code of Criminal Procedure seeking quashing of the order dated 1st August 2009 passed by ACMM, New Delhi under Section

156(3) of the Code of Criminal Procedure directing registration of FIR on a complaint filed by one Mohd. Rafique.

2. An FIR bearing No. 624/2005 under Section 302/34 of IPC was registered at Police Station Shahdara on 22nd December 2005, on the complaint filed by the petitioner regarding murder of his brother Mohd. Rashid by four persons including Mohd. Rafique, on whose complaint, the impugned order has been passed. Chargesheet against four persons including Mohd. Rafique was filed on 16th March 2006 and the case is pending trial before the Court of Sessions.

3. In his complaint, filed on 21st July 2006, Mohd. Rafique alleged that on 22nd December 2005, when he was sitting in the house of his sister Aamna, at about 9 PM, he came out hearing some noise and found some boys abusing each other. He further alleged that when he objected to this, deceased Mohd. Rashid intervened by asking as to whether the road belonged to his father. This, according to the complainant, was followed by exchange of hot words and the associates of Mohd. Rashid, including one Aarif, also threatened him with dire consequences. Mohd. Rashid thereupon asked a boy to call his brother. Within about 5 minutes, two accused named

in the complaint, namely Ansar and Salim, along with some other persons reached there and started abusing the complainant. All of them were having weapons in their hands, Ansar being armed with an iron Kataar, Salim being armed with a knife, Rashid with a Karchi and Aarif having an iron Saria. According to the complainant, they all tried to assault him and their associates also gave fist and kick blows to him. He further alleged that when accused Ansar and Salim tried to assault him, someone caught hold of him, and on seeing them, he somehow saved himself, but, Ansar and Salim were not able to stop their hands and caused injuries to Rashid, from their knife and Kataar. It was further alleged in the complaint that, thereafter, the accused in the complaint took Rashid to hospital after threatening the complainant, who himself received a number of injuries at the hands of accused persons. The police came to the spot and took the complainant to GTB hospital and got him admitted there. In the hospital also, the complainant was beaten by the accused persons and was saved from them by the police officials. Since Rashid was declared dead, the police registered a case under Section 302/34 of IPC against complainant and others but, they did

not register any case against the accused persons.

4. An application under Section 156(3) of the Code of Criminal Procedure was also filed by the complainant Mohd. Rafique seeking direction for registration of FIR against persons accused in the complaint.

5. Vide order dated 8th September 2006, the learned Metropolitan Magistrate directed the SHO to file a progress report in respect of incident of 22nd December 2005. Vide report dated 30th May 2007, the Investigating Officer of the case, through the concerned SHO, reported that the injuries caused to the complainant were self inflicted and sought filing of the complaint. Statements of some witnesses were recorded by the Investigating Officer before he submitted the above referred report to the learned Metropolitan Magistrate. Those witnesses told the police officers that the complainant Rafique had himself caused injuries on his person, with a view to create defence for him.

6. Since no one appeared for the complainant, the complaint was dismissed in default on 22nd January 2009. On a Revision Petition filed by him, the learned Addl. Sessions Judge vide order dated 5th February 2009 set aside the order dismissing

the compliant in default and restored it. Order dated 1st August 2009, directing registration of FIR under appropriate provisions of law, with further direction to hand over the investigation to Crime Branch was, thereafter, passed by the learned ACMM. Since, while directing registration of FIR, the learned ACMM had also directed registration of a case against certain police officials, a revision petition was filed by the State against that order. The learned Addl. Sessions Judge noted that the State was not aggrieved by the order to the extent it directed registration of FIR, on the complaint of Mohd. Rafique against persons named as accused in the complaint. The State was aggrieved only from that part of the order whereby he ordered registration of FIR against the police officials. The learned Addl. Sessions Judge declined to interfere with the order passed by the learned ACMM, but set aside the direction given by him for transferring the investigation to the Crime Branch.

7. The impugned order has been assailed primarily on the ground that once an FIR has been registered, chargesheet has been filed and the case has been committed to Court of Sessions, there cannot be a second FIR into the same incident

and the complaint filed by Mohd. Rafique, who himself is facing trial for committing murder, is nothing but an attempt to create a false defence for himself and to delay the progress of the trial pending against him.

8. The first question which comes up for consideration is as to whether an order passed under Section 156(3) of the Code of Criminal Procedure can be challenged by way of a petition under Section 482 of the Code of Criminal Procedure. It has been contended by the learned counsel for the complainant/respondent that since registration of FIR, on receipt of information of commission of a cognizable offence, is mandatory as provided under Section 154 of the Code of Criminal Procedure, the order passed by the Magistrate under Section 156(3) is in the nature of a reminder to the SHO and an administrative, order which cannot be subject matter of challenge before a superior court. On the other hand, the contention of the learned counsel for the petitioner is that the order passed under Section 156(3) being a judicial order, it is open to the petitioner to challenge it in appropriate proceedings. This was also his submission that if the Court comes to a conclusion that a petition under Section 482 of the

Criminal Procedure is not maintainable, the petition filed by him may be treated as a writ petition under Article 226/227 of the Constitution.

9. Section 156 of the Code of Criminal Procedure, to the extent it is relevant reads as under:-

“156. Police officer’s power to investigate cognizable case-

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

*(2) *****

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.”

10. Since the Magistrate can direct investigation only in respect of a cognizable case, it would be necessary for him before he passes any such order, to examine the allegations made in the application made to him and form a prima facie view that commission of a cognizable offence is disclosed from those allegations. If the Magistrate is of the opinion that the allegations made in the complaint do not disclose commission of a cognizable offence, he cannot direct investigation, in exercise of the powers conferred upon him under Section

156(3) of the Code. In that case, he will have no option but to dismiss the application seeking a direction to the Police to investigate the matter. Obviously, in that case he will have to pass a speaking order giving reasons for rejecting the application, which necessarily would require application of judicial mind on the part of the Magistrate.

