

Court No. - 77

Case :- APPLICATION U/S 482 No. - 27233 of 2024

Applicant :- Amit Kumar Tiwari And 4 Others

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Indra Deo Mishra, Manoj Kumar Mishra, Pankaj Kumar Tiwari

Counsel for Opposite Party :- Brijesh Kumar, G.A., Sudhanshu Kumar Singh

Hon'ble Arun Kumar Singh Deshwal, J.

1. Heard Sri Indra Deo Mishra, learned counsel for the applicants, Sri Brijesh Kumar, learned counsel for opposite party no.4 and Sri Pankaj Saxena, learned AGA for the State.

2. The present application has been filed to set aside the order dated 25.01.2024 passed by Additional Sessions Judge/Special Judge, POCSO Act, Prayagraj in Criminal Misc. Case No.79 of 2023, arising out of Case Crime No.415 of 2014, under Sections-147, 354Kha, 323, 504, 506 IPC and Section 7/8 of POCSO Act, Police Station-Meja, District-Allahabad.

3. Facts giving rise to the present controversy is that an FIR dated 09.10.2024 was lodged by opposite party no.4 against the applicants in Case Crime No.415 of 2014, under Sections-147, 354Kha, 323, 504, 506 IPC and Section 7/8 of POCSO Act making allegation against the applicants that they have sexually assaulted his minor daughter. Police after the investigation submitted final report in that case on 24.08.2018. After receiving the final report, learned Magistrate issued notice to the opposite party no.4 but

opposite party no.4 could not appear before the court. Thereafter, the concerned court accepted the final report vide order dated 19.10.2023. Thereafter, the opposite party no.4 filed an application on 18.12.2023 to recall the order dated 19.10.2023 along with protest petition to reject the final report no.238 of 2018. The court below vide impugned order dated 25.01.2024 after recalling the order dated 19.10.2023 registered the protest petition of the opposite party no.4 as complaint case which is under challenge in the present petition.

4. Contention of learned counsel for the applicants is that after investigation in case crime no.415 of 2024, u/s 147, 354Kha, 323, 504, 506 IPC and Section 7/8 of POCSO Act, registered against the applicants, final report was submitted by the police. Thereafter, despite receiving the notice, first informant did not appear and court finally accepted the same vide order dated 19.10.2023. Thereafter, recall application along with protest petition was filed by opposite party no.2 on 18.10.2023 which was allowed and the order dated 19.10.2023 by which the final report was accepted was recalled and case was registered as complaint case without giving any reason. Even same amounts to review of the order dated 19.10.2023, which is barred by Section 362 Cr.P.C. In support of his contention, learned counsel for the applicants has also relied upon the judgement of a coordinate Bench of Gauhati High Court in **Hazi Mahamud Ali Vs. The State of Tripura** reported in **2006 0 CrLJ 4259** wherein it is observed that when the order has been passed in criminal court on merit, same cannot be recalled being barred by Section 362 Cr.P.C.

5. *Per contra*, learned counsel for opposite party no.4 has submitted that even after accepting the final report, there is no bar of taking cognizance by the Magistrate, if there is sufficient material on record. Therefore, there is no illegality in the impugned order. In support of his contention, learned counsel for the opposite party no.4 has relied upon the judgement of the Supreme Court in the case of **Kishore Kumar Gyanchandani Vs. G.D. Mehrotra & Another** reported in **AIR 2002 Supreme Court 483** as well as judgement of **Munilal Thakur and others etc. Vs. Nawal Kishore Thakur and another** reported in **1985 CRI.L.J. 437** and also the judgement of co-ordinate Bench of this Court in the case of **Safdar Vs. State of U.P. And Others** reported in **2008 (6) ADJ 64**, wherein it is observed that even if the final report is accepted, there is no bar in taking cognizance of offence on the protest petition.

6. Learned AGA though adopted the argument of opposite party no.4 but fairly submitted that in the impugned order dated 25.01.2024, no reasoning was given while recalling the order dated 19.10.2023 regarding *prima facie* case.

7. Considering the rival submission of parties and on perusal of record, it is clear that after receiving the final report, learned Magistrate issued notice to opposite party no.4 and it was also served upon him. Thereafter, the concerned court has accepted the final report vide order dated 19.10.2023 on perusal of case diary but no satisfaction was recorded about availability or non-availability of material in case diary.

8. The legal issue which arises for consideration in the present case is whether order of Magistrate accepting the

final report would come within the purview of Section 362 Cr.P.C., hence cannot be recalled or reviewed.

