REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2054 OF 2008
[Arising out of SLP (Crl.) No. 3031 of 2008]

Raghu Raj Singh Rousha …Appellant

Versus

M/s. Shivam Sundaram Promoters (P) L & Anr. …Respondents

J U D G M E N T

S.B. SINHA, J :

1. Leave granted.

2. Whether the High Court in exercise of its jurisdiction under Sections 397 and 401 of the Code of Criminal Procedure (for short "the Code") can pass an order in absence of the accused persons in the facts and circumstances of this case is the question involved in this appeal which

arises out of a judgment and order dated 25.02.2008 passed by the High Court of Delhi at New Delhi in Criminal Revision Petition No. 116 of 2008.

3. Before adverting to the said question, we may notice the admitted fact of the matter.

4. Respondent No. 1 is a company registered and incorporated under the Companies Act, 1956. It filed a complaint petition in the Court of Additional Chief Metropolitan Magistrate, New Delhi at Patiala House Courts under Section 200 of the Code in respect of an offence purported to have been committed and punishable under Sections 323, 382, 420, 465, 468, 471, 120-B, 506 and 34 of the Indian Penal Code accompanied by an application under Section 156(3) of the Code.

5. It is not necessary for us to deal with the allegations made in the said complaint petition in details. Suffice it to say that by reason of an order dated 7.02.2008, the Metropolitan Magistrate, New Delhi in whose court the aforementioned complaint petition was transferred, refused to direct investigation in the matter by the Station House Officer in terms of Section 156(3) of the Code, stating:

> "In the present case all the facts and circumstances of the case are within the knowledge of the complainant. Both the complainant and the accused company have been dealing with one another by way of contractual agreement and a MOU dt. 05/08/05 was entered between them as alleged in the complaint. From the complaint and the documents placed on record, it appears that there is some dispute between the parties in respect of immovable property and the payments pertaining to the sale of the same. The complainant submits that the accused had cheated him. In the facts and circumstances of the case there is no requirement of collection of evidence by the police at this stage as the complainant can lead his evidence. In view of this, present application u/s 156(3) CrPC is dismissed. The complaint can be conveniently dealt with U/s 200 CrPC and subsequent provisions. If there is necessity however of police that shall be taken u/s 202 Cr.P.C."

On the aforementioned premise, the complainant was asked to lead pre-summoning evidence. It was directed to furnish list of witnesses, if any.

6. Aggrieved by and dissatisfied therewith, respondent No. 1 filed a revision application before the High Court impleading the State only as a party. By reason of the impugned judgment, the High Court, having regard

to the purported consent of the learned APP appearing for the State, on the very first day of hearing, passed the following order:

> "On hearing learned counsel for the parties, it is agreed that the impugned order dated 7.2.2008 be set aside with direction to the learned MM to examine the matter afresh after calling for a report from the police authorities. The police authorities to hold a preliminary inquiry on basis of the complaint made by the petitioner/ complainant and submit a report to the learned Magistrate within three weeks from today. The petitioner to appear before the trial Court on 24.03.2008. Petition stand disposed of."

Appellant is, thus, before us.

7. Mr. H.S. Phoolka, learned senior counsel appearing on behalf of the appellant, would contend that having regard to the fact that the complaint petition was filed in terms of Section 200 of the Code read with Section 156 (3) thereof and as the learned Magistrate directed the respondent No. 1 to produce witnesses so as to enable it to proceed in terms of Chapter XV of the Code, the revision application could not have been disposed of without notice to the appellant.

8. Mr. Jaspal Singh, learned senior counsel appearing on behalf of the respondent No. 1, on the other hand, would contend that the criminal revision application having been filed at the pre-cognizance stage, the accused has no right to be heard. Strong reliance in this behalf has been placed on Chandra Deo Singh v. Prokash Chandra Bose alias Chabi Bose and another [AIR 1963 SC 1430] and Mohd. Yousuf v. Afaq Jahan (Smt) and Another [(2006) 1 SCC 627].

9. A person intending to set the criminal law in motion inter alia may file an application under Section 156(3) of the Code. When a First Information Report is lodged, a police officer has the requisite jurisdiction to investigate into the cognizable offence in terms of Section 156(1) of the Code. Where, however, a Magistrate is entitled to take cognizance of the offence under Section 190 of the Code, he may also direct that such investigation be carried out in terms thereof.

When a complaint petition is filed under Chapter XV of the Code, the Magistrate has a few options in regard to exercise of his jurisdiction. He may take cognizance of the offence and issue summons. He may also postpone the issue of process so as to satisfy himself that the allegations

made in the complaint petition are prima facie correct and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding as to whether or not there is sufficient ground for proceeding. By reason of the aforementioned order dated 7.02.2008, the learned Magistrate intended to inquire into the case himself. It is for the said purpose, he directed examination of the complainant and his witnesses.

10. One of the questions which arises for consideration is as to whether the learned Magistrate has taken cognizance of the offence. Indisputably, if he had taken cognizance of the offence and merely issuance of summons upon the accused persons had been postponed; in a criminal revision filed on behalf of the complainant, the accused was entitled to be heard before the High Court.

11. Section 397 of the Code empowers the High Court to call for records of the case to exercise its power of revision in order to satisfy itself as regards correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior court. Sub-section (2) of Section 397 of the Code, however,

prohibits exercise of such power in relation to any interlocutory order passed in any proceeding. Whereas Section 399 of the Code deals with the Sessions Judge's power of revision; Section 401 thereof deals with the High Court's power of revision.

Sub-section (2) of Section 401 of the Code reads, thus:

> "(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence."

