

**(2004) 01 RAJ CK 0016**

**In the Rajasthan High Court**

**Case No : Criminal Revision Petition No. 59 of 2003**

Central Bureau of Investigation

APPELLANT

Vs

Col. Sumant Mehta and Another

RESPONDENT

**Date of Decision : 21-01-2004**

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 239, 240  
Penal Code, 1860 (IPC) — Section 120B, 379, 420, 467, 468

**Citation : (2004) 3 RLW 1405 : (2004) 2 WLC 419**

**Hon'ble Judges : Shiv Kumar Sharma, J**

**Bench : Single Bench**

**Advocate : S.P. Tyagi, for the Appellant; R.S. Rathore and Ashok Mehta, for the Respondent**

**Final Decision : Allowed**

## **Judgement**

Shiv Kumar Sharma, J.—Petitioner C.B.I., in the instant revision petition seeks to quash the order dated October 23, 2002 of learned Additional Chief Judicial Magistrate SPE Cases, Rajasthan Jaipur (for short the "ACJM") whereby order of taking cognizance dated September 25, 2001 was recalled and the accused respondents were discharged of the offences under Sections 120B read with 379, 420, 467, 468 & 471 IPC.

2. Contextual facts depict that learned ACJM took cognizance of the offences under Sections 120B read with 379, 420, 467, 468 & 471 IPC against accused respondent Amul Kumar Mehta in his presence on September 25, 2001, by a speaking order. On October 5, 2001 accused respondent Sumant Mehta was sent to judicial custody and the ACJM took cognizance of the aforesaid offences against Sumant Mehta. Therefore the accused respondents moved an application on September 6, 2002 under Sections 3, 5 and 6 of Delhi Special Police Establishment Act, 1946 (for short "Delhi Act") praying therein that charge sheet filed by the CBI against accused respondents was without jurisdiction and the order taking cognizance deserves to be recalled and the accused respondents be

discharged. Learned ACJM vide order dated October 23, 2000 observed that charge sheet filed by CBI was not maintainable as State of Rajasthan did not accused the consent. Consequently order dated September 25, 2001 was recalled and the accused respondents were discharged.

3. Mr. S.P. Tyagi, learned counsel for the petitioner canvassed that Additional Public Prosecutor placed before the court below a notification bearing No. 25/7/6-AVD dated January 21, 1961 showing that Union of India authorised State of Rajasthan u/s 5 to investigate the offence incorporated in the Schedule. In part A and B of the said schedule Offences u/s 379, 420, 467, 468, 471 and 120B IPC have been respectively incorporated. The Addl. PP also placed on record a letter dated June 19, 1961, whereby the Home Secretary of State of Rajasthan communicated his consent to the Home Department of Union of India vide letter No. 25/3/60-AVD dated January 12, "1961 and the letter dated July 19, 1988 along with the schedule to show that with the approval of State of Rajasthan the powers and jurisdiction of CBI got extension in this State. But the court below conveniently ignored the relevant material and passed the impugned order.

4. Per contra, Mr. R.S. Rathore and Mr. Ashok Mehta, learned counsel for the accused respondents, supported the impugned order and contended that the court below did not commit any illegality in discharging the respondents in view of provisions contained in Section 239 Cr.P.C. Even otherwise the court below had jurisdiction to recall the order of taking cognizance in view of ratio indicated in K.M. Mathew v. State of Kerala and Another (1).

5. I have pondered over the rival submission and carefully scanned the material on record.

6. Before dealing with the meaningful question involved in the matter, I deem it appropriate to examine the relevant statutory provision and the case law.

7. Section 239 of the Code of Criminal Procedure provides that if, upon considering the police report and the documents sent with it u/s 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

8. In Arun Vyas v. Anita Vyas (2), their Lordships of Supreme Court indicated that Section 239 has to be read along with Sec. 240 Cr.P.C. If the Magistrate finds that there is prima facie evidence or the material against the accused in support of the charge (allegations) he may frame charge in accordance with Section 240 Cr.P.C. But if he finds that the charge (the allegations or imputations) made against the accused do not make out a prima facie case and do not furnish basis for framing charge, it will be a case of charge being groundless, so he has no option but to discharge the accused.

