

(2004) 12 CAL CK 0038
In the Calcutta High Court
Case No : C.R.R. No. 2206 of 2003

Pawan Kumar Santhalia and Another APPELLANT
Vs
The State of West Bengal RESPONDENT

Date of Decision : 01-12-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13, 13(1)
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 173(2), 173(8), 188, 190(1)
Hindu Adoptions and Maintenance Act, 1956 — Section 10, 11, 11(6), 6, 7
Penal Code, 1860 (IPC) — Section 182, 211, 34, 363, 365

Citation : (2005) 2 CALLT 427

Hon'ble Judges : Pravendu Narayan Sinha, J

Bench : Single Bench

Advocate : Milan Mukherjee and Sandipan Ganguly, for the Appellant; Sk. Kasem Ali Ahmed and Sudipta Mitra, S. Parmar and Subhajit Dan for Opposite Party No. 2, for the Respondent

Judgement

Pravendu Narayan Sinha, J.—This revisional application has been preferred by the petitioners under Sections 397/401 read with Section 482 of Criminal Procedure Code praying for setting aside the order dated 4.9.03 passed by the learned Sub-Divisional Judicial Magistrate (in short SDJM), Malda in G.R. Case No. 1604 of 1997 arising out of Kaliachak P.S. Case No. 206 dated 4.12.97 thereby directing the Superintendent of Police (in short S.P.), Malda for further investigation into the said case and rejecting FRT No. 21 dated 14.2.03 and also rejecting prayer of the Investigating Officer (in short I.O.) to accord permission to initiate a proceeding u/s 182/211 of the Indian Penal Code (in short I.P.C.) against the de facto complainant and also praying for quashing the criminal proceeding being G.R. Case No. 1604/97.

2. The facts of the case as it transpires from the revisional application is that Bina Devi Santhalia, the opposite party No. 2 filed a complaint in the Court of the learned Chief Judicial Magistrate (in short CJM), Malda on 4.12.97 praying for sending the petition of complaint to O.C., Kaliachak P.S. for investigation u/s

156(3) of Cr.P.C. and the learned Chief Judicial Magistrate duly forwarded the complaint to O.C., Kaliachak P.S. for investigation and on the basis of such complaint/First Information Report Kaliachak P.S. Case No. 206 dated 4.12.97 under Sections 363/365/34 of I.P.C. was started against the accused persons including the present petitioners. The allegations made in the First Information Report by opposite party No. 2 Bina Devi Santhalia was that, on 15.12.96 there was a ceremony in the house of Kailash Agarwal to celebrate birth of his son and opposite party No. 2 along with her minor son Pankaj Kumar, aged about five years, attended the said ceremony. Bina Devi was talking with her relatives who assembled in the said ceremony and at about 1 P.M. she found her son absent and she started searching for her son. Subsequently, she learnt from some persons that the accused persons including the petitioners had taken away her son keeping her busy talking to other relatives. There was a rivalry between accused persons and husband of Bina Devi Santhalia and in order to teach a lesson to her husband, the accused persons kidnapped her minor son Pankaj. She earlier lodged written complaint at Kaliachak P.S. on 17.12.96 but, the police officers reduced it into G.D. Entry No. 706 dated 17.12.96 and did not take any step for investigation or for the recovery of the kidnapped minor son of complainant. Thereafter, she lodged the complaint before the learned Chief Judicial Magistrate on 4.12.97 which was sent to the O.C., Kaliachak P.S. for investigation and accordingly the aforesaid Kaliachak P.S. Case was started.

3. The petitioners thereafter obtained anticipatory bail and after surrendering before learned Sub-Divisional Judicial Magistrate they were enlarged on regular bail. Subsequently C.I.D., West Bengal took up investigation and after completing investigation the Investigating Officer (in short I.O.) submitted final report No. 88 dated 27.4.01. The learned Sub-Divisional Judicial Magistrate after considering the materials on record by his order dated 30.5.02 directed further investigation into the matter. Thereafter, investigation was made for the second time by different I.O. and the second I.O. also submitted report in final form vide final report No. 21 dated 14.02.03 and also submitted a prayer before the learned Sub-Divisional Judicial Magistrate to accord sanction to initiate a criminal proceeding under Sections 182/211 of Indian Penal Code against the complainant. The complainant Bina Devi filed a naraji petition against the said second final report. The accused persons also filed an application against the naraji petition. The learned Sub-Divisional Judicial Magistrate, Malda after considering the materials on record by his order dated 4.9.03 directed the S.P., Malda to reinvestigate the case by an officer not below the rank of Inspector. Challenging the said order the petitioners have moved this Court in this revisional application.

