

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

Date of Decision: 11th July, 2016

+ **CRL.M.C. 5377/2014 & Crl.M.A.No.18337 /2014 (stay)**

SHALINI TYAGI

..... Petitioner

Through Mr. Vikas Pahwa, Sr.Advocate
with Ms. Bhavya Sethi and
Mr.Vipul Sharma, Advocates

versus

STATE NCT OF DELHI & ANR.

..... Respondents

Through Mr. Ashok K.Garg, APP for R-
1.
Mr.N.A.Sabastian, Advocate
for R-2.

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Feeling aggrieved by the summoning order dated 28.02.2014 passed by learned Metropolitan Magistrate whereby cognizance of complaint filed by respondent no.2 under Section 200 of the Code of Criminal Procedure, 1973 read with Section 156(3) of the Code under Section 323/341/354/351/534 IPC against the petitioner and Mr.Nagesh Akela was taken, present petition under Section 482 of the Code of Criminal Procedure has been filed. Before dealing with the challenge to the summoning order

raised by the petitioner, it will be in fitness of things to narrate the brief facts leading to passing of the impugned order.

2. Smt.Sushma Mathai filed a complaint against the petitioner and one Sh.Nagesh Akela alleging inter alia that she was working in R.B.Seth Jessa Ram Hospital for the last 19 years and was working on the post of Deputy Nursing Superintendent and also the vice-president of the Hospital Employees Trade Union . On 29.04.2014 she went to Dr.Naveen Jain, the then Superintendent in connection with the problems of nurses where she was abused and insulted by him and she was asked not to come to his office and to contact Mr.Nagesh Akela, the then Chief Administrative Officer of the Hospital. On the same day, in the evening at about 3.30 pm, she sent an e-mail to Mr.Nagesh Akela and thereafter went personally to his office situated at the first floor where Sh.Mahesh Pandey was already present. At the same time, one Smt.Praveen Khattar who is working in T.P.A.A Department came there to take drinking water as the water dispenser was fitted in the office of Mr.Nagesh Akela. After taking a small disposable water bottle from the hands of Smt.Praveen Khattar she was taking water Mr.Nagesh Akela entered into his room and on seeing the complainant, Smt Praveen Khattar and Mr.Mahesh Pandey got angry. He started talking in disrespectful manner and used filthy language. Hearing the voice of Mr.Nagesh Akela, Smt. Shalini Tyagi, the petitioner who was working in the Chief Human Resources Department arrived at the spot and provoked Nagesh Akela to teach a lesson to the complainant and others present there. On her provocation, Nagesh Akela caught the complainant from the chest and pressed it by force and thereafter gave a fist blow and slapped her on

cheeks. He also gave beatings to Mahesh Pandey and threatened them all to remove from union employees of the hospital.

3. Initially report under Section 156 (3) Cr.P.C was called by learned Metropolitan Magistrate. Report was submitted that no cognizable offence was made out. Thereafter, learned Metropolitan Magistrate proceeded to examine the complainant and her witnesses and thereafter, impugned order of summoning was passed.

4. Feeling aggrieved, the present petition has been filed. Learned Senior Counsel for the petitioner submitted that the summoning order dated 28.02.2014 is bad in law as the learned Magistrate did not consider the status report filed by the police after conducting an enquiry contemplated under Section 156 (3) Cr.P.C. The Enquiry Officer on the complaint filed by the complainant conducted an enquiry and opined that the complaint is an outcome of pending dispute between the employer and employees and is of a civil nature. He also mentioned that two civil matters pertaining to labour dispute is pending in Labour Court, Karkardooma and four matters are pending before the Labour Office, Pusa Road. Even pertaining to the incident of 29.04.2011, the complainant did not co-operate with the Investigating Officer and refused to get herself medically examined and ran away from the hospital. The Union used the complainant as a tool in filing a false complaint due to pending labour issues with management of the hospital. Since the opinion was given by an independent authority, it was incumbent upon the learned Magistrate to consider the same while passing the impugned summoning order. Reliance is placed on ***Dr. Kapil Garg vs. State*** (2003) 70 DRJ 621; ***Dr. Narender Nath vs. State*** (2008) 104 DRJ 655 and ***Dr. Rajni Palri Wala vs. Dr. D. Mohan*** ILR (2009) IV Delhi 760.

Learned counsel further submits that mere bald allegations that the petitioner 'provoked' is not enough to rope her to be an accused under Section 34 IPC as such, the impugned order of summoning be set aside. Reliance is placed on *Nirmal Singh & Ors. vs. State* 2011 CrLJ 2258; *Nagaraja vs. State of Karnataka* (2008) 17 SCC 277; *Vaijayanti vs. State of Maharashtra* (2005) 13 SCC 134; *Hem Raj vs. Raja Ram* (2004) 9 SCC 18; *State of Orissa vs. Arjun Das Arya* (1999) 8 SCC 154 and *Ramesh Singh Yadav vs. State of Bihar* (1999) 8 SCC 555.