12. Submission of Mr. Jaspal Singh that by reason of the impugned order the appellant was not prejudiced and in any event at the pre-summoning stage, he was not an accused, cannot be accepted.

Sub-section (2) of Section 401 of the Code refers not only to an accused but also to any person and if he is prejudiced, he is required to be heard.

An order was passed partially in his favour. The learned Metropolitan Magistrate has refused to exercise its jurisdiction under

Section 156(3) of the Code. Had an opportunity of hearing been given to the appellant, he could have shown that no revision application was maintainable and/ or even otherwise, no case has been made out for interference with the impugned judgment.

13. In Makkapati Nagaswara Sastri v. S.S. Satyanarayan [(1981) 1 SCC 62], this Court opined that the principle of *audi alteram partem* is applicable in a proceeding before the High Court.

Yet again in P. Sundarrajan and Others v. R. Vidhya Sekar [(2004) 13 SCC 472], this Court held:

> "4. On the above basis, it proceeded to consider the material produced by the petitioner before it and without taking into consideration the defence that was available to the respondent proceeded to set aside the order of the Magistrate, and directed the said court to take the complaint on file and proceed with the same in accordance with law.
> 5. In our opinion, this order of the High Court is ex facie unsustainable in law by not giving an opportunity to the appellant herein to defend his case that the learned Judge violated all principles of natural justice as also the requirement of law of hearing a party before passing an adverse order."

14. We may also notice that this Court in Vadilal Panchal v. Dattatraya Dulaji Ghadigaonkar and another [AIR 1960 SC 1113], opined:

> **"9.** The general scheme of the aforesaid sections is quite clear. Section 200 says inter alia what a Magistrate taking cognisance of an offence on complaint shall do on receipt of such a complaint. Section 202 says that the Magistrate may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against and direct an inquiry for the purpose of ascertaining the truth or falsehood of the complaint; in other words, the scope of an inquiry under the section is limited to finding out the truth or falsehood of the complaint in order to determine the question of the issue of process. The inquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage; for the person complained against can be legally called upon to answer the accusation made against him only when a process has issued and he is put on trial. Section 203, be it noted, consists of two parts: the first part indicates what are the materials which the Magistrate must consider, and the second part says that if after considering those materials there is in his judgment no sufficient ground for proceeding, he

> may dismiss the complaint. Section 204 says that if in the opinion of the Magistrate there is sufficient ground for proceeding, he shall take steps for the issue of necessary process."

15. The question again came up for consideration before this Court recently in Divine Retreat Centre v. State of Kerala & Ors. [AIR 2008 SC 1614], wherein this Court opined that the jurisdiction of the High Court even in terms of Section 482 of the Code is not unlimited. It was held that even in a case where no action is taken by the police, the informant's remedy lies under Sections 190 and 200 of the Code.

Similar view has been expressed by this Court in Sakiri Vasu v. State of Uttar Pradesh and Others [(2008) 2 SCC 409].

16. It is in the aforementioned backdrop the decision of this Court in Chandra Deo Singh (supra) may be considered. Therein, this Court opined that although an accused has no right to participate unless the process is issued, he may remain present either in person or through a counsel or agent with a view to be informed of what is going on. It was held that one of the objects behind the provisions of Section 202 of the Code is to enable the

Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint but that is not the stage where defence of an accused can be gone into, stating:

> "…An enquiry under Section 202 can in no sense be characterised as a trial for the simple reason that in law there can be but one trial for an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the legislature has made no specific provision permitting an accused person to take part in an enquiry. It is true that there is no direct evidence in the case before us that the two persons who were examined as court witnesses were so examined at the instance of Respondent 1 but from the fact that they were persons who were alleged to have been the associates of Respondent 1 in the first information report lodged by Panchanan Roy and who were alleged to have been arrested on the spot by some of the local people, they would not have been summoned by the Magistrate unless suggestion to that effect had been made by counsel appearing for Respondent 1. This inference is irresistible and we hold that on this ground, the enquiry made by the enquiring Magistrate is vitiated…"

It was emphasized that the question as to whether a process has to be issued or not lies within the exclusive domain of the Magistrate so as to enable him to arrive at a satisfaction that there is sufficient ground for

proceeding but not with a view to see as to whether there is sufficient ground for conviction, stating:

> "…No doubt, as stated in sub-section (1) of Section 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant."

17. In Mohd. Yousuf (supra), whereupon reliance has been placed by Mr. Jaspal Singh, this Court made a distinction between a pre-cognizance stage and post-cognizance stage. It was opined that an order under Sub-section (3) of Section 156 of the Code need not be passed when the Magistrate intends to take cognizance. Extensively referring to the decisions in Gopal Das Sindhi v. State of Assam [AIR 1961 SC 986] and Supdt. and Remembrancer of Legal Affairs v. Abani Kumar Banerjee [AIR 1950 Cal 437] as also other decisions, it was held that as in those cases cognizance had not been taken.

18. Here, however, the learned Magistrate had taken cognizance. He had applied his mind. He refused to exercise his jurisdiction under Section 156 (3) of the Code. He arrived at a conclusion that the dispute is a private dispute in relation to an immovable property and, thus, police investigation is not necessary. It was only with that intent in view, he directed examination of the complainant and his witnesses so as to initiate and complete the procedure laid down under Chapter XV of the Code.

19. We, therefore, are of the opinion that the impugned judgment cannot be sustained and is set aside accordingly. The High Court shall implead the appellant as a party in the criminal revision application, hear the matter afresh and pass an appropriate order.

20. The Appeal is allowed.

…….J.
[S.B. Sinha]

..…….J.
[Cyriac Joseph]

New Delhi;
December 17, 2008

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