

(1997) 11 RAJ CK 0001
In the Rajasthan High Court
Case No : Civil Writ Petition No. 198 of 1994

Kan Singh and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 19-11-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 173(8), 190, 491
Penal Code, 1860 (IPC) — Section 120B, 406, 420, 498
Police Act, 1861 — Section 3

Citation : (1998) CriLJ 3163 : (1998) 1 RCR(Criminal) 605 : (1997) 3 RLW 2053 : (1998) 2 WLC 99 : (1998) 1 WLN 433 : (1997) 2 WLN 694

Hon'ble Judges : M.G. Mukherji, C.J.;B.S. Chauhan, J

Bench : Division Bench

Advocate : M.S. Singhvi, for the Appellant; K.L. Jasmatiya, Addl. Advocate-General, C.K. Garg and P.C. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, J.—The instant writ petition has been filed for quashing the order dated 14-10-1993 passed by the State Government and the orders dated 26th October, 1993 and 30th April, 1994, passed by the learned Addl. Chief Judicial Magistrate, Jodhpur, contained in Annexures 8, 9 and 11 to the writ petition.

2. The case has already made a checkered history though the investigation has not yet been completed. The factual matrix of the case reveal that the petitioner No. 3 Mr. Madhav Singh got married to the respondent No. 3 Smt. Usha Rani on 19-1-1989. The petitioner No. 3 left for the United State of America on 9th February, 1989, giving assurance to the respondent No. 3 that he would call her there at the earliest and would make all arrangement for visa etc. However, it appears that relationship of respondent No. 3 became strained with her husband, petitioner No. 3, as well as other family members, who are the present petitioners. The respondent No. 3 filed a complaint on 23-3-1992 under Ss. 498-A, 406, 420, 120B and 500, I.P.C. and immediately thereafter she lodged an FIR

in Police Station, Mahamandir, Jodhpur on 29-3-1992 on the same allegations, which is contained in Annexure 7 to the petition.

3. The investigations were made by various officers/authorities i.e. Mr. Narain Singh, SHO, Mahamandir Police Station. Mr. S. Mehtab, Addl. S.P. Jodhpur, Mr. M.K. Govil, Addl. S.P., Jodhpur, Mr. Munshi Singh, Circle Inspector and Mr. Narendra Mohan, Circle Inspector, CID(CB). The aforesaid investigating officers did not file any police report before the competent criminal Court. However, it is alleged by the respondent No. 3 that investigation had been substantially completed by them.

4. It appears that taking into account the status of the petitioner and after considering the representation filed on their behalf, the investigation was transferred to Mr. Pukh Raj Seervi, S.P. CID (CB) by the State Government. During the course of investigation Mr. Seervi had been transferred, therefore, the investigation was entrusted to Mr. Sudhakar Johari, S.O. III, CIC(CB), Jaipur, who after completing the investigation, submitted the Police report to the Inspector General of Police (Crimes), CID(CB), on 8-10-1993 for his approval to submit the said report before the competent criminal Court.

5. Respondent No. 3 had made some complaints/representations against the investigating officer Mr. Johari to various authorities and one such representation was made to Hon"ble President of India, whereupon the office of the President of India suggested the respondent No. 3 to approach the Chief Secretary to the Government of Rajasthan for the redressal of the grievance. In pursuance of the said letter, the respondent No. 3 approached the State Government and the competent authority i.e. the Deputy Secretary, Home, after looking into the grievances/allegations of the respondent No. 3 passed an order dated 14-10-1993 transferring the investigation from Mr. Johari to SP--I, CID(CB).

6. However, with the approval of the competent authority, Mr. Johari filed the police report before the competent criminal Court on 20th Oct. 1993 wherein after discussing/appreciating the entire evidence and recorded statements, he concluded that there was no sufficient evidence against the present petitioners to bring home any of the charges levelled against them. He also stated that while forming the said opinion, he could not agree with the earlier investigating officers, who had opined that there was sufficient evidence against the petitioners to put them on trial. The criminal Court applied its mind and considered the police report along with the protest petition filed by respondent No. 3 and rejected the same by order dated 26-10-1993. The Court directed the re-investigation by the agency as directed by the Deputy Secretary, Home, vide order dated 14-10-1993. As the said order was not complied with, the learned Magistrate issued contempt notice vide order dated 30-4-1994. Being aggrieved and dissatisfied, the instant writ petition has been filed.

