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

Date of decision: 05.12.2019.

+ CRL.M.C. 2095/2017

AJIT KUMAR YADAV @ ACHYUT DAS Petitioner

Through: Mr. Navin Kumar Jha and

Mr. Jitendra Kr. Jha, Advs.

versus

STATE OF NCT DELHI & ORS Respondents

Through: Mr. Sudarshan Rajan, Adv. for R-2

SI Abhishek Kumar, PS Amar Colony

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (O R A L)

1. Vide the present petition, the petitioner /complainant seeks directions thereby to set aside the impugned order dated 18.10.2016 passed by Ld. Additional Sessions Judge, Saket Court, New Delhi in Criminal Revision No. 98/2016 filed by the Respondent No. 2

2. In the present case, the learned Judge allowed the revision petition and quashed the summoning order dated 18.07.2016 passed by Ld. M.M, Saket Court, New Delhi whereby Respondents No. 2-4 therein had been summoned u/s 319 of Cr.P.C. 1973.

3. Case of the petitioner is that petitioner has renounced his family and

had been relentlessly serving Respondent No.2 herein, namely Maharaj Gopal Krishna Goswami in Iskcon Temple, Sant Nagar, Delhi (hereinafter referred to as the "said temple"), for the past six years from the date of incident.

4. On 15.02.2012, the primary accused in F.I.R. No. 153/2012, namely Dayanidhi Das (herein after referred to as the "primary accused" or "said accused"), tried to commit carnal intercourse with the petitioner but was unable to succeed as the petitioner raised an alarm. Thereafter, the said accused sought forgiveness from the petitioner and assured that he would refrain himself from doing such a horrifying, disrespectful and vulgar act in the future.

5. However, on 08.04.2012, when the petitioner was travelling with Respondent No. 2 and the abovementioned accused to Kurukshetra, the said accused once again tried to commit carnal intercourse with the petitioner at 1:00 A.M. i.e. in the wee hours of 08.04.2012., in a closed room and succeeded in his attempts. The petitioner failed to resist the attempts of the accused. The petitioner even shouted for help, however, as the door of the room was bolted, his frantic calls fell to deaf ears.

6. Further, the accused even threatened to kill the petitioner if he told anyone about the incident and stated that no one would pay heed to his complaints, as the accused is a very loyal and close servant of Respondent No. 2. The petitioner was frightened by the threats of the said accused and remained silent at that time.

7. On the morning of 08.04.2012, the petitioner immediately informed to Sundar Gopal Das, director of youth Iskcon Training Forum and also the Manager, namely, Sadhu Hriday Das of said Temple, about the incident over the telephone. However, instead of helping the petitioner, they told him that the accused is very closely associated to the president of the Temple, namely, Mohan Rupa Das and Respondent No. 2 and hence, they were helpless and further advised the petitioner not to take any action.

8. Thereafter, the petitioner informed Respondent No.2 about the entire incident. However, he purposely did not pay any heed to his complaints and stalled his requests to take action against the primary accused. The said accused is closely associated with Respondent No. 2 and hence, there was no action on the part of Respondent No. 2, despite of the repeated complaints and requests made by the petitioner.

9. Left with no other option, the petitioner sent an e-mail dated 26.04.2012 to the members of the Governing Body Commission (herein after referred to as "GBC") of the Temple, detailing there in the horrific and vulgar acts of carnal intercourse committed by the primary accused i.e. Dayanidhi Das at various instances with the various devotees of the said temple. The petitioner also categorically pointed out in the E-mail, about the failure of Respondent No. 2 in taking any action against the primary accused.

10. Thereafter, Respondent No. 2 merely suspended the said accused from the service of the temple for a period of six months. However, Respondent No. 2 reinstated him to service, after which he continued to commit the same horrific and vulgar acts with other devotees.

