
(2011) 11 AHC CK 0109

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 30398 of 2011

Nitin Kumar Agarwal

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 16-11-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 154(3), 156(3), 173(2), 173(8), 200

Penal Code, 1860 (IPC) — Section 409

Citation : (2012) 1 ADJ 217

Hon'ble Judges : N.A. Moonis, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Naheed Ara Moonis, J.—Heard learned counsel for the applicant and learned AGA and have been taken through the record. By means of the instant application, the applicant has invoked inherent jurisdiction of this Court u/s 482Cr.P.C. with a prayer to direct the Chief Judicial Magistrate Mathura to decide the protest petition filed by the applicant on 27.4.2009. Further prayer is also made to issue direction to the investigating officer to investigate the matter following the procedure laid down in Section 173 (8) Cr.P.C.

2. The facts in a nutshell emanating from the prosecution story is that a First Information Report was lodged by Ravendra Singh Executive Officer Nagar Palika Parishad Mathura against Ravindra Pandey the then Chairman, Ashutosh Gupta the then Revenue Inspector, Brij Lal Saini, Nazul Clerk of Nagar Palika Kosi Kalan Mathura, with the allegations that they had misused the power during the tenure of their service by withholding the record pertaining to Shop No. 68/285 and Nazul Demand No. 19 situated at Arya Samaj Road, Mathura which was not presented by them on being demanded again and again. On failure to produce the record, enquiry was held by the enquiry officer Nagar Palika against them. The accused persons were found to have committed offence of withholding the

Government file and the relevant documents with regard to the shop in question. The First Information Report was registered on 23.10.2007 vide Case Crime No. 854 of 2007 u/s 409 IPC, Police Station Kotwali District Mathura. The investigating officer took up the investigation and after collecting the material evidence submitted charge-sheet against only Ashutosh Gupta on 22.10.2008. On the basis of the charge-sheet, Magistrate concern took cognizance of the matter on 6.2.2009 and summoned the accused Ashutosh Gupta to face the trial u/s 409 IPC. On the basis of materials collected during investigation, prima facie no cognizable offence was made out against two accused persons namely Ravindra Pandey and Brijlal Saini.

3. The moot submission of learned counsel for the applicant is that the applicant had applied for allotment of shop in question which was transferred in favour of Smt. Pinki Agarwal wife of Vinod Kumar resident of Journalganj Police Station Kotwali District Mathura in connivance of the accused persons. Subsequent thereafter the shop in question was transferred in favour of Umesh Kumar son of Murari Lal. The applicant had deposited Rs. 1.00 lac with an application for allotting the shop in question in his favour. On the basis of application received through Right to Information, it came to his knowledge that the State Government had directed to enquire into the matter. Thereafter First Information Report was lodged by the Ravindra Singh Executive Engineer against the officials of Nagar Palika Mathura. On coming to know that only one person was charge-sheeted by the investigating officer, the applicant moved protest petition on 27.4.2009 with a prayer to direct the investigating officer to investigate the matter further following the procedure laid down in Section 173(8) Cr.P.C. Further prayer was also made that the final report submitted against two persons may be set aside. It was also submitted that the protest petition is pending since the year 2009 and has not been decided as yet which has caused great prejudice to the applicant. The applicant had earlier invoked extra ordinary jurisdiction of this Court under Article 226 Constitution of India by means of Criminal Misc. Writ Petition No. 1325 of 2008. The Hon'ble Division Bench was pleased to dispose of the writ petition vide order dated 24.1.2008 with a direction that in case the petitioner has any grievance, the petitioner would raise his grievance regarding delay in investigation of the matter before the Senior Superintendent of Police Mathura who would consider and decide the same within a period of two weeks. Pursuant to the direction of this Court dated 24.1.2008, the investigating officer had submitted charge-sheet against only one person on 22.10.2008 thus the interest of the applicant was highly prejudiced. In these circumstances the applicant filed the protest petition in the year 2009 with a prayer to direct the investigating officer to investigate the matter following the provisions laid down in Section 173 (8) Cr.P.C. The said protest petition could not see the final light and is still pending. Since the applicant has been agitating his grievance from the very inception and the matter is sub-judice before the Court concern since 2009. The applicant is an aggrieved person has got no other efficacious alternative remedy except to invoke the inherent jurisdiction of this Court u/s 482 Cr.P.C.

with a prayer to direct the Court concern to decide the protest petition and further investigation may also be done by the investigating officer in accordance with the provisions of Section 173 (8)Cr.P.C. at the earliest.