11. The use of the expression 'may' in sub-section (3) of Section 156 of the Code leaves no doubt that the power conferred upon the Magistrate is discretionary and he is not bound to direct investigation by the Police even if the allegations made in the complaint disclose commission of a cognizable offence. In the facts and circumstances of a given case, the Magistrate may feel that the matter does not require investigation by the Police and can be proved by the complainant himself, without any assistance from the Police. In that case, he may, instead of directing investigation by the Police, straightaway take cognizance of the alleged offence and proceed under Section 200 of the Code by examining the complainant and his witnesses, if any. In fact, the Magistrate ought to direct investigation by the Police only where the assistance of the Investigating Agency is necessary and the

Court feels that the cause of justice is likely to suffer in the absence of investigation by the Police. The Magistrate is not expected to mechanically direct investigation by the Police without first examining whether in the facts and circumstances of the case, investigation by the State machinery is actually required or not. If the allegations made in the complaint are simple, where the Court can straightaway proceed to conduct the trial, the Magistrate is expected to record evidence and proceed further in the matter, instead of passing the buck to the Police under Section 156(3) of the Code. Of course, if the allegations made in the complaint require complex and complicated investigation of which cannot be undertaken without active assistance and expertise of the State machinery, it would only be appropriate for the Magistrate to direct investigation by the Police. The Magistrate is, therefore, not supposed to act merely as a Post Office and needs to adopt a judicial approach while considering an application seeking investigation by the Police.

12. Section 154(1) of the Code of Criminal Procedure enjoins upon the Station House Officer of a Police Station to record FIR as and when he receives information relating to commission of

cognizable offence. If he fails to perform this statutory obligation on his part, any person aggrieved by refusal of the Station House Officer to record FIR can send the substance of such information to the Superintendent of Police concerned as provided in Section 154(3) of the Code. If satisfied that the information received by him discloses commission of a cognizable offence, he has to either investigate the case itself or directs investigation by a Police Officer subordinate to him. Such a Police Officer will have all the powers of a Station House Officer in relation to that offence. If the intention of the legislature were merely to ensure compliance of statutory obligation of the Station House Officer to register FIR, on receipt of the information relating to commission of a cognizable offence, there was no need to give such an authority to the Magistrate, since the requisite authority has already been given to the Superintendent of Police under Section 154(3) of the Code. The purpose of vesting such a power on the Magistrate was to bring upon the matter, a judicial and judicious approach, which by necessary implication needs to be selective. The use of the word “may” leaves no reasonable doubt about the intention of the legislature that the Magistrate

needs to consider the feasibility, necessity and propriety of investigation by the Police before he passes an order under Section 156(3) of the Code. The use of the word “shall” in Section 154(3) and use of the word “may” in Section 156(3) also make the legislative content quite clear. If the legislature intended to leave no option for the Magistrate but to direct investigation by the Police, the legislature would have used the word “shall” as has been done in Section 154(3) rather than using the word “may” which gives a clear indication that the Magistrate has a discretion in the matter and can in appropriate cases refuse to order registration of FIR.

13. Since the discretion vested in the Magistrate under Section 156(3) of the Code of Criminal Procedure is a judicial discretion which cannot be exercised arbitrarily and on his whims and fancies, but needs to be guided by on sound principles of law governing exercise of such a discretion, it cannot be said that the discretion exercised by him cannot be subject matter of challenge in appropriate proceedings. If the Magistrate exercises discretion arbitrarily or in contravention of the principles governing exercises of such a discretion by him, the person against whom the discretion is exercised

cannot be left remediless. In a given case, the Magistrate may take a view that the complaint received by him does not disclose the commission of a cognizable offence and may, therefore, reject an application filed under Section 156(3) of the Code seeking directions for investigation by the Police. If the complainant is aggrieved on account of the view taken by the Magistrate and feels that the complaint does in fact disclose commission of a cognizable offence, can it be said that the complainant has no remedy against the order passed by the Magistrate. In yet another case, the Magistrate may take a view that the complaint made to him does not need assistance of the Police by way of investigation by the State machinery and he may proceed to examine the complainant and his witnesses under Section 200 of the Code of Criminal Procedure. The complainant may, however, feel otherwise, and the case may be such as would warrant investigation by State machinery. Can it be said that the complainant, if he is aggrieved on account of the view taken by the Magistrate has no remedy with him, available in law. The answer to these questions can obviously be only in negative. The Magistrate acts judicially, exercises a judicial discretion while directing

investigation by the Police or rejecting the request seeking such direction and in doing so he passes a judicial order. It is therefore difficult to accept that a judicial order cannot be challenged before a superior court, in any proceedings whatsoever.

14. A judicial order can be of three types. It may be a final order, an intermediate order or an interlocutory order. If an order finally disposes of a matter in dispute, it is termed as a final order. As held by the Hon'ble Supreme Court in **Amar Nath vs. State of Haryana and Anr.**(1977) 4 SCC 137, the term interlocutory order denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the rights of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order. As held by the Supreme Court, the orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order.

15. Taking a view most favourable to the complainant/respondent and assuming an order passed under

Section 156(3) of the Code of Criminal Procedure to be an interlocutory order was such an order can, in appropriate cases, definitely be challenged by filing a petition under Section 482 of the Code of Criminal Procedure of the Code of Criminal Procedure. As noted by the Supreme Court in **CBI vs. Ravi Shankar Srivastava** 2006 (7) SCC 188, Section 482 of the Code does not confer any new powers on the High Court. It only saves the inherent power, which the High Court possessed even before the enactment of the Code. Since no procedural enactment can provide for all the cases that may come up before the Courts, they do possess inherent powers, apart from express provisions of law which are necessary for proper discharge of functions and duties imposed by law on them. This doctrine finds statutory recognition in Section 482 of the Code of Criminal Procedure. In the case of **Madhu Limaye vs. The State of Maharashtra'** (1977) 4 SCC 551, the Hon'ble Supreme Court held that the inherent powers of the High Court come into play when there is no provision for redressal of the grievance of the aggrieved party. Of course, the power under Section 482 of the Code needs to be exercised very sparingly and only to prevent abuse of the process of the

Court or to otherwise secure the ends of justice.