11. Learned counsel for the petitioner submits that the petitioner sent the E-mail dated 26.04.2012 to various members of the GBC from the E-mail address amitdarshan@yahoo.in (Amit Kumar) i.e. under the guise of a fictional third person because the petitioner was under grave threat of his life and liberty, as Respondent No. 2 holds a powerful and reputed position in the society and would seek to inflict harm upon the petitioner if the said e-mail came to his knowledge. The members of the GBC completely ignored

the petitioner's complaints and requests and further, failed to give any reply to the abovementioned e-mail. Furthermore, one of the members of the GBC told the petitioner that they could not help him in anyway and only the local in charge of the Temple could take action regarding the afore mentioned incident.

12. Learned counsel for the petitioner submits that it is evident from the evasive replies of the temple authorities, including the GBC of the temple and their inability to take action against the primary accused, that the Respondent No. 2 has full control over all the authorities of the temple and they are fearful of him. Further, despite having full knowledge of the various instances of unholy and heinous carnal intercourse committed by the said accused with various devotees of the temple, respondent No.2 purposely and malafidely did not take any kind of action against him. Thus, Respondent No.2 is working hand in glove with the primary accused.

13. Left with no other alternative, the petitioner went to Amar Colony Police Station to make a complaint against the accused. However, the police refused to lodge his complaint. Furthermore, the police authorities restrained the petitioner from leaving the police station unless he undertook to withdraw his complaint. Thereafter, the petitioner called up his Advocate to

seek help upon which his Advocate dialed police helpline no. 100 and made a complaint on behalf of the petitioner to the police authorities. The police authorities called upon the petitioner to lodge his complaint at about 2:00 A.M. on the next morning however, the petitioner left that place and went to Vrindawan, U.P. owing to the threat posed by the Respondent no.2 and said accused.

14. Subsequently, the petitioner sent an online complaint to the commissioner of police and D.C.P. Sarita Vihar, Delhi from Vrindavan, U.P. to which the Commissioner instantly took cognizance and directed the investigating officer along with one const. Sh. Sushil Kumar to escort the petitioner to Delhi and register his complaint and further take cognizance of the entire incident. Accordingly, the statement of const. Sushil Kumar under Section 161 of the Code of Criminal Procedure, 1973 was recorded, in this regard. Then only, on the written complaint dated 07.05.2012, FIR No. 153/2012 was registered at Police Station Amar Colony, u/s 377/511 of IPC against Dayanidhi Das. Thereafter, the petitioner was examined medically.

15. On 07.05.2012, few people from the temple again came to P.S. Amar Colony and on the pretext of resolving the matter, took the petitioner outside the police station. Thereafter, the said persons forcibly took the petitioner to

respondent no.2 in the temple where they forcibly made the petitioner to make false and frivolous statements under coercion and duress and then recorded the same on a mobile. The said false and frivolous statements were recorded forcefully from the petitioner by the accomplices of respondent No. 2, who had brought a knife and threatened to kill the petitioner, if he did not make the statements as directed by them.

16. Learned counsel submits that learned Sessions Court erred in observing that at the time when the application under section 319 of Cr.P.C. was filed by the petitioner, learned MM was dealing only with cancellation report and could either accept or reject the same. Pertinently, the Ld. M.M. vide order dated 03.05.2013 had categorically accepted the protest petition/objections filed by the petitioner against the cancellation report dated 30.06.2012 thereby taking cognizance of the offences against the said accused i.e. Dayanidhi Das U/s 377 of the IPC and had rejected the cancellation report dated 30.06.2012.

17. Learned counsel further submits that Ld. M.M. had rejected the cancellation report and had taken cognizance of the offence as empowered u/s 190(1)(b) read with 200 of Cr.P.C. after recording the statement of the petitioner. Hence, the inquiry into the offence U/s 377 of the IPC against the

said accused had already commenced before the Ld. M.M., prior to the summoning of the Respondent nos. 2 to 4 as accused U/s 319 of the Cr.P.C. Thus, the Ld. Sessions court failed to observe that order dated 18.07.2016 passed by the Ld. M.M. issuing summons to the Respondent Nos. 2 to 4, squarely falls within the purview of the provisions of sections 319 of the Cr.P.C. in as much as the inquiry in the F.I.R. No. 153/12 dated 07.05.2012 had already commenced after the Ld. M.M. took cognizance of the offence U/s 377 of the IPC against the said accused vide its order dated 03.05.2013.