4. Mr. Milon Mukherjee, learned advocate appearing for the petitioners contended that the order of the learned Sub-Divisional Judicial Magistrate giving direction to the S.P., Malda to reinvestigate the case by an officer not below the rank of Inspector of his choice and selection under his personal care and guidance and to submit report in final form four months from date of receiving the order is bad in

law. The term "reinvestigation" implies initiation of investigation from the inception, whereas the term "further investigation" implies continuation of previous investigation. The learned Magistrate is not empowered to direct reinvestigation when twice earlier investigation were made. The order of the learned Sub-Divisional Judicial Magistrate giving direction for reinvestigation is bad in law.

5. Mr. Sudipta Mitra, learned advocate for opposite party No. 2 contended that the order of the learned Sub-Divisional Judicial Magistrate should be read as a whole and not a particular line or word used in the order. Just above the line giving direction for reinvestigation, the learned Magistrate clearly mentioned that in the said case in the given circumstances there should be further investigation by some other police agency, other than the D.D., Malda. The direction to the S.P., Malda for reinvestigation should be treated as further investigation and not reinvestigation. Section 173(8) of Cr.P.C. gives power to an Officer-in-Charge of a police station to make further investigation into a case. A Magistrate is also empowered to direct Officer-in-Charge of a police station for further investigation, if after going through the materials on record and the case diary the learned Magistrate applying his mind thinks that in the said case further investigation is necessary. Accordingly, the impugned order of reinvestigation should be treated as direction for further investigation, and being so, there was no illegality in the order.

6. Mr. Sk. Kasem Ali Ahmed, learned advocate for the State of West Bengal contended that the order of the learned Sub-Divisional Judicial Magistrate, Malda directing the S.P. to reinvestigate should be treated as an order giving direction for further investigation. A Magistrate is empowered to direct further investigation and is not bound to accept the report submitted by police, if the learned Magistrate finds that there were defects in the investigation and there is scope of further investigation. Accordingly, the order of the learned Sub-Divisional Judicial Magistrate be regarded as bad in law.

7. After hearing the submissions of the learned advocates of the parties I find that the second I.O. after completing investigation submitted second final report in the form of FRT No. 21 dated 14.2.03. The de facto complainant filed a naraji petition against the said final report and the accused persons also filed written objection against the naraji petition filed by de facto complainant. The learned Sub-Divisional Judicial Magistrate after hearing the parties and considering the entire matter and the applications filed by the parties passed the impugned order dated 4.9.03. Towards the end of the order passed by the learned Sub-Divisional Judicial Magistrate he mentioned that, "I think that in the given circumstances, the case should be further investigated by some other police agency, other than the D.D., Malda. S.P., Malda be asked to reinvestigate the case by an officer not below the rank of Inspector of his choice and selection under his personal care and guidance and to cause submission of report in final form within four months from the date of receiving the order." If these lines are properly construed, the

only meaning that can be inferred is that, the learned Sub-Divisional Judicial Magistrate, Malda indicated in the said order that there is scope of further investigation as investigation made by the previous I.Os were not complete and there were some defects in the investigation which made it essential for further investigation. Accordingly, the learned Sub-Divisional Judicial Magistrate observed that the case should be further investigated by some other police agency. The direction of learned Sub-Divisional Judicial Magistrate to the S.P., Malda thereafter for reinvestigation should not be construed as direction for reinvestigation and the entire order starting from beginning to end, if construed properly, will reveal that the learned Sub-Divisional Judicial Magistrate intended further investigation and not reinvestigation. Section 173(8) of Cr.P.C. empowers an officer in charge of a police station to cause further investigation even after submission of report in final form u/s 173(2) of Cr PC, if fresh materials and evidence comes to the knowledge of Officer-in-Charge. Similarly a Magistrate is empowered to direct further investigation, if he finds that the report submitted by I.O. after investigation is not proper and there remained some defects in investigation. If there is scope of further Investigation a Magistrate is not bound to accept the report in final form submitted by I.O. and the Magistrate can direct further investigation. Accordingly, in the impugned order the use of the word "reinvestigation" should be construed as direction for "further investigation" and being so the said order was not illegal, irregular or without jurisdiction, Now the question that crops up before this Court is whether there was scope of such direction for further investigation by the learned Sub-Divisional Judicial Magistrate in this case.

