

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Appellate Side)

MAT 922 of 2022
IA No. CAN 1 of 2022
CAN 2 of 2022

Reserved on: 13.07.2022
Pronounced on: 28.07.2022

Kushal Agarwal

...Appellant

-Vs-

Mahendra Kumar Jain & Ors.

...Respondents

Present:-

Mr. Parag Tripathi, Sr. Advocate
Mr. Ankit Agarwal,
Mr. Srinivasan Ramaswamy,
Mr. Nilay Sengupta,
Mr. Sujit Banerjee, Advocates
... for the appellant
Mr. Kalyan Banerjee, Sr. Advocate
Mr. Debanjan Mandal,
Mr. Anuj Singh,
Mr. Ajay Agarwal,
Mr. Somopriyo Chowdhury,
Mr. Sanket Sarawgi,
Mr. Arka Banerjee, Advocates
... for the respondent No.1
Mr. Amitesh Banerjee, Sr. Advocate
Mr. Chama Mukherjee,
Mr. Siraj Gooptu, Advocates
... for the State

Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
JUDGE

Prakash Shrivastava, CJ:

1. This appeal is at the instance of one of the accused challenging the order of the learned Single Judge dated 14.06.2022 whereby W.P.A. No.

17293 of 2021 filed by the complainant has been allowed and a Special Investigation Team has been formed to investigate the offences.

2. Facts in nutshell are that appellant was married to Rashika Jain (daughter of respondent no. 1) on 09.02.2020. It is stated that on 16.02.2021 Rashika Jain fell down from the terrace of the appellant's apartment and was taken to Woodlands Hospital and she had died on the same day. Respondent No. 1 had lodged a complaint with the police on 17.02.2021 on the basis of which FIR No. 15/21 at Alipore Police Station for the offences under Sections 306, 498A, 34 of the IPC was registered. Respondent No. 1 on or about 7th of October, 2021 had filed W.P.A. No. 17293 of 2021 raising grievance against the unsatisfactory investigation and making a prayer for constituting the Special Investigation Team to investigate the offences in Alipore Police Station Case No. 15 of 2021. By the order under challenge, learned Single Judge has allowed the prayer.

3. Submission of the learned Counsel for the appellant is that the writ petition filed by the respondent No.1 was not maintainable because he had filed an application under Section 156(3) of the Cr.P.C. and without disclosing this fact, simultaneously, he had invoked the writ jurisdiction. He further submits that even otherwise in respect of the grievance relating to improper investigation the writ petition was not maintainable and the appropriate remedy was to approach the Judicial Magistrate and in support of his submission he has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Sakiri Vasu vs. State of Uttar Pradesh and Others** reported in (2008) 2 SCC 409, in the matter of **Sudhir Bhaskarrao Tambe vs. Hemant Yashwant Dhage and Others** reported in (2016) 6 SCC 277 and in the matter of **M.**

Subramaniam and Another vs. S. Janaki and Another reported in (2020) 16 SCC 728. He has further submitted that before the learned Single Judge, order of the Judicial Magistrate dated 06.05.2022 was not produced wherein learned Judicial Magistrate had recorded satisfaction about the investigation and the said order has not been dealt with by the learned Single Judge. He has also submitted that merely because in the application before the Judicial Magistrate, respondent no. 1 had not mentioned any provision of law that will not make any difference as the contents of the application reveal that it was an application under Section 156(3) of the Cr.P.C. and in support of his submission he has placed reliance upon in the matter of **P.K. Palanisamy vs. N. Arumugham and Another** reported in (2003) 9 SCC 173. He has also submitted that on the ground of suppressing the order of the Judicial Magistrate dated 06.05.2022, the writ petition itself is liable to be dismissed and in support of his submission he has place reliance upon the Division Bench order of the Delhi High Court in the matter of **Satish Khosla vs. Eli Lilly Ranbaxy Ltd.** reported in 1988 (44) DRJ (DB). He has raised the submission that the averment made by the respondent No. 1 in the affidavit before this Court in respect of as to what transpired before the learned Single Judge at the time of hearing cannot be looked into as the same does not form part of the record of the learned Single Judge. In support of his submission, he has placed reliance upon the judgment of Hon'ble Supreme Court in the matter of **State of Maharashtra vs. Ramdas Shrinivas Nayak and Another** reported in (1982) 2 SCC 463. He has also submitted that learned Single Judge has not examined the case diary and that delay in investigation is attributable to the respondent No. 1 and in this regard he has submitted