18. Learned counsel further submits that learned MM had recorded the statement of the petitioner dated 03.05.2013 on oath and thereafter, proceeded to treat the said protest petition as a complaint petition U/s 200 of the Cr.P.C.

19. To strengthen his arguments, learned counsel has relied upon the case of the Hon'ble Supreme Court decided in ***India Carat (Pvt.) Ltd. vs. State of Karnataka and Anr.: (1989) 2 SCC 132*** whereby categorically held that:

...."the position is, therefore, now well settled that upon receipt of a police report under section 173(2) a magistrate is entitled to take cognizance of an offence u/s 190(l)(b) of the code even if the police report is to the effect that no case is made out against the accused. The magistrate can take into account the statements of the witnesses examined by the police during the investigation

and take cognizance of the offence complained of and order the issue of process to the accused U/s 190(l)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigating and take cognizance of the case, if he thinks fit, in exercise of his powers U/s 190(l)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in sections 200 and 202 of the code for taking cognizance of a case U/s 190(l)(a) though it is open to him to act U/s 200 or section 202 also. The High court was, therefore, wrong in taking the view that that the second Additional Chief M.M. was not entitled to direct the registration of a case against the second respondents and order the issue of summons to him...."

20. Hence, the Ld. M.M. while applying its mind had precisely treated the aforesaid protest petition as a complaint petition U/s 200 of the Cr.P.C. which has been upheld by the Apex Court in a catena of judgments. However, the Ld. Sessions Court failed to appreciate that upon bare perusal of the provisions of section 319(1) of the Cr.P.C. it is evidently clear that the provisions of Section 319 of the said code can be invoked at any time in the course of any inquiry into, or trial of, an offence where it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused.

21. While concluding his arguments, learned counsel for the petitioner submits that in view of the facts and circumstances of the case and the judicial pronouncement cited above, the present petition deserves to be allowed by setting aside the impugned order dated 18.10.2016.

22. On the other hand, respondent no.2 in its counter affidavit stated that whenever a particular procedure has been prescribed in Law, that procedure ought to be followed as per the law. In the present case, the Learned MM failed to follow the procedure prescribed under the Criminal Procedure Code and went on to record the statement of the complainant after taking cognizance of the offence but even before the framing of notice upon the alleged accused. The code of Criminal Procedure, however, does not contain any provision for recording the statement of the witness at such stage in a case filed upon a police reports/closure report. Such recording of statement was itself illegal. It was on the basis of such statement that the Magistrate summoned the respondent No.2, which procedure is alien to criminal law. It was in this context that the Ld. Addl. Sessions Judge observed that the Ld. MM have adopted the procedure alien to criminal jurisprudence. Thus, there being no infirmity in the impugned order, the present petition is liable to be dismissed.

23. In addition to above, learned counsel for respondent no.2 submits that though the order dated 03.05.2013 of the Ld. MM records that Protest Petition has been filed by the Petitioner, but no such protest petition was on record. It is for this reason that the Petitioner has also not filed any such protest petition before this Court along with the present petition. In this view of the matter, the Addl. Sessions Judge had observed that no protest petition has been filed. In this view of the matter, the Magistrate erred in entertaining an application under Section 319 of Cr.P.C.

24. Further submits, aforesaid provision can be exercised by a trial courts only at the stage of inquiry or trial. However, in the absence of any inquiry or trial such powers cannot be exercised. The Ld. Sessions Judge has kept in view the above position of law observed that the case was not at the stage of an inquiry or trial. The fact remains that the Ld. Magistrate, in the absence of any legally admissible evidence took into consideration inadmissible evidence/statement of the complainant recorded in the court without following a due process of law and thereafter, entertained the application u/s 319 Cr.P.C., which could not have relied upon inadmissible evidence. In this view of the matter, the Ld. Sessions Judge rightly set aside the order passed by the Ld. MM and thus, the impugned order should be upheld.