7. Heard Mr. M.S. Singhvi, learned counsel for the petitioners, Mr. C.K. Garg, learned Senior Advocate with Mr. P.C. Sharma and Mr. K.L. Jasmatiya, learned

Addl. Advocate General for the State.

8. Mr. Singhvi learned counsel for the petitioners has urged that learned Addl. Chief Judicial Magistrate lacks the inherent competence to issue direction for reinvestigation and the impugned order dated 26-10-1993 is vitiated as the learned Magistrate has not applied his mind to the. Police report submitted by Mr. Johari. Learned Magistrate did not give any reason specifying as to how the police report was erroneous, rather it is based on the direction/order of the Government dated 14-10-1993, transferring the investigation to another officer.

9. The issues raised in the petition are no more *res integra*. In fact, the prayer has been made for quashing impugned orders dated 14-10-1993, 26-10-1993 and 30-4-1994. Thus, impliedly, petitioners have sought the quashing of the investigation, that would amount to quashing the FIR itself. Petitioners are trying to achieve the goal by indirect method which they cannot do directly. It is settled law that what cannot be done "*per directum*" is not permissible to be done "*per obliquum*", meaning thereby whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance and it can be explained by quoting the legal maxim - "*quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*". However, it is settled law that investigation lies within the sole domain of the executive and Court does not generally come into picture so long investigation remains pending unless there are exceptional circumstances. The formation of an Opinion as to whether or not an accused person should be put to trial is to be formed by the investigating officer, objectively, on the basis of evidence collected by him. Such formation of opinion is a final step of investigation. Once the police report is filed in the competent Court, it is not binding on the criminal Court and Court may scrutinize the evidence collected by the investigating officer and take a contrary view. However, there is no bar under the law not to investigate further even after submitting the police report. Issues similar to those involved in the instant case, came for consideration before Hon'ble Supreme Court in *State of Bihar and Another Vs. J.A.C. Saldanha and Others*, wherein the Apex Court observed as under (Paras 16 to 25):

The general power of superintendence as conferred by Section 3 would comprehend the power to exercise effective control over the actions, performance and discharge of duties by the members of the police force throughout the general district. The word "*superintendence*" would imply administrative control enabling the authority enjoying such power to give directions to the subordinate to discharge its administrative duties and functions in the manner indicated in the order. It is only when a subordinate authority subject to superintendence is discharging duties and functions of a quasi judicial character under a statute that the inhibition or abdication of such power can be invoked. But where the subordinate subject to such power of superintendence of the superior is discharging administrative-judicial executive functions, obligations and duties, the power of superintendence would comprehend the authority to

give directions to perform the duty in a certain manner, to refrain from performing one or the other duty, to direct someone else to perform the duty and no inhibition or limitation can be read in this power unless the section conferring such power prescribes one. Such is the scope and ambit of power conferred by Section 3 on the State Government of superintendence over the entire police force of the State....

...It would thus transpire that where the power is limited or fettered or taken away by some specified provision to the contrary, the general power of superintendence would comprehend power to issue directions, orders for performance of duty in a certain manner, directing someone else to discharge certain function, refrain from performing certain duty, etc. Superintendence connotes supervision which implies a hierarchy, viz., supervisor and the one supervised. It would, therefore, mean keeping a check, watch over the work of another who may be a subordinate in a hierarchy of authority. It would also comprehend that supervision is not merely a negative thing so as to keep a watch but it would imply giving of direction, guidance, even instructions and in a given case and in a given situation asking one who is being supervised to forbear from doing a thing and directing someone else to do that thing....

The power of the Magistrate u/s 156(3) to direct further investigation is clearly an independent power and does not stand in conflict with the power of the State Government as spelt out hereinbefore. The power conferred upon the Magistrate u/s 156(3) can be exercised by the Magistrate even after submission of a report by the investigating officer which would mean that it would be open to the Magistrate not to accept the conclusion of the investigating officer and direct further investigation. This provision does not in any way affect the power of the investigating officer to further investigate the case even after submission of the report-as provided in Section 173(8)....