that the password of the seized mobile phone was belatedly supplied by the respondent No. 1 and that other 4 queries raised in the communication dated 10.02.2022 sent by the police to the respondent No. 1 were not replied.

4. Learned Counsel for the respondent No. 1 has opposed the appeal by submitting that a limited direction of constituting the SIT for investigation has been issued by the learned Single Judge and the appellant accused has no right to choose investigating agency and that no appeal has been preferred by the State. He has further submitted that entire arguments are focused on the appellant but there are 2 more accused in the FIR against whom no action has been taken and police is hand in glove with the accused. He has further submitted that the warrant of arrest was issued only against the appellant, not against other 2 accused persons and even against the appellant no action has been taken. He further submits that application filed before the Judicial Magistrate was for monitoring the investigation and it was not an application under Section 156(3) of the Cr.P.C. and that even otherwise the Judicial Magistrate has no power to form SIT. He also submits that about 11 months after making seizure of the iPhone on 10.02.2022 notice was issued by the police to respondent No. 1 to provide the password which shows the inaction on the part of the police and the password was immediately provided on 22.02.2022. He also submits that the Advocates for the appellant had appeared before the learned Single Judge and were present at the time of argument but they did not mark their appearance. He also submits that the order of the Judicial Magistrate was duly brought to the notice of the learned Single Judge and that the order under challenge is only an interlocutory order. In

support of his submission that victim also has a right of speedy trial, he has relied upon the judgment in the matter of **Dilawar vs. State of Haryana and Another** reported in (2018) 16 SCC 521. In support of his submission that accused has no right of choose investigating agency, he has also placed reliance in the matter of **Union of India and Another vs. W.N. Chadha** reported in 1993 Supp (4) SCC 260, in the matter of **Romila Thapar and Others vs. Union of India and Others** reported in (2018) 10 SCC 753. In support of his submission that Judicial Magistrate has limited power under Section 156(3) of the Cr.P.C., he has place reliance upon in the matter of **Chandra Babu Alias Moses vs. State Through Inspector of Police and Others** reported in (2015) 8 SCC 774. He has also place reliance upon in the matter of **Arnab Ranjan Goswami vs. Union of India and Others** reported in (2020) 14 SCC 12, in the matter of **Gujarat Steel Tubes Ltd. and Others vs Gujarat Steel Tubes Mazdoor Sabha and Others** reported in AIR 1980 SC 1896, and in the matter of **State of West Bengal and Others vs. Committee For Protection of Democratic Rights, West Bengal and Others** reported in (2010) 3 SCC 571.

5. Learned Counsel for the State has submitted that the delay in obtaining the CFSL report is normal as there is a long queue in CFSL. He has further submitted that the present SIT is investigating the offences and the stand of the State is neutral, neither supporting the appellant nor the respondent No. 1.

6. We have heard the learned Counsel for the parties and perused the record.

7. Undisputed position is that the daughter of the respondent No. 1 was married to the appellant on 09.02.2020 and on 16.02.2021 she had

died allegedly on account of falling from the terrace of the appellant's apartment. It is also not in dispute that the FIR 15 of 2021 for offences under Section 306, 498A, 34 of the IPC was registered at Police Station Alipore on 17.02.2021. Till the passing of the order of the learned Single Judge on 14.06.2022 i.e. almost after 15 months of registration of the FIR, the investigation was not completed and charge sheet was not filed.