25. I have heard learned counsel for the parties at length and perused the material available on record.

26. It is not in dispute that there was no allegations of any sort levelled by the petitioner against respondent no.2 either in his initial complaint made to the police on the basis of which FIR in this case was registered, nor even in his statement recorded by learned MM under section 164 Cr.P.C.

27. It is also not in dispute that acting upon the statement made by the petitioner/complainant before the Ld. MM, the police had filed cancellation report in this case and notice of which was also served upon the petitioner. However, an application under section 319 Cr.P.C. was filed by the petitioner through his counsel before the Ld. MM, wherein it was stated that respondent no.2 alongwith two of his associates were also required to be summoned by the court as accused.

28. It is pertinent to mention here that the Ld. MM at the relevant point of time was dealing only with the cancellation report and it was still within her prerogative to either accept or reject the same. However, no inquiry or trial was pending before the Ld. MM so that she could have invoked the provisions of section 319 Cr.P.C.

29. In the Trial Court Record, there is a statement made by the petitioner/ complainant on oath recorded by Ld. MM on 03.05.2013, wherein he had narrated all the incidents in detail and had levelled allegations against many persons including the respondent no.2. However, the aforesaid statement of the petitioner was recorded by the learned MM as neither the matter was at the stage of '*trial*' in which he could have been summoned as a witness for the purpose of his examination, nor the learned MM was dealing with the protest petition as a '*private complaint*' under section 200 Cr.P.C. in which she could have directed the complainant to adduce his pre-summoning evidence after taking cognizance of the matter. Not only this, while relying upon the said statement recorded by Ld. MM, she had proceeded to summon the respondent no.2 alongwith two other members of Iskon Society, namely, Adyut Krishan and Adi Yogi as accused in this case for an offence u/s 506 IPC and that too without even taking cognizance of the same.

30. On perusal of the order dated 18.07.2016, on the one hand, learned MM had observed that substantial offence under section 506 IPC was made out against accused persons including respondent no.2, whereas, on the other hand, learned Judge had mentioned that everything was done at the behest of the respondent no.2, thus, if respondent no.2 was not the actual offender

himself, rather he was an abettor of the crime. However, no such cognizance of the offence of abetment, if any, whatsoever was taken by the learned MM before summoning of respondent no.2.

31. In view of the fact that there was no allegation against respondent no.2 in the first complaint which culminated into FIR and thereafter statement recorded under section 164 of Cr.P.C. and even thereafter he had not made any complaint to any of the authority stating that first statement of the petitioner and the statement under section 164 of Cr.P.C. was recorded under coercion, duress and threat. Moreover, learned Judge who recorded the statement had put a specific question to the petitioner that whether there is any pressure, coercion in making statement under section 164 Cr.P.C., the petitioner said in Negative.

32. Even as per the contents of the petition, the petitioner had approached the respondent no.2 for taking action against the said accused and he was removed from service and for rest of the offence, he could not take any action as the FIR had already been lodged, therefore, there was no issue left with respondent no.2 to take any action in this matter.

33. It is also not in dispute that the petitioner had not filed a petition under section 156(3) Cr.P.C. or under section 200 Cr.P.C. But recording statement in application filed under section 319 Cr.P.C. is alien to the Cr.P.C. because that stage had not come in the present case. The FIR in question lodged for the offence punishable under section 377/511 IPC, thus, the case is to be tried by the Sessions Court. However, the learned MM passed the order and summoned respondent no.2 along with other accused. Since the other accused are not before this Court, therefore, I hereby do not comment upon summoning of those accused but the fact remains is that in the F.I.R., which has been registered based upon the complaint of the petitioner and also in the statement under section 164 Cr.P.C., there was no allegation against respondent no.2.

34. In view of above discussion and settled procedure prescribed in Cr.P.C., the cases cited by the petitioner are not applicable. Therefore, I find no illegality and perversity in the impugned order dated 18.10.2016 passed by the learned Sessions Court.

35. Finding no merit in the present petition, the same is, accordingly, dismissed.

(SURESH KUMAR KAIT)
JUDGE

DECEMBER 05, 2019
ms/ab