There is a clear cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of, an offence is the field exclusively reserved for the executive through the police department, the superintendence over which vests in the State Government ...once...the investigating officer submits report to the Court requesting the Court to take cognisance of the offence u/s 190 of the Code its duty comes to an end. On a cognisance of the offence being taken by the Court the police function of investigation comes to an end subject to the provision contained in Section 173(8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the Court and to award adequate punishment according to law for the offence proved to the satisfaction of the Court.... This has been recognized way back in *King Emperor v. Khwaja Nazir Ahmad* (1944) 71 I A 203 : (1945 Cri LJ 413, where the Privy Council observed as under :

...The functions of the judiciary and the police are complementary, not

overlapping and the combination of individual 1 berty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved u/s 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it and not until then.

10. However, it was also observed that till the investigation is complete, the High Court cannot usurp the jurisdiction of the learned Magistrate. Investigation comes to an end the moment police report is submitted before the concerned Magistrate, unless the Magistrate directs further investigation [vide State of Uttar Pradesh Vs. Lakshmi Brahman and Another,

11. In State of Bihar and Another Vs. P.P. Sharma, IAS and Another, the Hon"ble Apex Court held that the police report submitted by the investigating officer is subject to judicial scrutiny of the Magistrate at the stage of taking cognizance. Though under the law the accused does not have a right to be heard at this stage, however, if he has any grudge against the investigating officer or with the method of investigation, he can bring to the notice of the Magistrate his grievance and under such circumstances, learned Magistrate is under obligation to look into the same. The natural corollary of this would be that the grievance can also be raised by the complainant, who, even otherwise, under the law is entitled to file a protest petition and in the same manner, his grievance may also be examined. In investigation, the investigating officer has been given wide powers which may be exercised with great latitude and such powers had been given so that he may complete investigation successfully. In P.P. Sharma's case (supra), Hon"ble Supreme Court observed as under :

It is by [investigating officer's] action that law becomes an actual positive force...trust-worthiness of the police is the primary ensurance. Reputation in investigative competence and individual honesty of the investigator are necessary to enthuse public confidence...when the power is exercised mala fide it undoubtedly gets vitiated by colourable exercise of powers.... The investigating officer is expected to investigate justly and fairly....

12. The same principle has been followed and reiterated by the Hon"ble Supreme Court in State of Haryana and others Vs. Ch. Bhajan Lal and others, It had further been observed in the said case that if the investigating officer "transgressed and circumscribed limits and improperly and illegally exercised his investigatory powers in breach of any statutory provision causing serious prejudice" to a party, then the Court on being approached by the person aggrieved for the redress of any grievance must consider the nature and extent of breach and pass appropriate order.

13. In the instant case, the competent authority i.e. the Home Secretary, exercised his powers u/s 3 of the Police Act and transferred the investigation from Mr. Johari to SP I, CID(CB) by order dated 14-10-1993. The said order had

been served upon the Inspector General of Police, Crimes, CID(CB) and to the investigating officer Shri Johari, on the same day. There is no denial to this fact as mentioned by the respondent No. 3 in her affidavit, either by the petitioners or by the respondent No. 1. In response to the order of this Court dated 17-9-1997, a letter dated 14-10-1997 has been filed by the learned Addl. Advocate General stating that the said order had been re-ceived in the office of Inspector General of Police, Crimes CID(CB), on the same day but the said authority-has not officially communicated it to Mr. Johari. However, nobody has denied the statement of respondent No. 3 that the order was served upon the Inspector General of Police, Crimes CID(CB) and Mr. Johari by her brother on the same day. It appears that in spite of the said order, the Inspector General accorded the approval on 15-10-1993 for filing the police report (FR) prepared by Mr. Johari before the competent criminal Court and the same was filed by Mr. Johari on 20-10-1993 in the Court, upon which the Court passed the order dated 26-10-1993.

14. It is not petitioner's case that the Deputy Secretary, Home had no competence to exercise powers of transferring the investigation from Shri Johari by order dated 14-10-1993 nor there is any allegation of mala fide or bias against the State while passing the said order. After looking to the record of the case and claims and counter claims of the parties, it cannot be said even by stretch of any imagination that the said order has been passed by the competent authority without application of mind. Rather, filing the police report by an officer who has lost competence to do so fortify the apprehension raised by the respondent No. 3 in her application. Thus no fault can be found with the order dated 14-10-1993.

