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

Reserved on: 19th March, 2013
Pronounced on: 8th April, 2013

\+ **CRL.M.C. 161/2013**

RAJENDER SINGH DAGAR ..... Petitioner

Through: Mr. R.N.Mittal, Senior Advocate with Mr. S.P. Kaushal, Advocate with Mr. Ankit Goel, Advocate

versus

THE STATE NCT OF DELHI ..... Respondent

Through: Ms. Rajdipa Behura, APP for the State
Mr. Ramesh Gupta, Senior Advocate with Mr. Dinesh Mudgil, Advocate
Mr. Ajandra Sisodia, Advocate for Complainant.

\+ **CRL.M.C. 428/2013**

PADAM SINGH DAGAR ..... Petitioner

Through: Mr. R.N.Mittal, Senior Advocate with Mr. S.P. Kaushal, Advocate with Mr. Ankit Goel, Advocate

versus

STATE NCT OF DELHI ..... Respondent

Through: Ms. Rajdipa Behura, APP for the State
Mr. Ramesh Gupta, Senior Advocate with Mr. Dinesh Mudgil, Advocate
Mr. Ajandra Sisodia, Advocate for Complainant.

\+ **CRL.M.C. 681/2013**

BHARAT SINGH ..... Petitioner

Through: Mr. Ramesh Gupta, Senior Advocate with Mr. Dinesh Mudgil, Advocate, Mr. Ajandra Sisodia, Advocate

versus

STATE & ORS. ..... Respondent

Through: Ms.Rajdipa Behura, APP for the State Mr. R.N.Mittal, Senior Advocate with Mr. S.P. Kaushal, Advocate, Mr. Ankit Goel, Advocate for R-2 & 3.

CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. These three Petitions arise out of the FIR No.123/2012 wherein on filing of the charge sheet by an order dated 01.09.2012, the learned Metropolitan Magistrate ('MM') took cognizance of the offence against all the accused persons including Rajinder Dagar and Padam Singh Dagar and ordered issuance of the process against the earlier said two persons. (Petitioners in Crl.M.C.161/2013 and 428/2013).

2. Order dated 01.09.2012 was successfully challenged by these two Petitioners in Criminal Revision Petition No.410/2012 in the Court of learned Additional Sessions Judge, New Delhi who relying on *Kishun Singh & Ors. v. State of Bihar, 1993 Crl.LJ 1700* opined that in a case exclusively triable by the Court of Sessions, "MM" was not competent to take cognizance and it was only the Sessions Court which can take cognizance under Section 193 of the Code of Criminal Procedure, 1973 (the Code) after the case is committed to it by the learned 'MM'. The learned ASJ held that the dictum in *Kishun Singh* had been approved by

the Supreme Court in its later judgments in *Dharampal & Ors. v. State of Haryana & Anr. 2004 (13) SCC 9;* and *Jaswant & Anr. v. State of Rajasthan, 2009 (8) Scale 275.* Thus, the learned ASJ set aside the order taking cognizance against Rajinder Singh and Padam Singh Dagar and consequently issuing process against them.

3. There is another twist to the case, in as much as, when the case was committed to the Court of Session, the learned ASJ by an order dated 05.01.2013 took cognizance under Section 193 of the Code against the earlier said two Petitioners and held that the Sessions Court need not wait for the stage of Section 319 of the Code. Consequently order dated 21.09.2012 came to be passed by the learned ASJ was set at naught and the order dated 01.09.2012 passed by the learned 'MM' stood revived.

4. For the sake of convenience, the Petitioner in Crl.M.C.681/2013 shall be referred to as 'BS' whereas Petitioners in Crl.M.C. 161/2013 and Crl.M.C. 428/2013 shall be referred to as 'RSD' and 'PSD' respectively.