16. When the High Court, on examination of the record finds that there is a grave miscarriage of justice or abuse of the process of the Court or there is failure of justice on account of the order passed by the Court below, it becomes the duty of the High Court to correct such an order at the very inception, lest miscarriage of justice ensues. It is with a view to meet the ends of justice and prevent abuse of the process that the High Court has been vested with inherent powers, which have been recognized by the Legislature in statutory recognition in Section 482 of the Code of Criminal Procedure. Therefore, the order passed by the Magistrate under Section 156(3) of the Code of Criminal Procedure irrespective of whether it directs investigation by the Police or it declines to give such a direction, can be challenged before the High Court under Section 482 of the Code of Criminal Procedure.

17. Even an order which is incapable of being challenged under Section 482 of the Code of Criminal Procedure can be challenged by way of a writ petition under Article 226/227 of the Constitution. Recently, I had an opportunity to examine this issue while deciding Criminal Revision Petition

No.293/2006 titled **R.C.Sabharwal versus Central Bureau of Investigation** and connected cases, 166 (2010) DLT 362. After reviewing case law on the subject, I held that even an interlocutory order passed by a Special Judge exercising power under Prevention of Corruption Act can be challenged by way of a writ petition. It was noted that Article 227 of the Constitution gives, to High Court, the power of superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction and this jurisdiction conferred upon the High Court cannot be limited or fettered even by an Act of the State Legislature. Referring to the decision of the Supreme Court in **Industrial Credit and Investment Corporation of India Limited vs. Grapco Industries Limited**, 1999 (4) SCC 710, where it was held that there was no bar on the High Court examining the merits of the case in exercise of its jurisdiction under Article 227 of the Constitution if the circumstances so require, the decision of the Supreme Court in **Surya Dev Rai vs. Ram Chander Rai & Others**, (2003) 6 SCC 675, holding that the amendment of the Section 115 of Code of Criminal Procedure could not have taken away the constitutional jurisdiction of the High Court to

issue a writ of Certiorari nor can the power of the superintendence conferred on the High Court under Article 227 of the Constitution be taken away, the decision of the Supreme Court in **Rupa Ashok Hurra** (2002) 4 SCC 388, holding that the orders and proceedings of a judicial court subordinate to the High Court can be challenged under Article 226 of the Constitution, and also relying upon the decision of a Constitution Bench of Supreme Court in **L.Chandra Kumar vs. Union of India** 1997 (3) SCC 261, holding therein that the jurisdiction conferred on the High Court under Article 226 and 227 of the Constitution is a part of the basic structure of the Constitution, forming its integral and essential feature, which cannot be tampered with or taken away even by constitutional amendment, it was held that irrespective of the embargo placed by Section 19(3)(C) 115 of Prevention of Corruption Act, an interlocutory order passed by the Special Judge can be challenged by way of a writ petition under Article 226/227 of the Constitution.

18. In **Vanshu Vs. State of U.P. 2007** CrI.L.J. 4677, Allahabad High Court held that the order passed by the

Magistrate, directing registration of FIR and investigation of the case, being an interlocutory order, is not amenable to revisional jurisdiction of the High Court. In the case before Allahabad High Court, the order passed by the Magistrate under Section 156(3) of the Code of Criminal Procedure was challenged by the accused persons by filing a revision petition before the Sessions Judge, who set-aside the order passed by the Magistrate. The order passed by the Magistrate was then challenged before the High Court on the ground that the order being a pre-cognizance order, Sessions Judge had no jurisdiction to entertain the revision filed by the accused. The High Court felt that while passing order under Section 156(3) of the Code of Criminal Procedure, the Magistrate had not applied his mind against anybody and since the accused does not have right to appear before the Magistrate at pre-cognizance stage, he cannot challenged an interlocutory order passed in such a proceedings. The High Court observed that the order passed by the Magistrate was only a preemptory reminder or intimation to the police to exercise their plenary power of the investigation. The petition before this Court being under Section 482 of the Code of Criminal Procedure, the

decision of Allahabad High Court taking a view that the order passed by the Magistrate being an interlocutory order, could not be challenged under Section 397(2) of the Code does not apply to this petition. Even an interlocutory order can definitely be challenged by way of a petition under Section 482 of the Code of Criminal Procedure, as noted earlier.

19. In **Ram Naresh Chaudhary & Ors. Vs. State**, 2008 Cr1.L.J. 1515, the High Court was dealing with a Revision Petition filed by the proposed accused against an order passed by the Magistrate under Section 156(3) of the Code of Criminal Procedure. With respect to the Hon'ble Judge of the High Court, I am unable to agree that despite its being a judicial order, an order passed under Section 156(3) of the Code of Criminal Procedure cannot be challenged even by way of a petition under Section 482 of the Code of Criminal Procedure. In any case, since the petition before the High Court was a Revision Petition and not a petition under Section 482 of the Code, the observation made by the learned Judge to the effect that an order under Section 156(3) of the Code of Criminal Procedure, despite being a judicial order, could not be challenged even by moving an application under Section 482 of

the Code are rather in the nature of an obiter and do not constitute the ratio of the decision rendered by him.

