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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(CRL) 533/2012 & CrI.M.A. No. 4340/2012**

Date of Decision: 13th September, 2013

RAJESH DUBEY Petitioner

Through Mr. C.M. Maini and Mr. Arvind
 Dhingra, Advocates

versus

STATE & ORS. Respondent

Through Mr. Dayan Krishnan, ASC for State
 Mr. Mohit Mathur, Mr. Rajeev
 Goyal and Mr. Ujjwal K. Jha,
 Advocates for R-2.
 Mr. R.C. Tiwari, Advocate for R-3.

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

:SUNITA GUPTA, J.

1. Whether the learned Additional Session Judge, in exercise of his jurisdiction u/s 397 of the Code of Criminal Procedure (for short, the 'Court') can pass an order in the absence of accused in the facts and circumstances of the case is the question involved in this writ petition which arises out of an order dated 27.02.2012 passed by the learned Additional Session Judge in criminal revision No.26/2012.

2. Before adverting to the said question, it will be relevant to note the admitted facts. Respondent no.1 is a company incorporated under the Companies Act, 1956. It filed a complaint in the Court of ACMM, Dwarka in respect of an offence reported to have been committed and punishable u/s 408/418/420/467/468/471 read with Section 120B/34 IPC accompanied by an application u/s 156(3) of the Code.

3. It is not necessary to deal with the allegations made in the said complaint in detail. Suffice it to say, vide order dated 23.11.2011, the learned M.M. Dwarka, in whose Court the aforementioned complaint was transferred, refused to direct investigation in the matter by the Station House Officer in terms of Section 156(3) of the Code stating:

“14. I am of the considered opinion that present case is not a fit case to be referred to the police u/s 156(3) Cr.P.C as complainant company itself is in possession of the evidence to prove the allegations made. All the original invoices and air bills as submitted by accused No.2 through accused No.1 for approval and final payment, would be in the possession of the complainant company. The witnesses are very well known. The particulars of the accused are also available. The other documents and the records to be produced, are also with the complainant. In my opinion, the investigation or inquiry to be carried out is not of such technical nature which can only be conducted by the police and the same can be conveniently led by the complainant by adducing pre-summoning evidence.

15. This Court has already observed that prima facie there appears to be a commercial dispute.

16. Accordingly the request of the complainant company to refer the matter to the police for investigation u/s 156(3) Cr.P.C is declined and the complainant is directed to lead pre-summoning evidence on 19.01.2012.”

4. Aggrieved by the said order, respondent no.2 filed a revision petition before the learned Additional Session Judge impleading the State only as a party. The learned Additional Session Judge allowed the revision petition and set aside the impugned order by observing:

“16. In view of my above discussion and case laws mentioned above, I have also given my thoughtful consideration on the order dated 23.11.2011. In the operative para no.14, learned Trial Court has held that the complainant company itself is in possession of the evidence to prove the allegations and in para 12, learned Trial Court has held that the matter pertains to commercial transaction and is essentially of civil nature. In this case transaction was done between two companies by their deputed officers. Allegedly both have conspired and cheated the revisionist by raising inflated, forged and fabricated bills. All the documents may not be available with the complainant and certain documents are needed to be obtained from Customs/Airline office which the revisionist is unable to procure itself without the assistance of the police. There is one note allegedly written by accused Shobit Srivastav which needs to be investigated. The complaint available on file manifestly show cognizable offence as there are clear cut allegations against the accused persons. Learned Trial Court, therefore went wrong in declining the application u/s 156(3) Cr.P.C.

17. In my opinion, this is not a case in which no offence of any kind was made out. Further as mentioned above the complainant may not be able to collect the entire documents and evidence. The revision petition is allowed as the impugned order passed by Ld. MM suffers from illegality and the same is hereby set aside. Ld. Trial Court is directed to reconsider the application u/s 156(3) Cr.P.C of the revisionist and pass order afresh.”

5. Feeling aggrieved by this order, this writ petition has been filed by the petitioner seeking setting aside of this order primarily on the ground that in the absence of the accused persons, no order could have been

passed to the prejudice of the accused, unless he had an opportunity of being heard.

6. Sh. Chander Mohan Maini, Advocate appearing on behalf of the petitioner contended that having regard to the fact that the complaint was filed u/s 200 of the Code read with Section 156(3) and as the learned Magistrate directed the respondent no.1 to produce witnesses, the revision petition could not have been disposed of without notice to the petitioner. Reference was made to Section 399 and 401 of the Code. Reliance was placed on ***Raghu Raj Singh Rousha vs. Shivam Sundaram Promoters (P) Ltd. & Anr.***, 1(2009) SLT 610 and ***Manharibhai Muljibhal Kakadia & Anr v. Shaileshbhai Mohanbhai Patel & Ors.***, JT 2012(10)SC 61.