5. Mr. Ramesh Gupta, learned senior counsel appearing on behalf of 'BS' urges that the Petitioners 'RSD' and 'PSD' had been sent up to face trial and their names were admittedly kept in Column 11 of the report under Section 173 of the Code, although 'RSD' and 'PSD' were not arrested by the police during the course of investigation. The learned senior counsel argues that under Section 190 of the Code the Magistrate was not only empowered to take cognizance against the accused persons sent up for trial but also against the persons the police claimed not to have sufficient evidence to prosecute them. Since in the instant case the police referred to the statement made by 'BS' having named the Petitioners 'RSD' and

'PSD' as the conspirators, there was nothing illegal in taking cognizance against them by the learned 'MM'.

6. The learned senior counsel states that the learned 'ASJ' erred in interfering in the order of taking cognizance by order dated 21.09.2012. Thus, according to learned senior counsel, the order dated 21.09.2012 is liable to be set aside.

7. On the other hand, Mr. R.N. Mittal, learned senior counsel appearing on behalf of 'RSD' and 'PSD' urges that it was not only on the basis of *Kishun Singh* that the learned ASJ set aside the order dated 01.09.2012 passed by the learned 'MM' but what weighed with the learned 'ASJ' was also that there was no prosecutable evidence filed by the IO against 'RSD' and 'PSD'. Thus, the learned 'ASJ' was fully justified in setting aside the order dated 01.09.2012 particularly when the order dated 01.09.2012 was a totally non speaking order and did not reflect the application of mind by the learned 'MM'.

8. The learned senior counsel for the 'RSD' and 'PSD' argues that 'BS' preferred to file a Petition under Section 482 of the Code, whereas only a Revision Petition was maintainable against the order dated 21.09.2012 which is impugned by 'BS'. He urges that although a Petition under Section 482 of the Code could be converted into a Revision Petition under Section 397 but since the period of limitation for filing a Revision Petition had expired by the time the Petition under Section 482 of the Code was filed, the same cannot be entertained. The learned senior counsel places reliance on a judgment of the Coordinate Bench of this Court in *A.K. Dixit v. Manoj Kumar & Ors. 1991 (1) JCC (Delhi) 181*

wherein it was laid down that a Petition under Section 482 of the Code can be invoked only when no other remedy is available. The learned senior counsel argues that the order dated 01.09.2012 passed by the learned 'MM' on the face of it is a totally non-speaking order and since both the parties are before this Court against the two orders whereby cognizance was initially taken by the learned 'MM' and subsequently by the 'ASJ', this Court being the supervisory Court can itself examine the material produced by the police to analyse whether there was sufficient ground to take cognizance against 'RSD' and 'PSD'.

9. There is no dispute about the proposition of law which is very fairly conceded by Mr. R.N. Mittal, that a Magistrate is competent to take cognizance against any accused on the basis of the material in the report under Section 173 of the Code irrespective of the fact whether it is a Magisterial trial or a Sessions trial case. In this connection, a reference may be made to the report of Supreme Court in *M/s. SWIL Ltd. v. State of Delhi & Anr., AIR 2001 SC 2747* wherein it was laid down that after taking cognizance of the offence under Section 190 of the Code, the Magistrate is to decide as to who should be summoned as an accused. It was clarified that the Magistrate is entitled to issue process even against the persons who are not named as an accused in the charge sheet by the police. Para 6 of the report is extracted hereunder:

> *"6. In our view, from the facts stated above it is clear that at the stage of taking cognizance of the offence, provisions of Section 190 Cr.P.C. would be applicable. Section 190 inter alia provides that `the Magistrate may take cognizance of any offence upon a police report of such facts which constitute an*

offence.' As per this provision, Magistrate takes cognizance of an offence and not the offender. After taking cognizance of the offence, the Magistrate under Section 204 Cr.P.C. is empowered to issue process to the accused. At the stage of issuing process, it is for the Magistrate to decide whether process should be issued against particular person/persons named in the charged sheet and also not named therein. For that purpose, he is required to consider the FIR and the statements recorded by the police officer and other documents tendered along with charge sheet. Further, upon receipt of police report under Section 173(2) Cr.P.C., the magistrate is entitled to take cognizance of an offence under Section 190(1)(b) even if the police report is to the effect that no case is made out against the accused by ignoring the conclusion arrived at by the investigating office and independently applying his mind to the facts emerging from the investigation by taking into account the statement of the witnesses examined by the police. At this stage, there is no question of application of Section 319 Cr.P.C. Similar contention was negatived by this Court in Raghuband Dubey vs. State of Bihar, (1967) 2 SCR 423: (AIR 1967 SC 1167: 1967 (Cri.L.J.1081 by holding thus(para 9 of AIR, Cri LJ):