20. The learned counsel for the complainant/respondent has also referred to decision of this Court in Anupam Bhartia vs. State 2005 2JCC 1113 where this Court, while considering a petition against the order passed by the Magistrate under Section 156(3) of the Code, took the view that the matter before the Magistrate was a complicated matter requiring expert handling to collect the evidence. The learned Judge was of the view that the order passed by the Magistrate did not suffer from any illegality, impropriety or jurisdictional error, resulting into failure of justice. While dismissing the petition, this Court was of the view that the Magistrate cannot refer matter under Section 156(3) of the Code of Criminal Procedure mechanically, though he was not required to give a detailed order and reasons. During the course of judgment this Court inter-alia observed as under:-

“It is needless to say that all discretions exercised by a judicial forum will be exercised judiciously.”

21. Thus this judgment also recognizes that the discretion exercised by a Magistrate under Section 156(3) of the Code is a

judicial discretion, which cannot be exercised arbitrary. Even while passing an order under Section 156(3) of the Code, the Magistrate necessarily needs to apply his mind to the facts and circumstances of the case in order to take a prima facie view as to whether the complaint made before him discloses commission of a cognizable offence or not and further to decide whether the case before him needs to be investigated by the police or it was a simple case which the complainant himself could prove by leading evidence before the Magistrate without aid and State machinery and, therefore, the order passed by him is a judicial order. Once it is held that the discretion exercised by the Magistrate is a judicial discretion and the order passed by him is a judicial order, it is difficult to accept that the order passed by him is not capable of being challenged in any judicial proceedings on any ground whatsoever.

22. The learned counsel for the complainant/respondent has also referred to decision of Orissa High Court in **Gangadhar vs. State of Orissa** 2009 Cr1.L.J. 839, where it was held that an order passed under Section 156(3) of the Code of Criminal Procedure having been passed at a pre-cognizance stage, being

an interlocutory order, no revision was maintainable against it. This judgment is of no help to the complainant/respondent as the proceedings before this Court have been instituted under Section 482 of the Code of Criminal Procedure and there is also a request to treat it as a petition under Article 226/227 of the Constitution in case the Court is of the view that even a petition under Section 482 of the Code of Criminal Procedure is not maintainable against an order passed under Section 156(3) of the Code.

23. In his written submissions, the learned counsel for the complainant/respondent has also mentioned the following decisions:

- *Anupam Bhateeya & Anr. vs. State & Ors.*, 2005(2) JCC 1113.
- *Rajiv Kumar Singh vs. Govt. of NCT Delhi*, DLT 2001(89) 419.
- *Grow-on Exports (India) Ltd. & Ors. vs. J.K. Goel & Anr.*, 2002 (1) JCC 113.
- *Inder Singh Dahiya & Anr. vs. The State NCT of Delhi & Ors.*, Crl.M.C. 8314-15/2006 dated 8th April 2008.
- *Santosh Kumar Bagla vs. State*, Crl.M.C. 895/2007 dated

10th March 2008.

- *Ravinder @ Hawaldar & Ors. vs. State* 2008, *Cri.L.J.* 1988.
- *Diamed AG vs. State & Anr.*, *Crl.M.C.* 8673-74/2006 dated 28th April 2009.
- *A.K. Garg vs. Gopal Krishan Dua*, *Crl.M.C.* 733/2005 dated 30th July 2009.
- *Jai Kishan Sharma vs. State & Ors.* 2009 (3) *JCC* 2132.
- *Abdul Aziz & Ors. vs. State of U.P. & Ors.*, 2009 *Cri.L.J.* 1683.
- *Narender G. Goel vs. State of Maharashtra & Anr.*, (2009) 6 *SCC* 65.
- *M/s. Whirlpool of India vs. Govt. of NCT of Delhi & Ors.*, *W.P.(Crl.)* 725/2002 dated 19th September 2005.
- *Gautam R. Patel & Ors. vs. Govt. of NCT of Delhi & Ors.*, 2007 (1) *JCC* 488.
- *Daulat Radhu Bhatija vs. State*, 1995 *Cri.L.J.* 2158.
- *Smt. Gulista & Ors. vs. State of U.P. & Anr.*, *Crl.Rev.* 2549/2007.
- *Gangadhar Behera & Anr. vs. State of Orissa & Anr.* *Crl.Rev.* 232/2006.
- *Suryakant Dubey & Ors. vs. State of U.P. & Anr.*, *Crl.Rev.*

5841/2006.

These judgments are based on their individual facts. None of them lays down a binding preposition of law to the effect that on no ground whatsoever can the order passed by the Magistrate under Section 156(3) of the Code of Criminal Procedure be challenged before the High Court either by filing a Revision Petition or by way of a petition under Section 482 of the Code of Criminal Procedure or under Article 226/227 of the Constitution. It is difficult to accept that the High Court despite having been vested with extraordinary jurisdiction and having been assigned the task of keeping subordinate courts within the confines of their legal authority, ought to be a silent spectator, even where it is satisfied that the legal process has been grossly abused and the order passed by the court below is likely to thwart the course of justice. It is the bounden duty of this court to step in and take remedial measures, wherever the ends of justice so require.

24. The next question, which comes up for consideration, is as to whether the Order passed by the learned ACMM, directing investigation by the police, needs interference by this Court in exercise of its extraordinary jurisdiction under

Section 482 of the Code of Criminal Procedure. Relying upon the decision of the Supreme Court in the case of **T.T.Antony vs. State of Kerala & Ors.** AIR 2001 SC 2637, it was contended by the learned counsel for the petitioner that there cannot be two FIRs in respect of the same offence or even same incident and since one FIR has already been registered and investigated, followed by filing of chargesheet against the complainant and others, it was not permissible for the learned ACMM to direct registration of second FIR in respect of the same incident. On the other hand, relying upon the decision of the Supreme Court in **Upkar Singh vs. Ved Prakash** 2005 (1) CRJ 499, it was contended by the learned counsel for the complainant that there can be two FIRs in case there are counter versions of the same incident and, therefore the impugned order does not call for any interference. In the case of **T.T. Antony** (supra), 2 incidents occurred on the very same day consequent to a decision taken by a Minister to inaugurate the function of an evening branch of a co-operative bank which was opposed by members of a political group and in that process the 1st incident took place in the proximity of the Town Hall at a place called Kutupuramba in Kerala and the

second incident took place in the vicinity of a Police Station at the same place. During the said 2 incidents, on the orders of Executive Magistrate and Deputy Superintendent of Police, the police open fired as a result of which 5 persons died and 6 persons were injured amongst the demonstrators. In regard to the incident which took place near the Town Hall the police registered Crime No. 353 of 1994 under Sections 143, 147, 148, 332, 353, 324 and 307 read with Section 149 IPC along with some other offence while in regard to the incident which took place near the Police Station a case was registered under Crime No. 354 of 1994 under Sections 143, 147, 148, 307 and 427 read with Section 149 IPC and other offences named therein. Both the cases were registered on the date of incident itself.

