

**IN THE HIGH COURT AT CALCUTTA  
CRIMINAL REVISIONAL JURISDICTION  
APPELLATE SIDE**

PRESENT:

**THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE**

**CRR 2378 of 2019**

**Dipanwita Das**

**Versus**

**The State of West Bengal & anr.**

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| For the petitioner | : | Mr. Arindam Jana<br>Mr. Subhradeep Koley |
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| For the Opposite party no.2 | : | Mr. Subit Majumder |
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| For the State | : | Ms. Manisha Sharma |
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| Heard on | : | 16.12.2024 |
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| Judgment on | : | 19.12.2024 |
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**Dr. Ajoy Kumar Mukherjee , J.:**

1. Opposite party no.2 herein lodged a written complaint on 18<sup>th</sup> May, 2019 alleging that the petitioner and the defacto complainant are residents of their respective flats within same building. The father of the accused was requested to attend a meeting for taking a decision over small masonry work in the said building but her father did not attend the said meeting.

Accordingly some of the flat owners took a decision to carry out the work and petitioner's father gave verbal consent but during continuance of such work, the accused raised obstruction and dismantled the said work and abused the complainant and others with filthy languages. When they raised protest the petitioner physically assaulted the complainant for which she sustained injury and she was treated medically. On the basis of such written complaint Netaji Nagar FIR no. 162 dated 20.05.2019 was registered under section 341/323 IPC and after completion of investigation police submitted charge sheet against the present petitioner under section 341/323 IPC.

**2.** Being aggrieved by the said criminal proceeding petitioner submits that before lodging the instant FIR, the petitioner herein lodged a complaint against Tanmoy Bose, Arpita Bose and Chitra Mukherjee and the same was registered as Netaji Nagar P.S. case no. 161 of 2019 dated 20.05.2019 which was in connection with self same incident which allegedly took place around 12.00 to 12.30 hours on 18.05.2019. Petitioner further submits that she made several GD entries before the officer in charge of Netaji nagar police station against the illegal activities of the flat owners, including the present complainant Arpita Das.

**3.** Petitioner strenuously argued that the instant case is a counter blast of the FIR lodged by the petitioner herein being aforesaid Netaji Nagar P.S. case no. 161 dated 20.05.2019. It has been further argued on behalf fo the petitioner that even if the allegations are taken at their face value and accepted in their entirety, it does not constitute any offence punishable under section 341 of the IPC. In the four corners of the FIR no allegation of

wrongful restraint has been made. It is further argued that section 323 of the IPC is a non cognizable offence and the instant FIR cannot give rise to the police to investigate the case which is absolutely a case involving a non cognizable offence, since police cannot investigate a non-cognizable offence without the order of the Magistrate under section 155 (2) of the Code of Criminal Procedure. Accordingly the petitioner submits that the purported investigation made by the police and submission of charge sheet is bad in law. She further submits that the Court cannot act like a mouth-piece of the investigating agency, but the court has to apply his judicial mind while taking cognizance of the offence.

**4.** Learned Counsel appearing on behalf of the opposite party and the State raised objection against the submission made on behalf of the petitioner, contending that specific allegation has been attributed against the present petitioner in the FIR. Moreover the injury report of complainant Arpita Das clearly mentioned the name of the petitioner herein as assailant. They further submit that the witnesses who were examined during investigation have also specifically described the incident stating that on the date of the occurrence the petitioner herein physically assaulted the complainant.

**5.** I have considered submissions made by the parties.

**6.** Needless to say that in order to constitute an offence under section 341 of the Indian Penal Code following ingredients are required to be fulfilled.

- (i) Accused obstructed a person
- (ii) He did it voluntarily

- (iii) It prevented such person from proceeding in certain direction in which he had the right to proceed.

**7.** From the four corners of the allegation levelled in the FIR, I do not find any allegation of wrongful restraint against the present petitioner. The statements recorded during investigation also does not speak about any case of wrongful restraint by the accused/petitioner.

**8.** In the present context the investigating agency has filed charge sheet under section 341 and 323 of the IPC. Needless to say that the offence under section 323 is a non cognizable offence in respect of which prescribed punishment is imprisonment upto one year or fine upto Rs. 1000/- or both.

**9.** In view of aforesaid discussion even if prosecution case is taken to be true in its entirety, no case has been disclosed under section 341 of the IPC and since the other offence allegedly made under Section 323 is a non-cognizable offence, and the allegation leveled in the FIR and materials in the case diary do not constitute any other cognizable offence, the investigation without order of a Magistrate and taking cognizance on the basis of such police report is barred by section 155(2) of the Code of the Criminal Procedure which states:-

*“155(2):- No police officer shall investigate a non cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.”*

**10.** The above situation puts me a question for adjudication as to whether Magistrate would take cognizance upon such police report and will go on trial, when the accused person was booked under both cognizable

and non-cognizable offence and after completion of investigation, police report filed in the form of charge-sheet does not disclose cognizable offence but it discloses only a case of non-cognizable offence.

**11.** In an earlier Judgement in **H.N. Rishbud and Inder Singh Vs. The State of Delhi reported in AIR 1955 Supreme Court 196**, the Apex Court while dealt with a similar situation under the old Code of Criminal Procedure, 1898 held that a defect or illegality in investigation, however serious has no direct bearing on the competence or the procedure relating to cognizance or trial. It was further held that no doubt a police report which results from an investigation is provided in Section 190 of the Code of Criminal Procedure as the material on which cognizance is taken, but it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Supreme Court specifically pointed out that Section 190 of the Code of Criminal Procedure is one out of a group of Sections under the heading "*Conditions requisite for initiation of proceedings*" and the language of the Section is a marked contrast with that of the other Sections of the group under the same heading i.e., Section 193 and 195 to 199. In fact these latter Sections regulate the competence of the Court and bar its jurisdiction in certain cases except in compliance therewith but Section 190 does not. The Apex Court in this context specifically held while no doubt in one sense Clause (a), (b) and (c) of Section 190 (1) are conditions requisite for taking up cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity.