> *"In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence."*

10. What is emphasized by Mr. R.N. Mittal is that whenever the police reports about insufficient evidence or lack of evidence, the application of

mind on the part of learned 'MM' must be exhibited from the order taking cognizance. Order dated 01.09.2012 is extracted hereunder:-

"01.09.2012

Fresh police report u/s 173 Cr.PC. filed by IO Inspector R.K. Meena today. It be checked and registered.

....

An application for obtaining palm prints of the accused Vikas is filed by the IO. Application perused. Submissions heard.

IO states that though palm prints of accused Vikas had been taken earlier, as per memo number 1103/1/FPB dated 28.08.2012 of the Director Finger Prints Bureau, Delhi Police, the same were not taken properly. He, therefore, request that permission be granted for taking palm prints afresh. In view of the submissions of the IO, IO is permitted to obtain palm prints of the accused Vikas @ Vicky as per rules in the Dossier Section in the court premises of the Dwarka Courts Complex.

The application is disposed of accordingly.

Police report and documents perused. Submissions heard.

I take cognizance of the offence.

Accused Rajinder Dagar and Padam Singh Dagar were not arrested.

Copies of the police report and documents are supplied to the accused present in court.

IO undertakes to file E challan along with sufficient copies.

Issue summons to the accused Rajinder Dagar and Padam Singh Dagar returnable on 04.09.2012. IO is bound down for next date.

Copy of this order be given dasti to the IO as per request.

(MANIKA)

Metropolitan Magistrate-12 (South-West)

01.09.2012"

11. In the report under Section 173 of the Code the names of 'RSD' and 'PSD' were shown in Columns 11(i) and 11(j) whereas names of Narender Singh @ Jonty and Virender @ Dheela against whom cognizance was not taken were shown in Columns 12(a) and 12(b) respectively. The officers in charge of the Police Station opined that no evidence to prosecute Narender Singh @ Jonty and Virender @ Dheela could be found. He further opined that there was no corroborative evidence to the statement of 'BS' as against the Petitioners 'RSD' and 'PSD' still on the basis of statement of 'BS' they were kept in column 11.

12. It is well settled that the Magistrate may not give reasons for taking cognizance. In a case the order taking cognizance by itself may amount to application of mind. But in the peculiar facts of the instant case wherein police divided the accused in three sets, that is, one who were arrested and against whom there was sufficient evidence and kept in column 11, second, the accused persons that is the Petitioners 'RSD' and 'PSD' against whom the police found some evidence in the shape of the statement of PW 'BS' but did not find any corroborative evidence, they were also kept in Column No.11, in other words, they were also charge sheeted. And the third Narender Singh and Virender Singh against whom the prosecuting agency did not find any evidence at all and, therefore, kept them in column No.12 and did not send them up for trial. Thus, in the peculiar circumstances of this case there ought to have been specific mention as to why the cognizance was being taken against 'RSD' and

'PSD' and why the cognizance was not being taken against Narender Singh and Virender Singh.