During the pendency of the said cases the political Government of the State changed and the new Government appointed a Commission of Inquiry and on the report of the Commission, an investigation was directed to be conducted by the Deputy Inspector General of Police concerned, who, after investigation registered Crime No. 268 of 1997 under Section 302 IPC against the Minister, who was present at the time of

the incident, the Deputy Superintendent of Police, the Executive Magistrate who ordered the firing and certain police constables.

The registration of the said crime came to be challenged before the High Court by way of a writ petition and learned Single Judge of the High Court directed the case to be re-investigated by CBI. But in a Writ Appeal the Division Bench of the High Court quashed the FIR in Crime No. 268 of 1997 as against the Additional Superintendent of Police but it directed a fresh investigation by the State police headed by one of the three Senior Officers named in the judgment instead of fresh investigation by CBI as directed by the learned Single Judge

25. The direction of the Division Bench was challenged before the Supreme Court. The Apex Court, while setting aside the decision of the Division Bench, inter alia, observed as under:

“18. An information given under subsection (1) of Section 154 of Cr.P.C. is commonly known as First Information Report (F.I.R.) though this term is not used in the Code. It is a very important document. And as its nickname suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets

the criminal law into motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 of Cr.P.C., as the case may be and forwarding of a police report under Section 173 of Cr.P.C. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 Cr.P.C. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the First Information Report - F.I.R. postulated by Section 154 of Cr. P.C. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the First Information Report and entered in the station house diary by the police officer or such other cognizable offenses as may come to his notice during the investigation, will be statements falling under Section 162 of Cr. P.C. No such information/statement can properly be treated as an F.I.R. and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of the Cr. P.C.....

19. The scheme of the Cr.P.C. is that an officer in charge of a Police Station has to commence investigation as provided in

Section 156 or 157 of Cr.P.C. on the basis of entry of the First Information Report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of evidence collected he has to form an opinion under Section 169 or 170 of Cr.P.C., as the case may be, and forward his report to the Magistrate concerned under Section 173(2) Cr.P.C. However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 Cr.P.C.

20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 Cr.P.C. only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C. Thus there can be no second F.I.R. and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the F.I.R. in the station house diary, the officer in charge of a Police Station has to

investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Cr.P.C. (emphasis supplied)

26. Taking an example, the Supreme Court, during the course of the judgment, observed that in a situation where a person H having killed his wife W, informs the police that she had been killed by some unknown person but later on it is detected that the murder was committed by H, it does not require filing of fresh FIR against H.

27. The Apex Court further observed as under:

“However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) Cr.P.C. It would clearly be beyond the purview of Sections 154 and 156 Cr.P.C. nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter case, filed in connection with the same or connected cognizable offence alleged to

have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is underway or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 Cr.P.C. or under Article 226/227 of the Constitution.”

28. The decision in the case of **T.T. Antony** (supra) came up for consideration before a Three-Judges Bench of the Supreme Court in the case of **Upkar Singh** (supra). In that case, a complaint with the police was lodged by the first respondent before the Supreme Court against the appellant before the Court and some other persons. Crime No.48 of 1995 was registered on the basis of that complaint. The appellant before the Supreme Court claimed that he too had lodged a complaint with respect to the very same offence against the respondents, but his complaint was not entertained by the police. He tried to approach the Superintendent of Police and District Magistrate, but could not succeed in getting the FIR registered. Thereupon, he filed a petition under Section 156(3) of the Code of Criminal Procedure, whereupon the Magistrate directed registration of a case against the persons named as accused in the complaint filed by the appellant. Crime No.48 of 1995 was

accordingly registered by the police. The order of the Magistrate directing registration of the complaint was challenged by the first respondent, by filing a Revision Petition before the Additional Sessions Judge. The order passed by the Magistrate directing registration of criminal case was set aside by the Additional Sessions Judge. The order passed by the Additional Sessions Judge was challenged by the appellant before the High Court. The challenge however did not succeed. The order of the High Court was then challenged by the appellant before the Supreme Court. During pendency of the matter before the Supreme Court, decision came to be delivered in the case of **T.T. Antony** (supra). While granting leave to appeal, the Division Bench of the Supreme Court doubted the correctness of the judgment in the case of **T.T. Antony** (supra) and referred the matter to a larger Bench. After examining the decision rendered in the case of **T.T. Antony** (supra), the Supreme Court was of the view that the decision rendered by it in that case, did not preclude an aggrieved person from filing a counter case. The Court was of the view that in **T.T. Antony**, it had only held that any further complaint by the same complainant or others against the same

accused, subsequent to a registration of a case, is prohibited under the Code because an investigation in this regard would have already started and further complaint against the same accused will amount to an improvement on the facts mentioned in the original complaint and hence, will be prohibited under Section 162 of the Code. This prohibition, according to the Supreme Court, does not apply to counter complaint by the accused in the first complaint or on his behalf alleging a different version of the said incident. Allowing the appeal, the Supreme Court, inter alia held as under:

“23. Be that as it may, if the law laid down by this Court in T.T. Antony's case is to be accepted as holding a second complaint in regard to the same incident filed as a counter complaint is prohibited under the Code then, in our opinion, such conclusion would lead to serious consequences. This will be clear from the hypothetical example given herein below i.e. if in regard to a crime committed by the real accused he takes the first opportunity to lodge a false complaint and the same is registered by the jurisdictional police then the aggrieved victim of such crime will be precluded from lodging a complaint giving his version of the incident in question consequently he will be deprived of his

legitimated right to bring the real accused to books, This cannot be the purport of the Code.