9. Section 362 Cr.P.C. (corresponding Section 403 of BNSS) talks about judgement or final order disposing of a case which cannot be altered or reviewed by the concerned court. It would be apposite to mention Section 362 Cr.P.C. which is being quoted as under:

"362. Court not to alter judgment.—Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

10. From the perusal of Section 362 Cr.P.C. which is corresponding to Section 403 of BNSS, it is clear that when a judgement or a final order disposing of a case is signed then same cannot be altered or reviewed. Now the question arises whether the order accepting the final report submitted by police will come in the category of final order disposing of the case.

11. Apex Court in the case of Kishore Kumar Gyanchandani (supra) has observed that even after the acceptance of final report, Magistrate can take cognizance of offence on the complaint filed by the first informant. Paragraph no.6 of the Kishore Kumar Gyanchandani (supra) is being quoted as under:

"6. It is too well settled that when police after investigation files a final form under Section 173 of the Code, the Magistrate may disagree with the conclusion arrived at by the police and take cognizance in exercise of power under Section 190 of the Code. The Magistrate may not take cognizance and direct further investigation in the matter under Section 156 of the Code. Where the Magistrate accepts the final form submitted by the police, the right of the complainant to file a regular complaint is not taken away and in fact on such a complaint being filed the Magistrate follows the procedure under Section 201 of the Code and takes cognizance if the materials produced by the complainant make out an offence. This question has been raised and answered by

this Court in the case of Gopal Vijay Verma v. Bhuneshwar Prasad Sinha [(1982) 3 SCC 510 : 1983 SCC (Cri) 110] whereunder the view of the Patna High Court to the contrary has been reversed. The Court in no uncertain terms in the aforesaid case has indicated that the acceptance of final form does not debar the Magistrate from taking cognizance on the basis of the materials produced in a complaint proceeding."

12. Judgement of **Kishore Kumar Gyanchandani (supra)** was also relied upon by a coordinate Bench of this Court in **Safdar's case (supra)**.

13. Apex Court in the case of **Surendra Singh Vs. State of Bihar** reported in **(2005) 12 SCC 361**, has observed that when the final report is accepted by the concerned Magistrate after issuing notice to the first informant then same cannot be recalled, as recalling the same would amount to review of its earlier order which is impermissible in the eyes of law u/s 362 Cr.P.C. Paragraph nos.6 and 7 of the aforesaid judgement are being quoted as under:

"6. We have perused the two orders referred to hereinabove and we do notice that in the first of the orders the learned Chief Judicial Magistrate recorded that even though the notice was sent to the informant along with the police report no one appeared on behalf of the informant and the prosecution has submitted the final report mentioning "truth undetected". He further stated that the case is pending from the year 1998, hence final report had to be accepted. Thus in the factual background of the case, after applying its mind the court accepted the final report of the police.

7. Surprisingly and for the reasons not noticeable in the subsequent order on the same date the learned Chief Judicial Magistrate proceeded to take cognizance of the offence referred to hereinabove. This as contended by the learned counsel appearing for the appellant amounts to review of its earlier order which is impermissible in law under Section 362 CrPC. Hence the subsequent order of taking cognizance is bad in law."

14. The Apex Court in the case of **Ganesh Patel Vs. Umakant Rajoria in SLP (Criminal) No.9313 of 2021** has observed that procedural review u/s 362 Cr.P.C. is not barred and it is the substantive review of the order passed by criminal court which is barred by Section 362 Cr.P.C. The

relevant extract of the judgement of the Apex Court in **Ganesh Patel (supra)** is being quoted as under:

"This application for recall of the order was maintainable as it was an application seeking a procedural review, and not a substantive review to which Section 362 of the Code of Criminal Procedure, 1973, would be attracted. [Grindlays Bank Ltd. v. Central Government Industrial Tribunal & Ors. 1980 (supp) SCC 420]. On the aspect of the difference between recall and review and when an order of recall can be passed reference can be made to Budhia Swain and Others v. Gopinath Deb and Others, (1999) 4 SCC 396."

15. The Patna High Court in the case of **Munilal Thakur (supra)** has also observed that even after accepting the final report, Magistrate can still take cognizance upon the complaint or a protest petition filed by the first informant. Paragraph no.8 of **Munilal Thakur's case (supra)** is being quoted as under:

"8. To conclude, the answer to the question posted at the outset is rendered in the affirmative and it is held that a Magistrate, even after accepting the final report, can still take cognizance of the offence upon a complaint or a protest petition on same or similar allegations of fact."