13. Turning to the contention raised on behalf of the 'RSD' and 'PSD' and the reliance placed on *A.K. Dixit* I may submit that *A.K.Dixit* shall have to be held *per incurium* in view of the report of the Supreme Court in *Dhariwal Tobacco Products Ltd. & Ors. v. State of Maharashtra & Anr. (2009) 2 SCC 370* wherein it was held that inherent powers under Section 482 of the Code can be exercised even when the orders sought to be challenged is revisable under Section 397. Paras 7 and 8 of the report is extracted hereunder:-

> ***"7.*** *The power of the High Court can be exercised not only in terms of Section 482 of the Code but also in terms of Section 483 thereof. The said provision reads thus:*
>
> *"483. Duty of High Court to exercise continuous superintendence over Courts of Judicial Magistrates.—Every High Court shall so exercise its superintendence over the Courts of Judicial Magistrates subordinate to it as to ensure that there is an expeditious and proper disposal of cases by such Magistrates."*
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> *The inherent power of the High Court is not conferred by statute but has merely been saved thereunder. It is, thus, difficult to conceive that the jurisdiction of the High Court would be held to be barred only because the revisional jurisdiction could also be availed of. (See Krishnan v. Krishnaveni (1997) 4 SCC 241).*
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> ***8.*** *In fact in Adalat Prasad v. Rooplal Jindal (2004) 7 SCC 338 to which reference has been made by the learned Single Judge of the Bombay High Court in V.K. Jain [V.K. Jain v. Pratap V. Padode, (2005) 30 Mah LJ 778] , this Court has clearly opined that when a process is issued, the provisions of Section 482 of the Code can be resorted to……"*

14. Thus, the contention raised on behalf of 'RSD' and 'PSD' that the Petition under Section 482 of the Code (Crl.MC.681/2013) is not maintainable, is without merit and has to be rejected.

15. Since there appears to be non application of mind and as suggested by learned senior counsel for 'RSD' and 'PSD' that this Court in its supervisory jurisdiction can itself go through the material placed on record by the prosecuting agency to find out if there was sufficient material to take cognizance against the two Petitioners, I have gone through the statement of 'BS' recorded under Section 161 of the Code. He, inter alia, informed the IO that he knew accused Pinky, Kuldeep, Sumit, Virender Sehrawat, Satish, Ravinder and Navin since before. He told the IO that at the time of opening of fire accused Vikas @ Vickey and Kuldeep had exclaimed that in the last Municipal Elections he ('BS') had incurred enmity with Udaiveer @ Kala, Padam Singh @ Bandi son of Gurdyal and Rajender Dagar son of Sukhdev and he will have to pay the price for the said enmity. He ('BS') further informed the IO that in the Municipal Elections Udaiveer, 'RSD' and 'PSD' had threatened him that if he or any of his family members contested in the corporation elections, the consequences would be very bad. He informed the IO that a report in this regard was also lodged by him with the police and other authorities at the relevant time.

16. Mr. R.N. Mittal, learned senior counsel for 'RSD' and 'PSD' urges that much value cannot be attached to this part of the statement made by 'BS' in view of the fact that this witness claims to have disclosed all these facts to his brother Kishan Pehalwan who was completely silent on this aspect

in his statement under Section 161 of the Code. I would not agree. The discrepancies in the two statements and the fact whether these things were stated by 'BS' to his brother Kishan Pehalwan while he ('BS') was being removed to the hospital is a question which has to be considered by the learned 'ASJ' at the appropriate stage during framing of the charges or the trial as the case may be. To say the least, this material was sufficient to take cognizance against them that they were part of the conspiracy to open a murderous assault on 'BS' and others.

17. In the circumstances, the order dated 21.09.2012 passed by the learned 'ASJ' cannot be sustained. Consequently, Crl.M.C. 161/2013 and 428/2013 filed by 'RSD' and 'PSD' become infructuous.

18. I may also like to add that in *Kishun Singh & Ors. v. State of Bihar* it is laid down that the Court can certainly take cognizance against the offender if any evidence is produced during the course of trial yet this power under Section 319 of the Code did not preclude the Sessions Court to summon a person in exercise of its power under Section 193 of the Code if there is evidence to show involvement of the persons in commission of the offence against whom the cognizance is sought to be taken. The decision in *Kishun Singh* was overruled by a three Judge Bench decision of the Supreme Court in *Ranjit Singh v. State of Punjab (1998) 7 SCC 149*, wherein the Supreme Court laid down that once the Sessions Court takes cognizance of the offence pursuant to the committal order the only other stage when the Court is empowered to add any other person to the array of accused is after recording evidence. Paras 19, 20 and 21 of the report are extracted hereunder:-