24. We have already noticed that in the T.T. Antony's case this Court did not consider the legal right of an aggrieved person to file counter claim, on the contrary from the observations found in the said judgment it clearly indicates that filing a counter complaint is permissible.

25. In the instant case, it is seen in regard to the incident which took place on 20th May, 1995, the appellant and the 1st respondent herein have lodged separate complaints giving different versions but while the complaint of respondent was registered by the concerned police, the complaint of the appellant was not so registered, hence on his prayer the learned Magistrate was justified in directing the police concerned to register a case and investigate the same and report back.”

29. In view the authoritative pronouncement of the Supreme Court in the case of **Upkar Singh** (supra), it cannot be disputed that if the accused in the first FIR or some other person acting on his behalf, goes to the police with a version which runs counter to the version given by the complainant in the first FIR, it is permissible for the police to register a second FIR on the basis of the version given by him. Mere pendency of investigation in the first FIR registered by the police will not be

a valid ground for refusing to register a second FIR on the basis of the counter version given to the police. But, the difficulty in the present case is that not only has the investigation in the FIR lodged against the complainant been completed and has resulted in filing of chargesheet against him, the case against him has already been committed to Court of Sessions and is pending trial before it. During the course of arguments, I was informed that substantial evidence has already been recorded in the trial pending against the complainant and others. The question, which needs to be carefully considered is whether it was a permissible and appropriate exercise of discretion vested in the Magistrate under Section 156(3) of the Code of Criminal Procedure to direct the police to register a fresh FIR on the counter version given by the complainant at the stage where the trial against him pending before the Court of Sessions was substantially complete. It would be pertinent to note here that the chargesheet against the complainant and his co-accused was filed on 16th March, 2006 whereas the impugned order directing registration of FIR was passed on 1st August, 2009, i.e., more than three years after filing of chargesheet against

the complainant. It cannot be disputed that the allegations made in the complaint filed by Mohd. Rafiq would also be his defence in the murder case pending trial before the Court of Sessions. Chapter XVIII of the Code of Criminal Procedure prescribes the procedure for trial before a Court of Sessions. Once a case triable exclusively by the Court of Sessions is committed to it, the Court is required to consider the record of the case and the documents submitted therewith and decide, as provided in Section 227 of the Code, whether there was sufficient ground for proceeding against the accused or not. If the Judge is of the view that there is no sufficient ground for proceeding against the accused, he is liable to be discharged. If, however, the Judge is of the opinion that there is ground for presuming that the accused has committed an offence triable exclusively by the Court of Sessions, he is required to frame a charge, as provided in Section 228 of the Code. If the accused pleads not guilty, the Judge is required to take such evidence as the prosecution may produce in support of its case. If after taking evidence produced by the prosecution and examining the accused, as provided in Section 313 of the Code and hearing both the parties, the Judge considers that there is no

evidence of commission of an offence by the accused, he is required to record an order of acquittal, as provided in Section 332 of the Code. If the accused is not acquitted under Section 332 of the Code, he is to be called upon to enter his defence and adduce such evidence as he may have in support of the defence taken by him. If the accused so applies, the Judge is required to issue process for compelling the attendance of any witness or the production of any document or thing unless he is of the view that the application has been made for the purpose of delaying or defeating the end of the justice of otherwise vexatious. Thus, the scheme of the Code does not envisage consideration of the defence available to the accused at any stage before recording of the evidence of the prosecution and statement of the accused. If the defence available to the accused is considered at an earlier stage, that would be contrary to the scheme of trial envisaged in Chapter XVIII of the Code of Criminal Procedure and would thereby violate the legislative mandate. The allegations made in the complaint, being nothing, but the evidence which the complainant can have in his defence if the investigating agency is directed, at this stage, to investigate into his allegations, this would not

only be contrary to the scheme of trial envisaged in the Code of Criminal Procedure, but would also amount to relieving the complainant of discharging the onus placed upon him by law to substantiate the defence taken by him, by asking the State machinery to verify his defence and collect evidence on his behalf. It would be open to the complainant, at an appropriate stage, unless he is acquitted in terms of Section 332 of the Code, to not only examine himself as a witness, but, also summon any other witness and prove all such documents, as may support the defence taken by him. If the trial court believes the version given by him, not only will he be acquitted, it will also be open to the Trial Court to proceed against those whom it finds guilty for killing of Rashid and causing injuries to the complainant. But, the complainant having not come to the Magistrate before cognizance was taken by the Court, he must necessarily wait till the trial against him reaches a stage, where the allegations made by him can be considered on their merit.

30. The complaint before the Magistrate was filed by Mohd. Rafiq on 21st July, 2006, whereas chargesheet against him had already been filed on 16th March, 2006. Had the complaint

Mohd. Rafiq approached the Magistrate under Section 156(3) of the Code, before filing of chargesheet against him and others, it would not have been possible for the police to register another FIR on the basis of the counter version given by him and to carry out investigation into the allegations made by him. In that case, the police could have simultaneously investigated both the counter versions and after arriving at an appropriate conclusion, it would have filed chargesheet against the person whom it found to be the real culprit on the basis of the investigation carried out by it. But, once the police has completed its investigation and it has culminated in filling of a chargesheet against Mohd. Rafiq and others, it would not be appropriate to direct it to carry out a re-investigation on the basis of a contrary version given by the complainant Mohd. Rafiq. Since the complainant Mohd. Rafiq claims to be innocent, whereas the police, after carrying out investigation, has concluded he alongwith his co-accused is guilty of committing murder of Mohd. Rashid, investigation on the counter version given by the complainant would be a re-investigation and not only a further investigation by the police. Since the investigation had resulted into the filing of the

chargesheet, the case against the complainant had already been committed to the Court of Sessions and the trial was substantially complete, it was not an appropriate and legally permissible exercise of the judicial discretion vested in the Magistrate to direct registration of another FIR followed by a fresh investigation.