8. The allegation that the investigation was delayed due to the respondent No. 1 is not substantiated as the only document which is brought to the notice of this Court is the communication dated 10.02.2022 sent after more than a year of registration of the offence, to the respondent No. 1 requiring him to furnish certain information including the passwords of the iPhone which was seized. The passwords in the separate sealed envelope were provided by the respondent No. 1 vide communication dated 23.02.2022, therefore on this basis we cannot hold that the respondent No. 1 had delayed the investigation.

9. Learned Single Judge in the order under appeal has taken note of the social position of the parties and issue of delay. It has been found that the investigation has been rather slow and directionless. The respondent No. 6 in the writ petition i.e. the investigating officer has been found to be lacking in experience and also having lack of adequate support and machinery. In the said background, learned Single Judge, considering the gravity of offences and the delay, had opined that the Special Investigation Team consisting of senior and experienced police officers should be constituted. It is worth noting that the respondent No. 6 is also a part of the SIT. Learned Single Judge has not transferred the investigation to any outside agency but the SIT is headed by the Special

Commissioner of Police (II), Kolkata Police who has been directed to constitute her own team of competent officers to take over the investigation.

10. Hon'ble Supreme Court in the matter of **W.N. Chadha (supra)** in paragraph 92 has held that the accused has no right to have any say as regards the manner and method of investigation and also has no participation as a matter of right during the course of investigation of a case instituted on a police report till the investigation culminates in filing final report under Section 173(2) of the Code.

11. In the matter of **Romila Thapar and Others (supra)**, the position of law that the accused has no right with reference to manner of investigation has been reiterated as under:

“25. Again in *Sanjiv Rajendra Bhatt v. Union of India*, the Court restated that the accused had no right with reference to the manner of investigation or mode of prosecution. Para 68 of this judgment reads thus: (SCC p. 40)

“68. *The accused has no right with reference to the manner of investigation or mode of prosecution.* Similar is the law laid down by this Court in *Union of India v. W.N. Chadha*, *Mayawati v. Union of India*, *Dinubhai Boghabhai Solanki v. State of Gujarat*, *CBI v. Rajesh Gandhi*, *CCI v. SAIL* and *Janata Dal v. H.S. Chowdhary*.” (emphasis supplied)

26. Recently, a three-Judge Bench of this Court in *E. Sivakumar v. Union of India*, while dealing with the appeal preferred by the “accused” challenging the order of the High Court directing investigation by CBI, in para 10 observed: (SCC pp. 370-71)

“10. As regards the second ground urged by the petitioner, we find that even this aspect has been duly considered in the impugned judgment. In para 129 of the impugned judgment, reliance has been placed on *Dinubhai Boghabhai*

Solanki v. State of Gujarat, wherein it has been held that in a writ petition seeking impartial investigation, the accused was not entitled to opportunity of hearing as a matter of course. Reliance has also been placed on *Narender G. Goel v. State of Maharashtra*, in particular, para 11 of the reported decision wherein the Court observed that it is well settled that the accused has no right to be heard at the stage of investigation. By entrusting the investigation to CBI which, as aforesaid, was imperative in the peculiar facts of the present case, the fact that the petitioner was not impleaded as a party in the writ petition or for that matter, was not heard, in our opinion, will be of no avail. That per se cannot be the basis to label the impugned judgment as a nullity.”

12. In the matter of **Arnab Ranjan Goswami (supra)** in paragraph 52, the Hon’ble Supreme Court has taken the view that the displeasure of an accused person about the manner in which the investigation proceeds or an unsubstantiated allegation of a conflict of interest against the police conducting the investigation must not delay the legitimate course of law and warrant the invocation of the extraordinary power of the Court to transfer the investigation to CBI.

13. Hence, in view of the aforesaid judicial pronouncement, it is not open to the appellant to raise a complaint against the direction of the learned Single Judge to constitute the SIT specially when no prejudice is shown to have been caused to the appellant on account of such a direction.