16. However, Apex Court in the case of **Subrata Choudhury alias Santosh Choudhury and Others Vs. State of Assam & Another** reported in **2024 SCC OnLine SC 3126** has observed that if final report submitted by the police was accepted after considering the objection/protest petition then second protest petition or complaint on the same ground as of the earlier one is not maintainable except the case where the subsequent protest petition or second complaint has been filed on different grounds. Paragraph nos.23 and 27 of **Subrata Choudhury's case (supra)** is being quoted as under:

"23. In view of the plethora of decisions, there can be no doubt that even when Final Report filed after investigation based on the FIR registered pursuant to the receipt of

complaint forwarded by a Court for investigation under Section 156 (3) of the Cr. P.C., is accepted and protest petition thereto is rejected, the Magistrate can still take cognizance upon a second complaint or second protest petition, on the same or similar allegations or facts. But this position is subject to conditions.

27. Now, we will have to proceed with the appeal bearing in mind the exposition of law in Samta Naidu's case (supra) that if earlier disposal of the complaint was on merits and in a manner known to law, the second complaint on 'almost identical facts' which were raised in the first complaint would not be maintainable. "If the core of both the complaints is same, the second complaint ought not to be entertained," it was further held therein. In the light of the factual narration with respect to the disposal of the original complaint dated 11.11.2010, made hereinbefore and in view of the courses open to a Magistrate on receipt of a negative report and applying the exposition of law in Samta Naidu's case (supra) with respect to the maintainability of a second complaint we have no hesitation to hold that the maintainability of the second complaint dated 20.07.2011 filed by the second respondent would depend upon the question whether the core of the original complaint dated 11.11.2010 and the second complaint dated 20.07.2011 is the same as the disposal of the complaint dated 11.11.2010 was on merits and in a manner known to law. In this context, it is also to be noted after considering the final report, the protest complaint and admittedly, upon hearing the counsel for the complainant the protest petition was rejected not only by finding that the investigation suffers from no infirmity but also by finding that since it was conducted properly, no order for further investigation is invited and further that the materials are not sufficient to take cognizance. As noted earlier, despite the said nature of the order dated 06.06.2011 the second respondent-complainant has not chosen to challenge the same but, chosen only to file a fresh complaint, viz., the second complaint dated 20.07.2011."

17. From the analysis of the aforementioned judgements, it is clear that even if the final report is accepted by an order even then the concerned court may take cognizance of the offence on protest petition or separate complaint on the basis of material produced by the first informant/complainant. But if the Magistrate after giving opportunity of hearing to first informant passed a detailed order accepting the final order by discussing the case on merit then this order will amount to final order disposing the case so far as the cognizance on the basis of material of the case diary is concerned. Therefore, same cannot be recalled being

barred by Section 362 Cr.P.C.

18. It is also clear from the above analysis that if the final report was accepted by the concerned court after considering the protest petition of the first informant on merit then cognizance cannot be taken on the basis of second protest petition/complaint if contents of second protest petition or complaint is almost same as of the protest petition.

19. From the legal position discussed above, it is clear that the court concerned may take cognizance on the material produced by the first informant/complainant without recalling the order accepting the final report. But in case, the court on the application of the first informant filed along with protest petition recalls the order accepting the final order and takes cognizance on the basis of material of case diary then such recall of the order will be affected by the Section 362 Cr.P.C. (corresponding Section 403 of BNSS). However, procedural/review/recall of the order accepting the final report is permissible as per judgement of Apex Court in Ganesh Patel's case (supra) like those cases where no notice was served upon the first informant despite being statutory mandate.

20. Coming back to the present case, it is clear from the perusal of order dated 19.10.2023, same was passed after serving notice upon the opposite party no.4 but that was recalled by the impugned order dated 25.01.2024 without giving any reasoning that the case was of procedural recall/review and not the substantive recall/review, despite

the fact that the order dated 19.10.2023 accepting the final report was a final order disposing the case regarding cognizance on the basis of material available in the case diary. Therefore, same is barred by Section 362 Cr.P.C., though, there is no illegality in registering the protest petition of the opposite party no.4 as complaint case.

21. In view of the above, the order dated 25.01.2024 deserves to be set aside and matter is remanded back to the court of Additional District & Sessions Judge/Special Judge, POCSO Act, Prayagraj to pass a fresh order, after hearing both the parties, in light of the observations made hereinabove.

22. Accordingly, the present application is **allowed**.

Order Date :- 24.2.2025

S.Chaurasia