9. K.M. Mathew v. State of Kerala and Another (supra) was the case where two

Hon''ble Judges of Hon''ble Supreme Court indicated that even after issue of process in summons case accused can plead absence of any triable case against him and Magistrate, on being satisfied on reconsideration of the complaint, has discretionary power to order dropping of the proceedings against the accused instead of proceeding under Chapter XX.

10. However, in Nilamani Routray v. Bennet Coleman & Col. Ltd. (3), another Bench of two Hon''ble Judges of Supreme Court disagreed with the ratio indicated in K.M. Mathew's case and referred the said case for consideration before the Bench of Hon''ble three Judges.

11. In Bindeshwari Prasad Singh v. Kali Singh (4), the Bench of two Hon''ble Judges of Supreme Court propounded that there was no provision in Cr.P.C. empowering the Magistrate to review and recall the order passed by him. It was indicated thus:-

".....there is absolutely no provision in the Code of Criminal Procedure of 1908 (which applies to this case) empowering a Magistrate to review or recall an order passed by him. Code of Criminal Procedure does contain a provision for however, confers these powers on the High Court and the High Court alone. Unlike Section 151 of the Civil Procedure Code, the subordinate criminal courts have no inherent powers. In these circumstances, therefore, the learned Magistrate had absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the respondent was to move the Sessions Judge or the High Court in revision."

(12). Salient features of the case noticed by me, may be summarised thus:-

(i) Cognizance u/s 120B read with 379, 420, 467, 468 & 471 IPC was taken on September 25, 2001 by the ACJM against accused Amul Kumar Mehta in his presence by a speaking order.

(ii) Against accused Sumant Mehta cognizance was taken on October 5, 2001 in his presence by the ACJM and Sumant Mehta was sent to judicial custody.

(iii) Vide impugned order the ACJM only recalled his order dated September 25, 2001 and ignored the order dated October 5, 2001 whereby cognizance was taken against accused Sumant Mehta.

(iv) Both the accused respondents were discharged vide order dated October 23, 2002 on the ground that CBI failed to place on record the consent of State of Rajasthan to provide jurisdiction to CBI to investigate the cases in the State.

(v) The report and the documents sent with it u/s 173 Cr.P.C. were not examined at all the order to find out whether the charge against the accused persons were groundless or not.

13. Having given my thoughtful consideration to the rival submissions. I find that impugned order was not passed u/s 239 Cr.P.C. The ACJM while disposing the application of the accused respondents filed under Sections 3, 5 and 6 of the Delhi Act, ignored the relevant notifications that empowered the CBI to

investigate the cases in the State of Rajasthan. There is no provisions in the Cr.P.C. empowering the Magistrate to review of recall the order passed by him but the ACJM recalled the order dated September 25, 2001 which was passed in the presence of accused Amul Kumar Mehta. Ratio indicated in K.M. Mathew's case (supra) is not applicable to those orders that have been passed in the presence of the accused. It applies only to those orders of issue of process which are passed in absence of the accused and it provides opportunity to the accused to pleaded absence of any triable case after the accused appears before the Magistrate. I am of the considered opinion that act of ACJM in recalling the order taking cognizance and discharging the accused respondents ignoring the relevant notifications is manifestly unjust, without jurisdiction and it resulted in Miscarriage of Justice.

14. For the reasons aforementioned, I allow the revision petition and set aside the impugned order dated October 23, 2002 while restoring the orders dated September 25, 2001 and October 5, 2001 I direct the accused respondents to appear before the learned Additional Chief Judicial Magistrate SPE Cases Rajasthan, Jaipur on February 16, 2004. Record of the case be sent back forthwith.