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

+ CRL.M.C. 2077/2016 and Crl. M.A. No. 8808/2016 (Stay)

ASHOK KUMAR DIXIT Petitioner

Represented by: Mr. Ravin Rao, Advocate.

versus

THE STATE (GOVT OF NCT OF DELHI) & ANR..... Respondents

Represented by: Mr. Ravi Nayak, APP for the
State with SI Hem Karan, PS
Adarsh Nagar.

Mr. Narender Kr. Chhabra,
Advocate for respondent No.2.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER

28.11.2016

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1. By this petition the petitioner seeks setting aside of the order dated 19th April, 2016 whereby the learned Additional Sessions Judge dismissed the revision petition, upholding the order on charge dated 16th May, 2015 passed by the learned Metropolitan Magistrate directed framing of charge under Sections 352/506 IPC against the petitioner.

2. The short issue on which the petitioner challenges the order on charge dated 16th May, 2015 is that since a charge sheet for offences which were found non-cognizable was filed, no cognizance thereon could have been taken and no order could be passed directing framing of charge.

3. The issue raised in the present petition is covered by the Division Bench decision of this Court in N.K. Sharma vs. State, Crl. M.M. No.2042/2001 which was decided on a reference by the learned Single

Judge. The Division Bench of this Court held that even though initially the FIR is registered for cognizable offence and on investigation commission of non-cognizable offence is found out a charge sheet filed thereon and proceedings pursuant thereto cannot be held to be non-est. The investigation conducted will be a valid investigation, only the charge sheet would be treated as a complaint and the Investigating Officer as the complainant of the said complaint.

4. Considering the reference the Division Bench held:

“It is one thing to say that the allegations made in the first information report does not disclose a cognizable offence and it is another thing to say that either upon investigation or at the time of trial the Court having regard to the materials on record come to a conclusion that in fact the accused is guilty of offence which was non-cognizable in nature.

Furthermore even at this stage, the accused persons cannot take recourse of the provisions of Section 482 of the Code of Criminal Procedure praying for quashing of first information report inasmuch as not only charge-sheet has been filed but cognizance of the offence has been taken by the Magistrate concerned in exercise of his power under Section 190 of the Code of Criminal Procedure. The very fact that the learned Magistrate upon application of his mind on the basis of the material which was pressed before him pursuant to or in furtherance of the investigation carried out satisfied himself that there exists materials for taking cognizance of a cognizable offence and further more even came to the conclusion that an order directing charge under Section 324/34 IPC should be framed, it cannot be said that in this situation, Section 155(2) of the Criminal Procedure Code would come into play. The decision of the learned Single Judge of this Court in Mam Chand (supra) must be viewed from that angle. In that case the learned

Single Judge has come to the conclusion that having regard to the material on record no cognizable offence was found to have committed. In that view of the matter and relying upon the decisions referred to therein it was held:-

“I do not find much substance in the contention urged on behalf of the State that since the FIR was registered under Section 324 IPC and the said offence being cognizable, there was no bar in the police investigating the case. Once, on the circumstances prevalent at the time of registration of the case, it is evident that a non-cognizable offence is not made out, permitting the police to first register a cognizable offence, carry out investigations and ultimately if it is found that a cognizable offence was not made out, would be giving a long rope to the police. The nature of the offence is to be gathered from the facts available at the relevant time and if there is a doubt as to whether a cognizable offence is made out or not, the police can report it to the Magistrate concerned and obtain appropriate orders. On the one hand, no prejudice will be caused to the prosecution by adopting a safer course and on the other it will eliminate the possibility of misuse of power by the police. This approach will also be in consonance with the spirit and intention of Section 155 of the Code.”

On the other hand the Apex Court in H.N. Rishbud (supra) categorically held that even if there was certain irregularities at the time of first information report or complaint, the same would not vitiate the trial in the following terms:-

“The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of

cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises.

A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 Cr.P.C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190 Cr.P.C. is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings". The language of this section is marked contrast with that of the other sections of the group under the same heading, i.e., Section 193 and 195 to 199.

These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, Clauses (a), (b) and (c) of Section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either Clause (a) or (b) of Section 190(1). (whether it is the one or the other we need not pause to consider and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537 Cr.P.C. which is

in the following terms is attracted:

“Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge proclamation, order, judgment or other proceedings before or during trial or in an enquiry or other proceedings under this code, unless such error omission or irregularity has in fact occasioned a failure of justice.”

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in ‘Prabhu v. Emperor, AIR 1944 PC 73 (C) and ‘Lumbhardar Zutshi v. The King. AIR 1950 PC 26 (D). These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present case with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby.”

There is another aspect of the matter which must also be taken note of viz. the definition of 'complaint' as contained in Section 2(d) of the Code of Criminal Procedure, which reads as under:-

“2(d) “complaint” means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation – A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant.;

The functions of explanation as stated by the Apex Court in S.Sundaram Pillai etc., Vs. R. Pattabiraman AIR 1985 Supreme Court 582 are:-

“The object of an explanation to a statutory provision is-

a) to explain the meaning and intendment of the Act itself

b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserved.

c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful.

d) an explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purpose and intendment of the enactment, and right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.”

Thus by reason of the aforementioned explanation appended to Section 2(d); intendment of the Act itself has been manifested. Thus even if the learned Magistrate could not have taken cognizance on the basis of the report filed by the police authorities under Section 173 of the Code of Criminal Procedure he could have treated the said charge-sheet to be a complaint and take cognizance thereupon. This is pointed out only for the purpose of showing that even if the matter is considered from this angle we have no other option but to reach to the conclusion that the trial in a case of this nature would not be vitiated.”

5. In the present case FIR was registered for offences punishable under Sections 341/506/509 IPC however, charge sheet was filed for offences punishable under Sections 341/506/34 IPC. Upholding the order dated 16th May, 2015 passed by the learned Metropolitan Magistrate directing framing of charges under Sections 341/506/34 IPC, PS Adarsh Nagar, it is directed that the charge sheet filed be treated as a complaint and the Police Officer investigating the complaint as the complainant. The Police Officer being the complainant will be exempted from appearing before the learned Trial Court on every date as he is a public servant.

6. The petition and the application are disposed of with the above noted directions.

7. Order dasti.

MUKTA GUPTA, J.

NOVEMBER 28, 2016

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