8. Mr. Milon Mukherjee contended that the de facto complainant is the wife of Damodar Santhalia. Petitioners and Bajrang Santhalia, Arjun Santhalia and Damodar Santhalia are sons of Ram Niranjana Santhalia. Among the sons of Ram Niranjana Santhalia only Arjun Kumar Santhalia is a Bangladeshi national whereas the other sons reside in India and are Indian citizens. Originally Ram Niranjana Santhalia and his sons were residents of Bangladesh. Subsequently R.N. Santhalia and his four sons repatriated to India but Arjun Santhalia decided to stay at Chuadanga in Bangladesh. Arjun Santhalia @ Agarwala and his wife Nirmala Devi having no male issue were searching for adopting a son. Damodar Santhalia, husband of de facto complainant gave an offer to Arjun Santhalia to adopt his son Pankaj Santhalia and at that time Pankaj Santhalia was four years old. Being so offered Arjun Santhalia and his wife Nirmala Devi accepted the offer and took adoption of minor Pankaj Santhalia. All the other brothers and their family members consented to that adoption and pursuant to which Bina Devi Santhalia and Damodar Santhalia handed over the minor Pankaj Santhalia to accused Arjun Santhalia and house wife Nirmala Devi at Chuadanga in Bangladesh. The said minor Pankaj Santhalia is now a citizen of Bangladesh. Their relatives affirmed affidavit at Bangladesh in favour of the adoption of Pankaj Santhalia by Arjun Santhalia and celebration of Datta Homam ceremony to complete the adoption. Arjun Santhalia obtained an ex parte decree (in other

class Suit No. 8/98) from Bangladesh Court in respect of adoption of Pankaj Santhalia. Thereafter, Damodar Santhalia and others filed an application for setting aside the ex parte decree. The said ex parte decree was set aside but, thereafter Arjun Santhalia moved the Supreme Court of Bangladesh against order of setting aside the ex parte decree by the learned Subordinate Judge, Chuadanga in Misc. Case No. 16/99. The Supreme Court of Bangladesh in Civil Revision No. 10 of 2000 by order dated 26.8.03 set aside the order of the Subordinate Judge. Chuadanga in Misc. Case No. 16/99 and dismissed the said Misc. Case and affirmed the ex parte decree in favour of the adoption passed in other class Suit No. 8/98. The Bangladesh Cr PC is identical with Indian Cr PC and Section 188 of Cr PC in Bangladesh are identical with Indian provision of Section 188 of Cr PC.

9. The fact of adoption of Pankaj Santhalia by the accused Arjun Santhalia and his wife has been affirmed by the Hon"ble Supreme Court of Bangladesh. After such order affirming adoption of Pankaj Santhalia, the story of kidnapping of the said minor introduced by de facto complainant; is absolutely unbelievable. The I.O. rightly twice submitted report in final form vide final reports when during investigation it was transpired that Damodar Santhalia and his wife Bina Devi voluntarily gave their minor son Pankaj in adoption to Arjun Santhalia and his wife Nirmala Devi and there was valid adoption. The investigation made by the previous police officers were correct, proper and in true spirit of rules and laws prevalent for investigation. If the learned Sub-Divisional Judicial Magistrate finds that sufficient materials transpired through the investigation, he is empowered to take cognizance. After taking cognizance learned Magistrate may issue process against the accused persons. The learned Magistrate can treat the naraji as complaint and may examine the complainant and her witnesses u/s 200 of Cr PC, and thereafter, may proceed in accordance with law, if the learned Magistrate does not take cognizance on the basis of report in final form submitted by I.O. There was no ground at all for giving direction for further investigation in the instant matter. The I.O. or persons responsible may file the application under the Extradition Act. The minor Pankaj Santhalia, the alleged kidnapped boy, is not an accused but is a witness in this case. He is now a Bangladesh citizen and in view of Section 188 of Cr PC. the I.O. cannot proceed against accused persons. There is no need of further investigation when not only once but twice investigation have been made and further investigation would be nothing but wastage of money and time. Accordingly, the order of the learned Sub-Divisional Judicial Magistrate for further investigation should be set aside and the learned Sub-Divisional Judicial Magistrate may be directed to proceed in accordance with law.