5. The petition is basically contested by respondent no.2. Learned counsel for respondent no.2 submitted that the submissions made by the learned counsel for the petitioner is beyond pleadings. Moreover, the status report was duly considered by the learned Metropolitan Magistrate and only thereafter the complainant was directed to lead evidence. Counsel further submits that the officials of Karol Bagh Police Station are recipients of undue and unethical favour from the hospital such as obtaining free medical treatments and the status report is the result of showing undue favour to the hospital. For raising this submission reliance is placed on Annexure R-6 wherein it is mentioned that the hospital is giving various discounts to Karol Bagh Police Station people. Counsel further submits that although it is recorded that an independent enquiry was conducted into the allegations made by the complainant, however, pursuant to the information received by him under Right to Information Act, it was reported that no such enquiry report is available. Moreover, the status report was duly considered by the learned Metropolitan Magistrate while dealing with the application under Section 156(3) Cr.P.C on 04.01.2012 whereby the said application was dismissed and the complainant was directed to lead pre-summoning

evidence. It was only after number of witnesses were examined by the complainant that the accused persons including petitioner were ordered to be summoned. As such, it is submitted that the impugned order does not call for any interference.

6. Firstly, I shall deal with the submission of learned Senior Counsel for the petitioner that the summoning order dated 28.02.2014 is bad in law as the status report filed by the police was not considered while passing the impugned order. In *H.S. Bains vs. UT of Chandigarh* (1984) SCC 631, Hon'ble Supreme Court explained the three options available to the learned Metropolitan Magistrate in situations as the present one in the following words:

“It is seen from the provisions to which we have referred in the preceding paragraphs that on receipt of a complaint a Magistrate has several courses open to him. He may take cognizance of the offence and proceeded to record the statements of the complainant and the witnesses present under Section 200. Thereafter, if in his opinion there is no sufficient ground from proceeding he may dismiss the complaint under Section 203. If in his opinion there is sufficient ground for proceeding he may issue process under Section 204. However, if he thinks fit, he may postpone the issue of process and either enquire into the case himself or direct an investigation to be made by a Police Officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. On the other hand, in the first instance, on receipt of a complaint, the Magistrate may, instead of taking cognizance of the offence, order an investigation under Section 156(3).

The police will then investigate and submit a report under Section 173(1). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1) (b) and straight away issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The Police report under Section 173 will contain the facts discovered or unearthed by the police and the conclusion drawn by the police therefrom.

The Magistrate is not bound by the conclusions drawn by the Police and he may decide to issue process even if the Police recommend that there is no sufficient ground for proceeding further. The Magistrate after receiving the Police report, may, without issuing process or dropping the proceeding decide to take cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statements upon oath of the complainant and the witnesses present under Section 200 Criminal Procedure Code and thereafter decide whether to dismiss the complaint or issue process. The mere fact that he had earlier ordered an investigation under Section 156(3) and received a report under Section 173 will not have the effect of total effacement of the complaint and therefore the Magistrate will not be barred from proceeding under Sections 200, 203 and 204. Thus, a Magistrate who on receipt of a complaint, orders an investigation under Section 156(3) and receives a police report under Section 173(1), may, thereafter, do one of three things: (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence under Section 190(1) (b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report; (3) he may take cognizance of the offence under Section 190(1) (a) on

the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.”

This very judgment was relied upon by a Single Judge of this Court in **Dr. Narender Nath** (supra), however, the facts situation appearing in that case was different. In that case, on the basis of complaint, learned Metropolitan Magistrate directed registration of the case and further ordered investigation under Section 156 (3) Cr.P.C. Challenge was lodged by the State to the aforesaid order. However, the challenge failed in High Court as well as Supreme Court. Thereafter, SIT Section of crime branch submitted a closure/untrace report. The untrace report was kept pending and the Court proceeded to record statement of complainant and other witnesses and thereafter, passed summoning order. Under those circumstances, the matter was remanded back to the learned Metropolitan Magistrate for consideration of the closure report filed by the police and then passed the orders.

7. **Dr. Rajni Palri Wala** (supra) was a case where a complaint was filed by the applicant with Economic Offences Wing (EOW) of Delhi Police which refused to register First Information Report. An application under Section 156(3) Cr.P.C was filed. Crime branch submitted a report that no cognizable offence is made out. Arguments were heard on application under Section 156(3) Cr.P.C and the matter was posted for orders then, the applicant withdrew application under Section 156(3) Cr.P.C and the matter was posted for complainant’s evidence. The said order was challenged. The question of consideration was whether the Court could have allowed the

applicant to withdraw the application under Section 156(3) Cr.P.C. After dealing with the legal position, the matter was remanded back to the learned Metropolitan Magistrate to consider the report and proceed in accordance with law.