14. The investigation is apparently delayed in the present case and Hon’ble Supreme Court in the matter of **Dilawar (supra)** has held that no investigating agency can take unduly long time in completing the

investigation and that speedy investigation is recognized as a part of fundamental right of fair procedure under Article 21 of the Constitution.

15. So far as the arguments raised by the learned Counsel for the appellant that the respondent No. 1 had already availed the remedy under Section 156(3) of the Cr.P.C., therefore, writ cannot be maintained, we find that under Section 156(3) of the Cr.P.C. Judicial Magistrate does not have power to constitute SIT. The Hon'ble Supreme Court in the matter of **Chandra Babu Alias Moses (supra)** in paragraph 21 has taken note of the wider power of the superior Court to direct further, fresh, de novo investigation etc. under Section 482 of the Code and it has been found that Judicial Magistrate can only direct further investigation.

16. That apart, a perusal of the order of the learned Single Judge also reveals that the order of the Judicial Magistrate passed under Section 156(3) of the Cr.P.C. rejecting the prayer for day to day monitoring of the investigation was brought to the notice of the learned Single Judge by the learned Senior Counsel appearing for the State and the police report in this regard was also taken on record. Hence, the submission of learned Counsel for the appellant based upon the judgment in the case of **Sakiri Vasu (supra)**, **Sudhir Bhaskarrao Tambe (supra)**, **M. Subramaniam and Another (supra)** in respect of the remedy before the Judicial Magistrate are of no help to them. Similarly, no benefit can be extended to the appellant on the basis of the Division Bench judgment in the case of **Satish Khosla (supra)** to the appellant as the order of the Judicial Magistrate under Section 156(3) of the Cr.P.C. was before the Single Bench.

17. Counsel for the appellant relying upon the judgment in the matter of **P.K. Palanisamy (supra)** has raised an issue that even if in the application filed before the Judicial Magistrate for monitoring the investigation, no provision of law was mentioned, then also it can be ascertained from the contents thereof that it was an application under Section 156(3) of the Cr.P.C. In the case of **P.K. Palanisamy (supra)** well-settled principle of law has been reiterated and non-mentioning of a provision does not invalidate the order if the Court or statutory authority had a requisite jurisdiction therefor. In the present case there is no issue of invalidation of order passed by the Judicial Magistrate dated 06.05.2022. Even otherwise if the proceedings were taken up before the Judicial Magistrate under Section 156(3) of the Cr.P.C. that would not take away right of the respondent No. 1 to file a writ petition seeking investigation by SIT because such a power does not exist with the Judicial Magistrate.

18. So far as the allegation of the respondent No. 1 as contained in affidavit in opposition that the Counsel for the appellant were present in the Court at the time of hearing by the learned Single Judge, we find that it is not substantiated by the order of the learned Single under challenge mentioning the appearance of counsel for the parties, therefore, such a contention cannot be accepted. Hon'ble Supreme Court in the matter of **Ramdas Shrinivas Nayak and Another (supra)** has held that the Court cannot launch into the enquiry as to what transpired in the Court below. Public policy bars and the Judicial decorum also restricts it as the matters of judicial record are unquestionable and are not open to doubt.

19. It is also worth noting that this being an intra-court appeal, once the view taken by the learned Single Judge is found to be possible and proper view, then no case for interference is made out. Hon'ble Supreme Court in the matter of **Gujarat Steel Tubes Ltd. and Others (supra)** in paragraph 73 has held that Appellate Court interferes not when the order appealed is not right but only when it is clearly wrong and that the difference is real, though fine.

20. Having regard to the above analysis, we find no error in the order of the learned Single Judge and no ground for inference is made out. The appeal is accordingly dismissed.

21. Any observation made in this order or in the order of the learned Single Judge will not prejudice the rights of the parties in trial.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
28.07.2022

PA(SS)

(A.F.R. / N.A.F.R.)