4. The crucial question for adjudication in the present case is whether the applicant is an aggrieved person to move an application in the nature of protest petition with a prayer to direct the Court below to exercise its power under Section173(8) Cr.P.C. for further investigation by the investigating officer when he has alternative remedies to pursue as provided under the Code.

5. A bald perusal of the record reveals that the investigating officer had submitted charge-sheet against only one person and the complicity of other two accused persons in the offence was not found. The Court below after scanning the material placed on record arrived at the conclusion that clinching material was found only against one person as such cognizance was taken only against Ashutosh Gupta u/s 409 IPC. The investigating officer had not submitted final report therefore, the application filed by the applicant cannot be treated as protest petition. The applicant cannot circumvent the issue raised by another person who lodged the First Information Report. In case the applicant had any grievance, he ought to have raised his grievance before the appropriate forum. The First Information Report was not lodged by the applicant. The Apex Court had discouraged the filing of the writ petitions and applications u/s 482 Cr.P.C. simply because a person has a grievance that his First Information Report was not lodged or after registration of the First Information Report, proper investigation was not done or even if the investigation was done but the accused persons were not charge-sheeted on the ground that the police had not fairly investigated the matter. The incumbent cannot knock the door of justice by filing the writ petition or applications u/s 482 Cr.P.C. insisting further investigation may be done by the police. The Hon"ble Apex Court has heavily come down that such practice may be depreciated and bogged down or should ordinarily refuse to interfere in such matters and to relegate the applicant to avail his alternative remedy.

6. Another point for consideration is whether any final report was submitted against the persons who were not charge-sheeted by the police and if submitted, it was accepted by the Magistrate concern or not. If the same was accepted by the Magistrate concern, then prior to accepting the final report the informant was given an opportunity of being heard or not and if the Magistrate has yet not passed the order on the final report he may treat it as complaint thereafter decide whether complaint should be dismissed or process be issued and proceed in accordance with law. If no charge-sheet was submitted by the investigating officer against some of the accused persons, the Magistrate is empowered to summon the accused persons u/s 319Cr.P.C. The cognizance is always taken of the offence, not of the offender. During the course of trial in case the Magistrate finds from the evidence or materials brought on record in course of trial that any person not being charge-sheeted but arraigned as the "accused" has committed

any offence for which he could be tried together with the accused already facing trial, the Court may proceed against such person for the offence which he appears to have committed. The accused persons can very well be summoned by the Court below in accordance with law. When there are other options open to the Court concerned, this Court cannot exercise power u/s 482 Cr.P.C. It is well settled that when a report is forwarded by the police to the Magistrate u/s 173(2) Cr.P.C., the report would reveal that an offence was committed by a particular person or persons in such a case the Magistrate may either accept the report and take cognizance of the offence or may disagree with the report and drop the proceedings or direct further investigation u/s 173(8) Cr.P.C. requiring the police to make further investigation. It is open to the Magistrate to pass suo-moto order directing the investigating officer to further investigate the matter and the investigating officer is also under obligation to follow the direction issued by the Magistrate. At the same time, the Magistrate cannot compel the investigating officer to change his opinion as to the report submitted by him. The function of the Magistrate and the Police are quite distinct. The Apex Court in the case of *Sakiri Vasu v. State of U.P.*, 2008(1) ADJ 149 (SC), has laid down the following parameters : If a person has a grievance that his F.I.R. has not been registered by the police station, his first remedy is to approach the Superintendent of Police u/s 154 (3) Cr.P.C. or other police officer referred to in Section 36 Cr.P.C. If despite approaching the Superintendent of Police or the officer referred to in Section 36, his grievance still persists, then he can approach a Magistrate u/s 156(3) Cr.P.C. instead of rushing to the High Court by way of a writ petition or a petition u/s 482 Cr.P.C. Moreover he has a further remedy of filing a criminal complaint u/s 200 Cr.P.C. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?

In view of above legal position, this Court is not inclined to entertain this petition in exercise of its inherent power u/s 482 Cr.P.C. The application is accordingly dismissed leaving it open to the applicant to approach before the appropriate forum ventilating his grievance.