

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
CRL.M.C. 10/2020, CRL.M.A. 29/2020 (Stay) and
CRL.M.A. 3212/2020 (Addl. Doc.)

Date of Decision: 03.09.2021

IN THE MATTER OF:

SHAMBHU SINGH KHETASAR Petitioner
Through: Mr. Pradeep Rai, Sr. Advocate with
Mr. Rajesh Kumar, Advocate.

versus

STATE (NCT OF DELHI) & ANR. Respondents
Through: Ms. Neelam Sharma, APP for State
Mr. Rachit Singh, Advocate for complainant/R-2.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI
(VIA VIDEO CONFERENCING)

MANOJ KUMAR OHRI, J. (ORAL)

1. The present petition has been filed under Article 227 of the Constitution of India read with Section 482 Cr.P.C. seeking setting aside of the summoning order dated 02.08.2019 passed by the learned ACMM-II, Patiala House Courts, New Delhi in Criminal Case No. 18409/2018 arising out of FIR No. 357/2008 registered under Sections 406/420/120B IPC at Police Station Connaught Place, New Delhi.
2. Learned Senior Counsel for the petitioner has assailed the impugned order primarily on the ground that despite the petitioner's name being kept in column No. 12 of the charge sheet, the petitioner has been summoned by the learned Magistrate vide a non-speaking order which shows complete

non-application of mind. He submits that the petitioner was never directly or indirectly associated with the activities of the complainant/respondent No. 2. It is also stated that the petitioner was neither signatory to any agreement nor participated in any of the discussions.

3. It is further submitted that finding no evidence against the present petitioner, the investigating agency had kept him in column No. 12 of the charge sheet. It was next submitted that the complainant is guilty of forum shopping as prior to the registration of the FIR, he had filed a complaint on 12.04.2008 with the S.H.O., Police Station Udai Mandir, Jodhpur, Rajasthan, a complaint before S.H.O., Paschim Vihar, Delhi on 03.05.2008 and a complaint before the EOW, New Delhi on 06.05.2008.

4. Learned Senior counsel would submit that a perusal of the first complaint would show that the concerned S.H.O. had marked the same to a Sub-Inspector for investigation. In the Status Report filed before the learned Metropolitan Magistrate, it has been mentioned that the Investigating Officer visited Jodhpur and interacted with the Investigating Officer at Police Station Udai Mandir, who informed him that the complainant was called a number of times to join the enquiry but he never joined. Rather, the complainant chose to file an application under Section 9 of the Arbitration and Conciliation Act, 1996 before the learned District and Sessions Judge, Jodhpur in which the Court appointed an arbitrator. The complainant again did not promptly participate in the arbitration proceedings and resultantly, the proceedings were terminated vide order dated 08.06.2017.

5. It is stated that in none of the above proceedings, the complainant made a whisper against the present petitioner.

6. As per the Status Report filed before the learned Metropolitan Magistrate, while an enquiry was pending with the EOW, New Delhi, the complainant filed an application under Section 156(3) Cr.P.C on 20.05.2008 before the learned ACMM, Patiala House Courts, New Delhi mentioning jurisdiction of Police Station Connaught Place, Delhi. The said complaint was accepted overlooking the fact that no complaint was filed in Police Station Connaught Place. The Court directed registration of a case and resultantly, the present FIR came to be registered at Police Station Connaught Place. This FIR was later transferred for investigation to Police Station EOW, New Delhi.

7. It has been submitted that in the aforementioned complaint filed under Section 156(3) Cr.P.C., the complainant levelled allegations against the petitioner for the first time. It has further been submitted that though investigation was carried out for a period of 10 years, no incriminating material was found against the present petitioner, for which reason, his name was kept in column No. 12 of the charge sheet. It is urged that the present matter is a fit case where summoning order is liable to be set aside, being arbitrary and having been passed without application of judicial mind.

8. Learned APP for the State has reiterated the stand of the investigating agency that no material was found against the present petitioner during the course of investigation.

9. Learned counsel for the complainant, on instructions, has stated that he has no submissions to make and would abide by the orders passed by the Court.

10. I have heard learned counsels for the parties and gone through the material placed on record.

11. A perusal of the material placed on record would show that prior to filing of the complaint under Section 156(3) Cr.P.C., the complainant had filed three complaints with different police stations apart from an application under Section 9 of the Arbitration and Conciliation Act, 1996. In none of the aforesaid three complaints and arbitration proceedings, the complainant had levelled any allegations against the present petitioner.

12. Over and above, the complainant wilfully chose not to join the enquiries conducted in pursuance of his above referred complaints. He, after initial appearance, chose not to participate in the arbitration proceedings as well. Under these facts and circumstances, the charge sheet was filed keeping the name of the petitioner in column No. 12.

13. Before proceeding to analyse the facts of the present case from the prism of judicial dicta on the subject, I deem it apposite to reproduce the impugned summoning order, which is stated to have been passed without due application of mind. This order, as passed by the learned ACMM, reads as under:-

*“Cognizance taken.
Summons be issued to the accused for 18.09.2019.”*

14. A reading of this order shows that process was issued against the petitioner in complete disregard of the settled principles of law regarding application of mind. The application of mind by the Magistrate at the time of taking cognizance is *a sine qua non* for issuance of process and it is best disclosed by disclosure of mind. In blatant ignorance of this established view, the impugned order was passed in a cryptic manner. This fact further assumes significant importance, considering that in the present case, the investigating agency had not forwarded the name of the petitioner as an

accused and his name was kept in column No. 12 for lack of evidence. The learned ACMM, while passing the impugned order, disagreed with the conclusion of the investigating agency but did not mention what led him to do so.