> **19.** *So from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 of the Code that court can deal with only the accused referred to in Section 209 of the Code. There is no intermediary stage till then for the Sessions Court to add any other person to the array of the accused.*
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> ***20.*** *Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order, the only other stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under Section 319 of the Code can be invoked. We are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused. Of course it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers.*
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> ***21.*** *But then one more question may survive. In a situation where the Sessions Judge notices from the materials produced but before any evidence is taken, that any other person should also have necessarily been made an accused (without which the framing of the charge would be defective or that it might lead to a miscarriage of justice), is the Sessions Court completely powerless to deal with such a contingency? One such situation is cited by the learned Judges through an illustration narrated in Kishun Singh case (1993) 2 SCC 16 as follows:*
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>> *"Where two persons A and B attack and kill X and it is found from the material placed before the Judge that the fatal blow was given by A whereas the blow inflicted by B had fallen on a non-vital part of the body of X. If A is not challaned by the police, the Judge may find it difficult to charge B for the murder of X with the aid of Section 34 IPC. If he cannot summon A, how does he frame the charge against B?"*

19. In *Dharam Pal & Anr.* another three Judge Bench decision of the Supreme Court, the correctness of the view taken in *Ranjit Singh* was doubted and a reference was made to the larger Bench. But till the

reference is decided, the three Judge Bench decision in *Ranjit Singh* shall hold the field. In *Jile Singh v. State of U.P. & Anr., (2012) 3 SCC 383* another two Judge Bench of the Supreme Court relied upon *Ranjit Singh* and held as under:-

> ***"12.*** *In the present case, if the order passed by the Chief Judicial Magistrate, Mathura, in issuing summons against the appellant on the complaint filed by Respondent 2 complainant, which has been confirmed by the High Court, is allowed to stand, it would mean addition of the appellant to the array of the accused in a pending case before the Sessions Judge at a stage prior to collecting any evidence by that court. This course is absolutely impermissible in view of the law laid down by a three-Judge Bench of this Court in Ranjit Singh (1998) 7 SCC 149.*
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> ***13.*** *The stage of Section 209 CrPC having been reached in the case, it was not open to the Chief Judicial Magistrate, Mathura to exercise the power under Section 204(1)(b) CrPC and issue summons to the appellant. The order of the Chief Judicial Magistrate, Mathura is totally without jurisdiction. The High Court was clearly in error in not keeping in view the law laid by this Court in Ranjit Singh followed by a subsequent decision in Kishori Singh (2004) 13 SCC 11 and in upholding the illegal order of the Chief Judicial Magistrate, Mathura."*

20. Thus, decision by a coordinate Bench of this Court in *Ravinder v. State Crl. Rev.P. 126/2012 decided on 08.05.2012* which is not in consonance with the three Judge Bench decision in *Ranjit Singh* shall be held to be *per incurium.* In this view of matter, the learned 'ASJ' was not entitled to take cognizance against 'RSD' and 'PSD' by order dated 05.01.2013 after committal of the case without reaching the stage under section 319 of the Code. But, as stated above, since the order dated 21.09.2012 has been set

aside, Crl.M.C.161/2013 and Crl.M.C.428/2013 have become infructuous.

21. In view of the above discussion, Crl.M.C. 681/2013 is allowed and the order of the learned Magistrate taking cognizance against 'RSD' and 'PSD' for the reasons as stated by me hereinabove is confirmed.

22. The observations made hereinabove were necessary for decision on the controversy raised by the parties and shall not tantamount to expression of my opinion on the merits of the case.

23. The learned 'ASJ' shall be at liberty to take his own view without being influenced by the observations made hereinabove.

24. The Petitions are disposed of in above terms.

25. Pending Applications also stand disposed of.

(G.P. MITTAL)
JUDGE

APRIL 08, 2013
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