

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

% Decided on: 15th November , 2016

+ **CRL.M.C. 4249/2016**

SAMIR AHLUWALIA

..... Petitioner

Represented by: Mr. Vijay Kumar Aggarwal,
Mr. Neeraj Kumar Jha and Mr.
Mudit Jain, Advs.

versus

STATE & ANR.

..... Respondents

Represented by: Mr. Amit Ahlawat, APP with
Insp. Vivek Pathak, STF/Crime
and Ins. Ramavtar, SHO
Seelampur.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

CrI.M.A. 17705/2016

Exemption allowed, subject to all just exceptions.

CrI.M.C. 4249/2016 & CrI.M.A. 17704/2016

1. FIR No.12/2013 was registered at PS Crime Branch on 15th January, 2013 pursuant to a written complaint dated 10th January, 2013 made by respondent No.2 through its Director Rajiv Bhadauria. On completion of investigation, the investigating officer filed a final report under Section 173(2) of Code of Criminal Procedure on 29th July, 2015 opining that there was no evidence to proceed against Samir Ahluwalia, the petitioner herein as an accused. On a protest petition filed by the complainant/respondent No.2, the petitioner filed an application seeking supply of copy of the protest

petition and an opportunity of being heard. The application filed by the petitioner was dismissed by learned CMM vide order dated 23rd April, 2016 inter alia the following reasons:-

“13. Coming on to the aspect, whether this right can be granted to accused person, to my mind the answer is emphatic “no”. the reasons are as under:

- 1) there is nothing adverse/incriminating against the accused persons and invariably if he is made to participate in the said proceedings either upon his volition or upon his insistence, the order passed at the time of adjudication of protest petition shall be after hearing either side – binding upon the accused also. Unnecessarily this stage shall result in participation of accused and thereafter such a order shall also prejudice his right to address at a later stage, if any;*
- 2) Court has no power to call him – in as much as, his status is not of an accused person.*
- 3) Prospective accused is also not supposed to state his version and has a right to keep silent.*
- 4) Such an adjudication is not warranted by CrPC and would only result in waste of judicial time – an exercise which may be repeated at later stages of the case.*

14. Coming on to the ratio of Hardev Singh Sandhu’s case (supra) as mentioned, the said judgment has been discussed in subsequent case of Vishu Dutt’s case (supra) by Hon’ble Rajasthan High Court wherein the ratio of Chandra Dev Singh (supra) has been reiterated. Thus, on this aspect also no reliance can be placed by the applicant.

15. Coming on the aspect of the situation wherein, the right of the accused persons is there, as mentioned earlier, these are needless to state statutory provisions wherein the accused is given right to be heard, same cannot be extended to the stage as sought for by ld. counsel for applicant.

16. *In view of the aforesaid discussion, this application is without any merit and the applicant cannot be given the right to participate in the adjudication of the protest petition. Same is dismissed. Needless to state that these observations are only on the aspect of the participation of Samir Ahluwalia in the adjudication of protest petition and nothing more.”*

2. Aggrieved by the order dated 23rd April, 2016 passed by learned CMM, the petitioner preferred a revision petition which was dismissed vide the impugned order dated 15th September, 2016. Hence the present petition.

3. Before this Court, learned counsel for the petitioner reiterates his submissions made before learned CMM and learned Additional Sessions Judge that while considering the acceptance of the closure report, the prospective accused should be afforded a right to be heard. Learned counsel for the petitioner places reliance on the decisions of this Court reported as 134 (2006) DLT 221 Prashant Goel Vs. State & Anr. and the order dated 25th April, 2016 of this Court in CrI.M.C. No.2565/2013 (Zee News Ltd. Vs. State & Anr.) and transfer petition TRP.CrI. No.45/2014 (Sudhir Chaudhary Vs. State & Ors).

4. During investigation the role of investigator is not only to collect material in favour of the complainant version but he has to collect entire material whether in favour or against the complainant and in favour or against the accused. Only on collection of the entire material the investigating officer can form the final opinion as to whether the final report under Section 173 Cr.P.C. is to be filed for the trial of the accused or a cancellation report. He is free to form the opinion on the basis of material facts collected by him. As held by the Supreme Court in the decisions

reported as (1980) 4 SCC 631 H.S. Bains, Director, Small Saving-cum-Deputy Secretary Finance, Punjab, Chandigarh Vs. State (Union Territory of Chandigarh) and M/s India Carat Pvt. Ltd. (supra) on receipt of the final report the Magistrate has three options:—

“6.....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.”

5. As per the provisions of Chapter XII of Code of Criminal Procedure after registration of the FIR, the officer incharge of the police station or officer authorised has to carry out investigation and on completion thereof file a final report under Section 173 Cr.P.C. The final report so filed under Section 173 Cr.P.C. is of three kinds though not named in the Cr.P.C. i.e. charge sheet for trial of accused, cancellation report opining that no case is made out for proceeding against the accused or an untraced report stating that despite efforts, evidence could not be found out. There is no provision in the Cr.P.C. that at the stage of acceptance or non-acceptance of the final report, either the prospective accused or the complainant is required to be heard however in view of the decision of the Supreme Court reported as AIR 1985 SC 1285 Bhagwant Singh Vs. Commissioner of Police since in the case

of cancellation report or an untraced report an order adverse to the complainant for not proceeding against the accused may be passed though the complainant has a right to be heard however the accused has no right to be heard.

6. Reliance of learned counsel for the petitioner on Prashant Goel (supra) is misconceived. In the said case the accused was effected as delay in filing the complaint was condoned without hearing the accused. It is in light of the fact that delay had been condoned without hearing the accused, the Court held that since the right of the accused was prejudicially effected, the order condoning the delay could not have been passed without hearing the accused. Section 468 Cr.P.C. bars cognizance on a complaint if the same is instituted after the lapse of the period of limitation unless the Court extends the time if properly explaining the delay or in the interest of justice under Section 473 Cr.P.C. It is well settled that if a proceeding is not instituted in time, even though the right may not be lost but the remedy is lost. Thus, to permit a party to avail the remedy which it has lost cannot be without hearing the party against whom the order adverse may be passed.

7. Learned counsel for the petitioner referring to the decision in Zee News (supra) refers to para 65 of the said judgment wherein the Court noting the decision reported as AIR 1963 SC 1430 Chandra Deo Singh Vs. Prokash Chandra Bose & Anr. observed that it was open to the prospective accused to remain present when the inquiry is underway before the Magistrate at the pre-summoning stage. In para 65, this Court also noted that the accused has “no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so as observed by the Supreme Court in Chandra Deo (supra).

8. The prayer in the application before the learned CMM was that the petitioner be supplied copy of the protest petition and he be heard. It is well settled that at this stage, the prospective accused has no right to be heard. Thus finding no error in the two orders passed by learned CMM and learned Additional Sessions Judge, the present petition and application are dismissed.

(MUKTA GUPTA)
JUDGE

NOVEMBER 15, 2016
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