15. It is worthwhile to note that in a case where the Magistrate agrees with the conclusion of the investigating agency to proceed against an accused, there is no requirement of recording of reasons at the time of taking cognizance. [Refer: Jagdish Ram v. State of Rajasthan and Another reported as (2004) 4 SCC 432]. However, in a case where the Magistrate disagrees with the conclusion of the investigating agency, the order issuing process must show application of mind.

16. The law on summoning of an accused and the requisite application of mind at that stage is well encapsulated by a number of decisions tendered by the Supreme Court. In Rupan Deol Bajaj (Mrs) and Another v. Kanwar Pal Singh Gill and Another reported as (1995) 6 SCC 194, where the complainant's objections to a closure report were overruled without recording of any reasons, the Court emphatically laid down that:

“28. Since at the time of taking cognizance the Court has to exercise its judicial discretion it necessarily follows that if in a given case - as the present one - the complainant, as the person aggrieved, raises objections to the acceptance of a police report which recommends discharge of the accused and seeks to satisfy the Court that a case for taking cognizance was made out, but the Court overrules such objections, it is just and desirable that the reasons therefor be recorded. Necessity to give reasons which disclose proper appreciation of the issues before the Court needs no emphasis. Reasons introduce clarity and minimise chances of arbitrariness. That necessarily means that recording of reasons will not be necessary when the Court accepts such police report without any demur from the

complainant...”

17. The Supreme Court has further opined on the importance of careful passing of summoning order in Pepsi Foods Ltd. and Another v. Special Judicial Magistrate and Others reported as **(1998) 5 SCC 749**, as follows: -

“28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course...”

18. On the issue of passing of a speaking order when the Magistrate’s view differs from that of the investigating agency, the Delhi High Court’s observation in Radesh Singh and Ors. v. State and Anr. reported as **2011 SCC OnLine Del 901**, merits mention:-

“4. ... No doubt, a Magistrate takes cognizance of the offence and not of the offenders, but when he sends summons to an offender, he sends summons asking the offender to face trial. The Magistrate must be clear in her mind as to what were the offences made out against the offender and that there was prima facie evidence against him, more specifically when the police during investigation has not been able to find out evidence of involvement of the offender. Since the Magistrate disagreed with the report of the police and considered that there was evidence to summon the petitioners and asked them to face trial, she must have spelt out the reasons for summoning the petitioners placed in Column No. 2. If the police had collected sufficient evidence and forwarded challan in respect of the offenders, the Magistrate may take cognizance of the offence and summon all such offenders for facing trial as named by police on the basis of evidence collected by the police but where the police has not found evidence and the Magistrate considered that there was sufficient evidence, then the Magistrate must pass a speaking order for summoning such offenders against whom, in the opinion of the police there was no evidence.”

(emphasis added)

19. More recently, the issue of summoning was discussed at length in Sunil Bharti Mittal v. Central Bureau of Investigation reported as (2015) 4 SCC 609 where, the facts involved were that in the investigation conducted, the role of the appellant was inquired into but finding no material to implicate him, the investigating agency filed the charge sheet without arraying him as an accused person. The Supreme Court took the opportunity to illustrate the law on taking of cognizance as follows:

“48. Sine qua non for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a prima facie case or not.

49. Cognizance of an offence and prosecution of an offender are two different things. Section 190 of the Code empowered taking cognizance of an offence and not to deal with offenders. Therefore, cognizance can be taken even if offender is not known or named when the complaint is filed or FIR registered. Their names may transpire during investigation or afterwards.

50. Person who has not joined as accused in the charge-sheet can be summoned at the stage of taking cognizance under Section 190 of the Code. There is no question of applicability of Section 319 of the Code at this stage (see SWIL Ltd. v. State of Delhi³⁷). It is also trite that even if a person is not named as an accused by the police in the final report submitted, the Court would be justified in taking cognizance of the offence and to summon the accused if it feels that the evidence and

material collected during investigation justifies prosecution of the accused (see Union of India v. Prakash P. Hinduja³⁸). Thus, the Magistrate is empowered to issue process against some other person, who has not been charge-sheeted, but there has to be sufficient material in the police report showing his involvement. In that case, the Magistrate is empowered to ignore the conclusion arrived at by the investigating officer and apply his mind independently on the facts emerging from the investigation and take cognizance of the case. At the same time, it is not permissible at this stage to consider any material other than that collected by the investigating officer.

51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words 'sufficient grounds for proceeding' appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein

while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.”

(emphasis added)

20. From the foregoing, it can be culled that the judicial dicta are consistent on the aspect that a summoning order must reflect application of mind by the Magistrate to the facts of the case and the law applicable thereto. It is not essential for a Court to pass a lengthy order but it must demonstrate that there was due application of judicial mind. The words ‘opinion’ and ‘sufficient ground’ mentioned under Section 204 Cr.P.C. leave no doubt that before issuing process, the Magistrate shall indicate on what material he has adjudged the case as fit for issuance of process. In the present case, the learned Magistrate failed to discharge this responsibility and passed the impugned order in a mechanical manner without showing application of judicial mind to the facts of the case. The same calls for interference. Consequently, the petition is allowed and the summoning order is set aside qua the present petitioner only with a direction that the matter be remanded back to the Court of concerned ACMM to pass the order afresh after due application of mind in accordance with law.

21. The petition is disposed of in the above terms along with the pending applications.

22. A copy of this order be communicated electronically to the concerned Trial Court.

(MANOJ KUMAR OHRI)
JUDGE

SEPTEMBER 3, 2021/na

Click here to check corrigendum, if any