

\$~15

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

+ CRL.M.C. 654/2016 and CrI.M.A.2715/2016 (stay)

MUKESH KHER, ADVOCATE AND ANOTHER..... Petitioners

Through: Petitioner No.1 in person

versus

STATE & ORS

..... Respondents

Through: Mr. Ashish Duta, APP for the State
with SI Amit Solanki & SI Sanjeev
Choudhary, PS Vasant Vihar.
Mr. Rahul Yadav, Adv. for R-3.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER

%

13.09.2018

The First Information Report (FIR) No.1458/2014 was registered on 10.12.2014 by Police Station Vasant Vihar at the instance and complaint of the third respondent (the complainant). It appears from the allegations made in the said FIR that the offences punishable under Sections 341/506/509/34 of Indian Penal Code, 1860 (IPC) and Sections 3(1) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (for short "SC/ST Act") were alleged to have been committed by the petitioners, they being associated with the Management of the school named Bala Pritam Guruharkishan International Public School, run by a society named, Uttar Pradesh Samaj (Regd.), the complainant described by the petitioners as the former employee.

The FIR was investigated into and a report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) was submitted by the

investigating officer, *inter alia*, stating that sufficient evidence had not come on record to cause arrest of the persons against whom allegations had been made, the witnesses who had supported the allegations of the complainant being interested, they also being ex-employees of the school, the names of the persons sought to be prosecuted consequently having been kept in column No.11, the report of the forensic scrutiny of close circuit television (CCTV) network copy of footage, of which copy had been given in the form of compact disc (CD), statedly covering the incident, which is the subject matter of the allegations in the case, being still awaited, a supplementary charge sheet to be submitted upon its receipt.

The metropolitan magistrate considered the said report and passed the following order:-

“07.01.2016

Fresh charge-sheet filed. It be checked and registered.

Present : Ld. APP for the State

Both the accused are absent (without arrest).

E-challan alongwith Hash value certificate also filed by the IO.

IO/ACP concerned in person.

Heard. Record Perused.

On the basis of the material on record, I hereby take cognizance of the offences as mentioned in the charge-sheet against both the accused.

Issue summons against the accused persons through IO concerned for 19.02.2016.”

Aggrieved by the aforementioned order, in the consequence of which the petitioners have been summoned as accused, the present petition invoking the inherent power and jurisdiction of this Court under Section 482

Cr.P.C. has been filed, the prime ground being that the allegations against the petitioners are false, baseless, motivated and concocted. It is submitted, with reference to the observations of the investigating agency in the aforementioned report under Section 173 Cr.P.C., that the petitioners were not even present at the scene at the relevant point of time nor had taken part in any incident by any act of commission or omission to subject the complainant with any harassment or other offences including under the SC/ST Act.

An order similar to the one as is assailed in the present petition has come to the notice of this court in yet another case allegedly involving offences under Section 3(1) of SC/ST Act in CrI.M.C. 2142/2015, *Sunil Kumar Rajput vs. State (Govt. of NCT of Delhi) & Anr.*, which was also listed today and which has been decided by oral order pronounced earlier in the course of the day. The following observations in the said order in the case of *Sunil Kumar Rajput* (supra) are germane and relevant for the present purposes and, thus, may be quoted verbatim:-

“Undoubtedly when the investigating police submits a report under Section 173 Cr. PC, the prerogative to take an appropriate view in accordance with law rests with the court of cognizance i.e. Metropolitan Magistrate. Again undoubtedly, at such stage, the Metropolitan Magistrate is not bound by the view expressed in the report of investigation submitted by the police. For clarity, it may be added that the Magistrate has a judicial discretion, power and jurisdiction to take a view contrary to the one reached by the investigating police – that is to say even in a case where the investigating police has submitted a report for cancellation or closure (not sending any person for prosecution), the Magistrate can reject the said view and on the basis of available

material proceed to take cognizance under Section 190 Cr. PC and to issue process under Section 204 Cr. PC. It is also true that the order taking cognizance, or issuing process, need not be a very detailed or elaborate one. But, it is always desirable that such an order must pass the muster of a judicial order which means the order must show application of mind and, for such tests to be passed, the order must take note atleast of the background facts, albeit briefly, and the reasons why the Magistrate is taking a particular view, specially when it is contrary to what has been recommended to him by the investigating agency.”

Since the report under Section 173 Cr.P.C. in the present case itself had indicated that the investigation was still not completed, the forensic report of the CCTV footage being still awaited, it also being beyond the domain of scrutiny under Section 482 Cr.P.C. to grapple with the issues of fact, (See: *Rajiv Thapar and Ors. vs. Madan Lal Kapoor*, (2013) 3 SCC 330), this court refrains from passing any observations either way on the truthfulness or falsity of the allegations made in the complaint in the case against the petitioners at this stage. The fact remains that the order which is impugned and whereby the petitioners stood summoned fails to pass the muster of a judicial reasoned order. It fails to take note of the conclusions reached by the investigating agency contradictory to the case of the complainant which, it must be added, were also tentative in nature, inasmuch as the forensic report was still awaited.

Ideally, in a case of this nature, the court of cognizance should have awaited the final report (supplementary) of investigation. It is stated by the Additional Public Prosecutor for the State, on instructions from the IO, that

CRL.M.C. 654/2016 Page 4 of 5

the forensic report has since been received and final report of investigation would be finalized and submitted in the near future.

Since the order which is impugned here is cryptic and definitely not a judicial order and bereft of application of mind, the same is set aside. The matter arising out of the report under Section 173 Cr.P.C. is remitted to the jurisdictional court of cognizance, which shall reconsider the same, in the light of above observations, after the supplementary report has been filed, based on FSL report, and pass a fresh order thereupon in accordance with law.

With these observations and directions, the petition and the applications filed therewith stand disposed of.

R.K.GAUBA, J.

SEPTEMBER 13, 2018

vk