7. Shri Mohit Mathur, Advocate for respondent no.2, on the other hand submitted that the impugned order is neither a final order nor an order prejudicial to the petitioner inasmuch as vide the impugned order, the Trial Court has only been directed to reconsider the application u/s 156(3) of the Code and to pass order afresh on the same. The impugned order has put the respondent in the same situation as it was earlier i.e pre-cognizance stage. The position of the petitioner has also not been altered by passing the impugned order. Therefore, no prejudice has been caused to the petitioner. The present petition is only an attempt to delay the proceedings. The impugned order is neither a direction to the Trial Court to proceed with the case in a particular way nor a direction to the police authorities to

hold any kind of enquiry nor any order of issuance of summons nor any direction to register the FIR. Therefore, no order was passed which may be stated to be prejudicial to the petitioner and prior to passing the impugned order, a hearing to the petitioner was not required. Reference was made to ***Chandra Deo Singh vs. Prokash Chandra Bose @ Chabi Bose and Another***, AIR 1963 SC 1430 and ***Amar Nath vs. State of Haryana***, 1977 SCC (CrL.) 585, where it was held that the accused has no right to be heard before he is summoned. Reliance was also placed on a judgment of this Court in ***Tata Motors Ltd. vs. State***, 2009 Law Suit(Del) 443, where after considering the ratio of number of judgments including ***Raghu Raj Singh Rousha*** (supra), the legal position was crystalised as under:-

“20. The legal position that emerges from the above decisions of the Supreme Court and this Court is as under:

- (1) There is a distinction to be drawn between the criminal complaint cases which are at the pre-cognizance stage and those at the post-cognizance stage. There is a further distinction to be drawn between the cases at the post-cognizance but pre- summoning stage and those at the post-summoning stage.
- (2) It is only at the post-summoning stage that the respondents in a criminal complaint would answer the description of an 'accused.' Till then they are like any other member of the public. Therefore at the pre-summoning stage, the question of their right to be heard in a revision petition by the complainant in their capacity as "accused" in terms of Section 401(2) Cr.P.C does not arise.

- (3) At the post-cognizance but pre-summoning stage, a person against whom the complaint is filed might have a right to be heard under the rubric of 'other person' under Section 401(2) Cr.PC. If the learned MM has not taken the cognizance of the offence then no right whatsoever accrues to such "other person" to be heard in a revision petition.
- (4) Further, it is not that in every revision petition filed by the complainant under Section 401(2) Cr.PC, a right of hearing has to be given to such "other person" or the accused against whom the criminal complaint has been filed. The right accrues only if the order to be passed in the revision petition is prejudicial to such person or the accused. An order giving a specific direction to the learned MM to either proceed with the case either at the post-cognizance or post-summoning stage or a direction to register an FIR with a direction to the learned MM to proceed thereafter might be orders prejudicial to the respondents in a criminal complaint which would therefore require them to be heard prior to the passing of such order.”

8. It was further submitted that the mandate of law is that no order u/s 401(2) shall be passed by the revisional Court to the prejudice of the accused or other person unless he has an opportunity of being heard. In the instant case neither any summon has been issued nor the learned Sessions Judge has directed for so nor directed the registration of FIR. The judgment of Hon'ble Supreme Court in *Raghu Raj Singh Rousha*(supra) is limited to the peculiar facts of that case and cannot be stretched to mean and include challenge in revision of any order of Magistrate as that would lead to opening a Pandora's box for the accused to interfere and interject the proceedings in every complaint case. No order prejudicial to the petitioner has been passed by the learned Sessions Judge, as such, the

petitioner had no right to be heard, therefore, petition is liable to be dismissed.

9. Sh. Dayan Krishan, learned ASC for the State submitted that the State is not a party to the criminal complaint and will abide by any of the direction given by the Court. Mr. R.C.Tiwari, Advocate for respondent no.3, however supported the petitioner.

10. To appreciate the contention, it will be in the fitness of things to reproduce Sections 190, 200, 202, 203, 204, 397, 398, 399 and 401 of Code of Criminal Procedure as under:-

“190. Cognizance of offences by Magistrates.- (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence –

- (a) upon receiving a complaint of facts which constitute such offence;
- (b) upon a police report of such facts;
- (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

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

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200. Examination of complainant.- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and

shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

- (a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complainant; or
- (b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

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202. Postponement of issue of process.- (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made, -

- (a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or
- (b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of

Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

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203. Dismissal of complaint.- If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

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204. Issue of process.- (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be –

- (a) a summons-case, he shall issue his summons for the attendance of the accused, or
- (b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees

are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

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397. Calling for records to exercise powers of revision.- (1)

The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.- All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

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398. Power to order inquiry.— On examining any record under Section 397 or otherwise, the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrates subordinate to him to make, and the Chief Judicial Magistrate may himself make or direct any subordinate

Magistrate to make, further inquiry into any complaint which has been dismissed under Section 203 or sub-section (4) of Section 204, or into the case of any person accused of an offence who has been discharged:

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.