8. ***Dr. Kapil Garg*** (supra) was a case where complainant lodged a report with the police station pertaining to which investigation was carried out. The Investigating Officer submitted a report under Section 173 Cr.P.C for closure of the case. However, this did not find favour with the learned Metropolitan Magistrate who directed further investigation by District Investigating Unit of Crime Branch as complainant had made allegations against the Investigating Officer and the SHO of the Police Station. District Investigating Agency Unit investigated the matter and submitted the final report that the Investigating Officer is filing challan against the accused persons for closure. However, the Court summoned the accused for offence under Section 386/506/34 IPC. In this case on the factual matrix of the case, the Court observed that no offences were made out against the petitioner and as such, the impugned order was set-aside.

9. The things are different in the instant case. As observed by Hon'ble Supreme Court in *H.S. Bains* (Supra), a Magistrate who on receipt of a complaint orders an investigation under Section 156(3) and receives a police report under Section 173(1), may, thereafter, do one of the three things:-

- (i) He may decide that there is no sufficient ground for proceeding further and drop action;
- (ii) He may take cognizance of the offence under Section 190 (1)
- (b) on the basis of the police report and issue process, and

(iii) He may take cognizance of the offence under Section 190 (1) (a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an enquiry under Section 202 if he thinks fit. Thereafter, he may dismiss the complaint or issue process, as the case may be.

10. Reverting to the case in hand, pursuant to the complaint made by the respondent No. 2, report under Section 156(3) Cr.P.C was called. The SHO Police Station Karol Bagh submitted a report stating therein that the enquiry revealed that Jassa Ram Hospital is running since 1952. In 2003 the hospital was taken over by Fortis Group. Union of the workers was not happy with the taking over of the hospital and started complaining against the hospital management. They also started fighting for better working conditions and increase in wages since 2003. On 29.04.2011 a PCR call was received at police station Karol Bagh regarding the incident which was assigned to SI Satender Kumar for enquiry. Enquiry revealed that the complainant was admitted to Jassa Ram Hospital vide MLC No. 1641 dated 29.04.2011. The complainant however absconded from the hospital without completion of her treatment. The employees union got an opportunity to aggravate the situation and used the complainant as a tool against the management of the hospital. It is reported that the allegations of misbehaviour, threats, eve-teasing and efforts to outrage the modesty of the complainant could not be substantiated. It was also submitted that a separate enquiry was conducted by the Committee of the hospital in which it was observed by the Committee that the allegations of sexual harassment are baseless and does not carry any weight. The matter relates to labour department and is of civil in nature. No

cognizable offence was made out and no police action was taken, however, a kalandra under Section 107/150 Cr.P.C was prepared against both to maintain law and order and peace of the area.

11. On 04.01.2012 the matter was considered by the learned Metropolitan Magistrate. The status report was also considered and thereafter the application under Section 156(3) Cr.P.C was dismissed by observing that the evidence is well within the reach of the complainant herself and she is well aware of the identity of the accused persons. Thereafter the matter was listed for pre-summoning evidence.

12. The complainant examined seven witnesses including herself. Vide impugned order dated 28.02.2014, the learned Metropolitan Magistrate passed the impugned order for summoning the accused persons on the ground that the material on record was sufficient to summon the accused persons for the offences under Section 323/341/354/351/506/509/34 IPC.

13. Under the circumstances, it is not a case where the status report filed by the SHO Police Station Karol Bagh was not considered at all by the learned Metropolitan Magistrate, however as seen above, while dismissing the application under Section 156(3) Cr.P.C, the learned Magistrate gave directions to the complainant to lead pre-summoning evidence. Thereafter when as many as seven witnesses were examined by the complainant including herself and then the impugned summoning order was passed. Since the status report had already been dealt with by the learned Metropolitan Magistrate while dismissing the application under Section 156(3) Cr.P.C there was no need to deal with the same again while passing the summoning order.

14. As regards the submissions that Section 34 IPC is not attracted in the instant case, as per the complaint, it was at the provocation given by the petitioner that the complaint was severally dealt with by co-accused Nagesh Akela, moreover, the applicability of Section 34 IPC pertains to the merits of the case. It will be open to the petitioner to urge the applicability of Section 34 IPC including various sections under which summoning order has been passed at appropriate stage. Needless to say when such submissions will be made by the petitioner, the same will be dealt with by the learned Metropolitan Magistrate in accordance with law. At this juncture, it will not be appropriate to make any observation lest it may affect the merits of the case.

15. Moreover, Section 482 Cr.P.C is an extraordinary remedy and the power under this Section is to be exercised sparingly. In view of the facts and circumstances of the case, there is no ground to interfere with the impugned order. Accordingly, the petition is dismissed.

(SUNITA GUPTA)
JUDGE

JULY 11, 2016
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