31. Though it has been alleged in the complaint filed by Mohd. Rafiq that the police did not register any complaint against the real culprits, but registered case only against him, there is no averment anywhere in the complaint that the complainant or someone acting on his behalf had complained to the officer in-charge of the concerned Police Station that, in fact, the murder of deceased Mohd. Rashid took place at the hands of Ansar and Salman. There is no allegation that the complainant Mohd. Rafiq or some other person on his behalf had sent any written complaint to the concerned Station House Officer alleging murder of Mohd. Rashid by Ansar and Salman and that complaint was not investigated by him. There is no allegation that the complainant Mohd. Rafiq had told the Investigating Officer that, in fact, murder of Mohd. Rashid was committed by Ansar and Salman, when they tried

to assail the complainant, but was not able to stop their hands, while the complainant saved from them. Section 154(3) of the Code of Criminal Procedure enables any person aggrieved by refusal on the part of a Station House Officer to record the information given to him related to commission of a cognizable offence, to send the substance of such information to the concerned Superintendent of Police, who if satisfied that the information received by him, discloses commission of a cognizable offence is duty-bound to either investigate case himself or direct investigation to be made by a police officer subordinate to him. This is not the case of the complainant that either he or anyone on his behalf had approached the concerned Deputy Commissioner of Police, as envisaged under Section 154(3) of the Code. Admittedly, the complainant Mohd. Rafiq did not file, alongwith his complaint, copy of any complaint/report made by him or someone acting on his behalf, either to the concerned SHO or to the concerned Deputy Commissioner of Police or any other superior police officer giving his version of the incident and claiming that the death of Rashid took place at the hands of Ansar and Salim.

32. The complainant Mohd. Rafiq, who was arrested on the

very same day, on which the incident took place, must have been produced before the concerned Magistrate a number of times for remanding him to police/judicial custody. Admittedly, no complaint at any point of time was made by Mohd. Rafiq to any Magistrate giving his version of the incident and requesting him to direct the Station House Officer or the Investigating Officer of the case to investigate his allegations. The complainant Mohd. Rafiq approached the Magistrate more than four months after chargesheet had already been filed against him. There is absolutely no explanation from the complainant Mohd. Rafiq as to what prevented him from either sending himself or asking someone acting on his behalf to send a written complaint to the concerned SHO or to the concerned Deputy Commissioner of Police. There is no explanation from him as to why he did not give his version of the incident to the Magistrate(s) before whom he was produced from time to time for the purpose of taking his remand. There is no explanation from him as to why he did not approach the Magistrate before filing of chargesheet against him. Had the complainant Mohd. Rafiq approached the Magistrate by way of a complaint before the Magistrate took cognizance, the

Magistrate would probably have been justified in keeping the chargesheet against Mohd. Rafiq and his co-accused pending and directing the police, in exercise of the power conferred upon him under Section 156(3) of the Code to register an FIR and carry out investigation on the basis of the version given by him. But, the complainant having not come to the Magistrate before his taking cognizance on the basis of the chargesheet filed against him, it would be difficult to sustain the order directing registration of FIR and carrying out of investigation at such a belated stage.

33. It was contended by the learned counsel for the complainant that there is no period of limitation prescribed for making complaint to the Magistrate in respect of the offence punishable with imprisonment for a term exceeding three years. No doubt, the Court can take cognizance of offences punishable with imprisonment for a term exceeding three years at any point of time, no period of limitation having been prescribed for taking cognizance of such offences, but the issue involved in this case is as to whether the Magistrate was justified in directing investigation under Section 156(3) of the Code when the complainant approached him at such a belated

stage when cognizance had already been taken by the Magistrate on the basis of the investigation carried out and chargesheet had already been submitted by the police.

34. It was submitted by the learned counsel for the petitioner that in fact the complaint is actuated by ulterior motives since the strategy behind seeking directions for investigation by the police is to stall the trial of the murder case pending against him on the ground that his complaint giving counter version of the incident being under investigation pursuant to a judicial order, the trial should be stayed or held up till the investigation into the counter version given by him is complete and culminates in filing of a chargesheet or final report, as the case may be. The argument of the complainant justifying such a relief would be that he will face a fait accompli, if he is convicted by the Sessions Court and later on the police, on the basis of investigation being conducted by it, comes to the conclusion that he was innocent and the other party was the real culprit. Considering the circumstances that (i) there is no allegation of the complainant Mohd. Rafiq or anyone acting on his behalf having made any complaint to the Station house Officer, giving counter version of the incident which took place

on 22nd December, 2005; (ii) there is no allegation of the complainant or anyone acting on his behalf having written to the Deputy Commissioner of Police under Section 154(3) of the Code of Criminal Procedure; (iii) there is no allegation of the complainant having given his version of the incident to the Magistrate before whom he was produced from time to time for the purpose of taking his remand; (iv) the complainant has not annexed copy of any complaint made to the Station House Officer or to a superior police officer either by him or anyone acting on his behalf; (v) the complainant did not approach the Magistrate at any time before filing of chargesheet and against him and taking of cognizance by the Court, it appears to me that the complaint filed by Mohd. Rafiq is indeed tainted with ulterior motives, the purpose being is to stall the progress of the trial pending against him which is stated to be substantially complete. If the Court directs registration of FIR and consequent investigation at this stage, it will only be lending a helping hand to a person who does not seem to be a bona fide person aggrieved on account of refusal of the police to register FIR on the complaint made by him and whose sole motive appears to be to frustrate or at least delay the trial

pending against him. Such an investigation, if directed at this stage, is bound prejudice the prosecution and result in circumventing the legal process.