15. The investigating officer and other authorities under the law have adopted the attitude of complete defiance of the order passed by a competent authority. The defiance is of such a great magnitude that it cannot be permitted to be condoned. If such defiance is condoned, it will lead to total subservience and further to a large deeper malaise in the governance of the administration. In fact, the conduct of belligerency shown by the authorities concerned is a challenge to the majesty of law itself and Court has no hesitation to say that their conduct has been reprehensible and it amounts to colourable exercise of powers [vide State of Punjab and Another Vs. Gurdial Singh and Others, The Court to take overall perspective of the whole matter. In D.K. Basu Vs. State of West Bengal, Hon''ble Supreme Court has observed as under:

If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen.

16. Similarly, in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, the Apex Court observed as under

It is indeed unthinkable that in a democracy governed by the rules of law, the executive Government or any of its power should possess arbitrary power over the interest of the individual. Every action of the executive Government must be in the form of reason and should be free from arbitrariness. That is the very essence of rules of law and its bare minimum requirement.

17. The rule of law inhibits arbitrary action and any arbitrary action is liable to be invalidated. Every action of the State or its instrumentalities should be fair, legitimate and above board. The action should be without any affection or aversion. The acts of the State instrumentalities should not even apparently be given the impression of bias, favouritism and nepotism. [vide Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation,

18. It is settled law that when the action of the State or its instrumentalities is not as per the rules or regulations or supported by a statute, the Court must exercise its jurisdiction to declare such an act to be a nullity. In Commissioner of Police, Bombay Vs. Gordhandas Bhanji, the Court observed as under:

An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor it be evaded, performance of it can be compelled.

19. Thus, the point to note and emphasise is that "all powers have legal limits". Ranjit Thakur Vs. Union of India (UOI) and Others,

20. The Home Secretary has taken a decision to vindicate the grievance made by the respondent No. 3 particularly to the effect that Mr. Johari was in collusion with the petitioners and she was not expecting a fair investigation from him. The said decision was taken by the competent authority in administrative exigency to ascertain the truth. The investigation was transferred and once the said transfer order had been passed and communicated to the concerned authority, its noncompliance is a serious matter and in fact, it is a challenge to the Authority u/s 3 of the Police Act itself. On the day the said order was passed and communicated to the competent authority, Mr. Johari became functus officio and lost competence to proceed with the investigation. The illegality committed by the Investigating Officer is patent and loudly obstructive and "leaves an indelible stamp of infirmity.

21. The said officers are not before this Court and nothing can be said against them behind their back. However, it is a serious matter, which requires consideration at the level of the State Government. The State Government through Chief Secretary is directed to examine the matter and consider the impact of such an order in running the administration.

22. So far as the question of application of mind by the Addl. Chief Judicial Magistrate on the police report is concerned, we have no hesitation in saying that it is not happily worded. The learned Magistrate has taken note of the

submissions made on behalf of the respondent No. 3 in her protest petition that after the order dated 14-10-1993 had been passed and communicated, Mr. Johari has lost the competence to file the police report. Learned Addl. Chief Judicial Magistrate directed to reinvestigate the matter by competent authority in pursuance of the order dated 14-10-1993. In fact, the substance and not the form is the touchstone of judging the merit or validity of the order passed by the learned Magistrate. We find no infirmity or illegality with the impugned order dated 14-10-1993 which has been passed by the competent authority in exercise of its powers u/s 3 of the Police Act to vindicate the grievance of respondent No. 3 and to ascertain the truth in the allegations made by her nor in the order dated 26-10-1993, which simply means that Mr. Johari had lost competence to file the report and matter requires reinvestigation as per order dated 14-10-1993. The subsequent impugned order dated 30th April, 1994 is also to ensure compliance of the order dated 14-10-1993. In view of the above, we find no substance in this petition and it is accordingly dismissed.

23. Before parting with the case, we may state that the other issues involved and argued by the counsel from both sides, particularly the factum of divorce by the petitioner No. 3 by the decree of a foreign Court, issue of "stridhana", admissibility of evidence created by the tape recorder etc. are not necessary to be dealt with at this stage. Moreover, making reference to either of these things would prejudice the investigation or the order to be passed by the competent criminal Court when the competent authority files a police report before it as required under the law. Similarly, looking or appreciating the evidence collected by the Investigating Officer, would amount to encroaching upon the jurisdiction of the learned Magistrate. Thus, we are not inclined to go into all these issues. However, we clarify that no observation made hereinabove shall adversely affect the cause of either party.

24. A copy of this Judgment be sent to the Chief Secretary for compliance.