**12.** Relying upon earlier judgements reported in AIR 1944 PC 73 and AIR 1955 PC 26 the Court held that the invalidity of the precedent investigation does not vitiate the result unless miscarriage has been caused thereby. The relevant portion of the judgment may be quoted below:-

*“It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for. Such a course is not altogether outside the contemplation of the scheme of the Code as appears from section 202 under which a Magistrate taking cognizance on a complaint can order investigation by the police. Nor can it be said that the adoption of such a course is outside the scope of the inherent powers of the Special Judge, who for purposes of procedure at the trial is virtually in the position of a Magistrate trying a warrant case. When the attention of the Court is called to such an illegality at a very early stage it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under section 537 of the Code of Criminal Procedure of making out that such an error has in fact occasioned a failure of justice. It is relevant in this context to observe that even if the trial had proceeded to conclusion and the accused had to make out that there was in fact a failure of justice as the result of such an error, explanation to section 537 of the Code of Criminal Procedure indicates that the fact of the objection having been raised at an early stage of the proceeding is a pertinent factor. To ignore the breach in such a situation when brought to the notice of the Court would be virtually to make a dead letter of the peremptory provision which has been enacted on grounds of public policy for the benefit of such an accused. It is true that the peremptory provision itself allows an officer of a lower rank to make the investigation if permitted by the Magistrate. But this is not any indication by the Legislature that an investigation by an officer of a lower rank without such permission cannot be said to cause prejudice. When a Magistrate is approached for granting such permission he is expected to satisfy himself that there are good and sufficient reasons for authorising an officer of a lower rank to conduct the investigation. The granting of such permission is not to be treated by a Magistrate as a mere matter of routine but it is an exercise of his judicial discretion having regard to the policy underlying it.”*

**13.** Coming back to the present case, the materials collected during investigation which includes statements recorded under Section 161 of the Code and medical report, prima facie discloses commission of non-cognizable offence against the accused but by no stretch of imagination it discloses any case of wrongful confinement or any other cognizable offence. It is also admitted position that police did not take permission under Section 155 (2) of the Code for continuing investigation in the present case.

**14.** Accordingly, the pertinent question that arises in following **Rishbud's case (supra)** which was decided on the basis of old Code, whether the police report filed in the present case can be treated as a complaint when there is no doubt that the investigation conducted by police is illegal as the allegation does not disclose any cognizable offence. It appears to me that Sections 154, 155, 156, 173 and 190 of the Code of 1973 are practically the same as the corresponding provision of the old Code of 1898 except that Section 190 (1) (b) which refers to "police report", because the old Code did not define a police report but Section 2(r) of the Code of Criminal Procedure, 1973 defines a police report as a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173.

**15.** The Code of 1973 also defines the term "complaint" in the same manner as in the old Code except it excludes a "police report" instead of excluding "a report of a police officer" as in the old Code. Moreover, in the Code of 1973 an explanation has been incorporated in the definition under the Code. Section 2(d) in this context may be reproduced below:-

*“2(d) “complaint” means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.*

*Explanation.-A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;”*

**16.** In view of aforesaid definition of complaint though “complaint” does not include a “police report” but under the explanation, complaint includes *“a report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence”*. The legislature has used the term “discloses” in order to mean that it may be that at the initial stage there was a confusion in the mind of investigating agency as to whether the offence is a cognizable or not but if after completion of investigation it “discloses” commission of non-cognizable offence then obviously it attracts the explanation laid down in Section 2(d) of the Code and for that reason a report of a police officer in a non-cognizable offence, which he was not authorized by a competent Magistrate to investigate, would amount to complaint and thereby a report of the police officer followed by investigation into a non-cognizable offence made without the order of a Magistrate cannot be treated as a valid report of a police officer for the purpose of Section 173. In this context it is also to be kept in mind

that in terms of explanation as above, though such report can be treated as a complaint, but it does not mean that it is a complaint by a private individual. It must be treated as a complaint by a public servant and for which Section 200 (a) shall apply.

**17.** Following the principle laid down in **Rishbud's case (supra)**, treating such report of a police officer as a complaint, it is open to the Magistrate to take cognizance under Section 190 (1) (a) of the Code and at the same time it is also open to the Magistrate to order fresh investigation under Section 202 of the Code to obviate any prejudice to the accused. Depending on the facts and circumstances of a particular case, it is also open to the Magistrate to decline to take cognizance.

**18.** Therefore, in such cases where investigation ended in a charge-sheet disclosing nature of non-cognizable offence it is open to the Magistrate to follow one of the three following courses:-

1. Treating the report of the police officer as a complaint lodged by a public servant purporting to act in the discharge of his official duties he can take cognizance under Section 190 (1) (a) of the Code.
2. Magistrate may either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as it thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding.
3. Decline to take cognizance of the offence.

**19.** In the present case as I have stated above that the materials collected during investigation discloses commission of non-cognizable offence the Court below is directed to treat the report of the police officer filed in the form of charge-sheet as a complaint and to take either of the three courses as stated above in accordance with law. In this context, I also made it clear that the Court below, even if has already taken cognizance upon any of the offences on the basis of charge-sheet that order of taking cognizance shall be treated as quashed.

**20.** Since the matter is pending for a considerable period of time the Court below is directed to act in accordance with law as per direction made above and to dispose of the proceeding at the earliest.

**21. CRR 2378 of 2019** thus stands disposed of.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

**(DR. AJOY KUMAR MUKHERJEE, J.)**