35. In *Eicher Tractor vs. Harihar Singh* 2009 (1) JCC 260 (SC), the appellant before the Supreme Court file a complaint under Section 138 of Negotiable Instruments Act. Cognizance on the complaint was taken on 12th April, 2001. On 4th October, 2002, respondent No.1 before the Supreme Court filed a private complaint alleging that the officials of appellant No. 1 had stolen two cheques and then forged them and presented those cheques to the bank at Faridabad. The Magistrate took cognizance on the complaint and issued summons to the appellants. The proceedings initiated by respondent No.1 were challenged by way of a petition before the High Court under Section 482 of the Code of Criminal Procedure. The petition having been dismissed, the appellants knocked the door of the Supreme Court. Relying upon its earlier decision in *State of Haryana vs. Bhajan Lal* 1992 supp.(1) SCC 335 holding therein that the power under Section 482 of the Code of Criminal Procedure to quash criminal proceedings can be invoked where the criminal

proceedings are manifestly attended with malafide and/or where the proceedings are maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, the Supreme Court quashed the criminal proceedings holding them to be a counter blast to the proceedings initiated by the appellant. The Court was of the view that continuance of such proceedings will be nothing, but an abuse of process of law.

36. In **Sunil Kumar vs. Escort Yamaha Ltd.** 1999 (8) SCC 468, the appellant filed an FIR alleging commission of offences, including criminal breach of trust by the respondents and claimed that they had withdrawn money by presenting blank cheques signed by the appellants. The case of the appellants in the FIR was that certain cheques had been given to the respondents with a specific understanding that they were to be presented against delivery of future vehicles and not for any past liability or dues. The respondent presented those cheques which, however, could not be encashed in view of the directions given by the appellant to the bank. The respondents filed a petition before this Court seeking quashing of FIR on the grounds that the averments in the FIR did not make out

offence and the criminal proceedings pursuant to the FIR had been initiated with an ulterior motive and were, therefore, a gross abuse of the process of law. A Division Bench of this Court having quashed the FIR, the appellant approached the Supreme Court and contended that since the allegations made in the FIR did constitute a cognizable offence, the same could not have been quashed in the light of the judgment of the Court in the case of **Bhajan Lal** (supra). The respondents before the Supreme Court, however, claimed that the criminal proceedings were instituted with an ulterior motive for wreaking vengeance and to pre-empt the filing of criminal complaint against him under Section 138 of Negotiable Instruments Act. The Supreme Court dismissed the appeal being satisfied that FIR was lodged in order to pre-empt the filing of the criminal complaint against the informant under Section 138 of Negotiable Instruments Act and, therefore, the High Court was well within its power in quashing the FIR which otherwise would tantamount to an abuse of the process of law. In the present case, the complainant is actually facing trial, and that too for committing murder. Hence, the case of the petitioner for quashing the order passed by the learned

ACMM, stands on a stronger footing.

37. In **Parminder Singh vs. G.S. Bhatia** CrI.M.C.1215/2007, decided on 4th December, 2007, the petitioner before this Court filed a complaint before the Magistrate seeking directions for registering FIR and investigation under Section 156(3) of the Code of Criminal Procedure. The Magistrate, however, did not direct investigation by the police, but took cognizance and directed the complainant to produce pre-summoning evidence. The order of the Magistrate was challenged before this Court holding that the petition had been filed just to delay the proceeding of the complaint case filed by the petitioner under Section 138 of Negotiable Instruments Act. This Court held that the Magistrate rightly did not order investigation under Section 156 (3) of the Code.

38. I am, therefore, satisfied that the impugned order, if allowed to stand, will result in gross abuse of the process of the Court, at the behest of a person accused of committing a serious offence. If such an order is not quashed, it will give a convenient tool to the persons facing trial for committing heinous crimes, pursuant to investigation carried out by the Stage machinery, to thwart the legal process, by filing a

complaint at a time which suits their strategy, giving a counter version claiming themselves to be innocent and implicating persons, who are likely to depose against them, so as to put pressure on those witnesses not to depose against them. In fact sheer pressure of being accused of having committed a serious offence, by itself may dissuade the witnesses from coming forward to give evidence against the accused and if that happens, the accused will become successful in his sinister design of frustrating the legal process initiated against him. Such attempts, therefore, need to be nipped in the bud and such abuse of legal process needs to be curbed by an effective and decisive intervention by this Court, which owes a duty to uphold the legal process and prevent its abuse or misuse by anyone, whosoever he may be.

39. There is yet another reason for not directing investigation by the police on the basis of the counter version given by the complainant. A perusal of the report dated 30th May, 2007 submitted to the learned Metropolitan Magistrate would show that on receipt of copy of the complaint, an investigation was actually carried out and after recording statement of certain witnesses, namely, Mohd. Sharif, Yamin Khan, Ali Hassan

Faiyazuddin and Mohd. Usman, the police officer who carried out the investigation reported that the injuries on the person of Mohd. Rafiq were self-inflicted and there was no substance in the complaint filed by him. Presumably, this investigation was carried out pursuant to the direction of the learned Metropolitan Magistrate dated 8th September, 2006. No useful purpose, therefore, is likely to be served by giving a direction to the concerned SHO under Section 156(3) of the Code for registration of a fresh FIR and carrying out re-investigation into the matter.

For the reasons given in the preceding paragraphs, I am of the considered view that the impugned order dated 1st August, 2009 cannot be sustained. The order is accordingly set aside.

The petition stands disposed of.

(V.K.JAIN)
JUDGE

MARCH 10, 2010

Ag/BG/sn'