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399. Sessions Judges powers of revision.-(1) In the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of section 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the provisions of sub-sections (2), (3), (4) and (5) of section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be constructed as references to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

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401. High Courts powers of revision.-(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the

Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defense.

(3) Nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.”

11. Section 190 Cr.P.C. states that the Magistrate can take cognizance of an offence upon receiving a complaint, police report or upon information received from any person other than the police officer or upon on his own information. Section 200 Cr.P.C. states that a Magistrate taking cognizance of an offence on a complaint shall examine on oath the complainant and witnesses present. The proviso stipulates when the complainant or witnesses are not required to be examined. Section 202 empowers the Magistrate to postpone the issue of process to either inquire into the case himself, or direct an investigation to be made by a police officer or by such other person, for deciding whether or not there is sufficient ground for

proceeding. A Magistrate can take evidence on oath. Under Section 203 Cr.P.C., a Magistrate can dismiss the complaint if he is of the opinion that there is no sufficient ground for proceeding but he must record his reasons. Section 204 deals with issue of process when the Magistrate finds that there are sufficient grounds for proceeding against the accused. This results in issuance of summons or warrants against the accused. Under sub-section (4), a complaint can be dismissed where the complainant does not pay process fee or the fee is not paid within a reasonable time.

12. By referring to Section 397 and 401 of the Code, it was submitted that no order to the 'prejudice of an accused' or any other person can be made unless the accused or the said person has been given an opportunity of being heard.

13. Whenever a revision is filed either before the Sessions Court or this Court, it is not necessary to give notice to accused for affording him an opportunity of being heard, irrespective of the fact whether the order is prejudicial to him or not. For example, when a complaint is dismissed in default and for non-prosecution due to non appearance of complainant and not taking any steps by filing process fee etc. u/s 204(4), in that eventuality, Section 401(2) would not be applicable and no notice is required to be issued as the order dismissing the complaint for default or non-prosecution does not touch upon the factual or legal merits of the complaint. The said order is a reflection on or about the conduct of the

complainant in the proceeding before the Court and the opinion formed by the Court about the said conduct. Such order, if they do not reflect and take into consideration the merits of the case, when challenged in revision, does not require notice to opposite side as held in *J.K. International vs. State*, 96(2002) DLT 795 and reiterated in *Hindustan Domestic Oil & Gas Co.(Bombay) Ltd & Ors. vs. State & Anr.*, 2012(4) JCC 2310.

14. Further in *Prabha Mathur & Anr. Vs. Pramod Aggarwal and Ors.*, (2008) 9 SCC 469, it was observed following the decision in *Chander Deo Singh* (supra) that the accused has no locus standi at the stage of investigation and he cannot insist for a hearing before process is issued against him. It was emphasised that “it is equally correct that if a person has no locus standi or right of hearing, such right does not accrue in his favour by an indirect process”.

15. In *Manharibhai*(supra), after taking note of the various decisions of Hon’ble Supreme Court and this Court, it was observed that the legal position is fairly well settled that in the proceedings u/s 202 of the Code, the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of fact , upto the stage of issuance of process, the accused cannot claim any right of hearing. Section 202 contemplates postponement of issue of process where the Magistrate is of the opinion that further inquiry into the complaint either by himself is required and he proceeds with the further inquiry or directs

an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. It is only when the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint u/s 203 of the Code, the question arises whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. It was observed that the effect of such dismissal is termination of complaint proceedings. That being so, the accused has a right to be heard.

16. ***Raghu Raj Singh Rousha***(supra) relied upon by learned counsel for the petitioner is distinguishable inasmuch as in that case when the application u/s 156(3) Cr.P.C was dismissed, in the revision filed before the High Court, the order was set aside with a direction to the Metropolitan Magistrate to examine the matter afresh after calling for a report from the police authorities. The police authorities were directed to hold a preliminary inquiry on the basis of the complaint made by the petitioner/complainant and to submit a report to the learned Magistrate within three weeks. Things are entirely different in the instant case inasmuch as vide impugned order dated 27.02.2012, learned Additional Session Judge has not given any direction to the police to investigate the matter. The matter has simply been remanded back to the learned Metropolitan

Magistrate for reconsidering the application u/s 156(3) Cr.P.C and to pass orders afresh. The learned Metropolitan Magistrate, while deciding afresh may decide the matter as deemed appropriate. The petitioner cannot possibly anticipate what order the learned Metropolitan Magistrate is going to pass. Under the circumstances, such an order cannot be said to be prejudicial to the petitioner. The position of the case has not been altered. Even no direction has been given to the police to investigate the matter or register the case. The only direction is to reconsider the application u/s 156(3) of the Code on the basis of materials already available on record. No order prejudicial to the petitioner has been passed. That being so, while hearing the revision petition by learned Additional Session Judge, presence of petitioner was not required at that juncture. That being so, there is no merit in the writ petition. Same is accordingly dismissed.

**SUNITA GUPTA
(JUDGE)**

SEPTEMBER 13, 2013

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