10. Mr. Mukherjea further contended that in order to take revenge Damodar Santhalia set up his wife Bina Devi lodged the First Information Report. The story of kidnapping is absolutely false and motivated and accordingly the I.O. rightly submitted FRT. In view of these matters there is no merit for continuation of the criminal proceedings and the said proceedings being an abuse of the process of Court should be quashed. In support of his contention Mr. Mukherjee cited the

decisions reported in H.S. Bains, Director, Small Saving-Cum-Deputy Secretary Finance, Punjab, Chandigarh Vs. State (Union Territory of Chandigarh), Abhinandan Jha and Others Vs. Dinesh Mishra, (Varki Thomas v. Forward Bank Ltd., Kottayam) and Bhagwant Singh Vs. Commissioner of Police and Another, .

11. Mr. Kasem Ali, learned advocate for the State of West Bengal contended that the First Information Report shows that the incident was on 15.12.96. After making search everywhere when the minor boy could not be recovered the de facto complainant lodged written information at Kaliachak P.S. on 17.12.96 but O.C., Kaliachak P.S. did not register any First Information Report, and instead of it, entered the said information into G.D. Entry No. 706 dated 17.12.96. If the natural guardians gave their minor son in adoption to accused Arjun Santhalia and his wife why the natural guardians would run everywhere and would lodge information at police station one day after the alleged incident. There cannot be adoption through affidavit affirmed before a notary. The kidnapped boy was a citizen of India by birth. Adoption, if any, must be according to law prevalent in India and without consent of parents or natural guardians there cannot be any valid adoption. The offence of kidnapping of the minor boy was committed at Kaliachak. Naturally Indian law would prevail in the instant matter and law of Bangladesh are not applicable. The story of adoption introduced by the accused persons on 6.8.95 is invalid when the mother of the kidnapped boy has lodged First Information Report stating therein that the incident of kidnapping of the minor boy Pankaj took place on 15.12.96. If the minor Pankaj was kidnapped on 15.12.96 he could not be given in adoption on 6.8.95 as claimed by the accused persons. The learned Sub-Divisional Judicial Magistrate has jurisdiction either to accept the report in final form submitted by police or not to accept the same and if he finds that there is scope of further investigation he is empowered to direct further investigation. Learned Sub-Divisional Judicial Magistrate, Malda has Jurisdiction to direct further investigation when the incident of kidnapping was within Kaliachak P.S. area in the District of Malda. The kidnapped boy has not yet been recovered. Instead of recovering the kidnapped boy, the I.O. sought for permission to initiate proceeding against the de facto complainant u/s 211 Indian Penal Code, which action was bad in law and shows that investigation was not done properly. Order for further investigation was proper and valid as the learned Magistrate has jurisdiction to direct further investigation. The said order is interlocutory order and no revision lies against that order.

12. Mr. Suitor Mitra, learned advocate for opposite party No. 2, de facto complainant contended that the circumstances how the child was kidnapped plays a vital role and it shows the genesis of the case. The petitioners and other accused persons called the mother of the child with the child into their residence to attend a ceremony. When the mother attended the residence of petitioners with the minor Pankaj she was taken in a separate place and was engaged in talking with other relatives. The minor boy was kept playing with other boys and in the midst of such playing the minor boy was kidnapped in absence of his mother. The First Information Report contains elements of cognizable offence.

After investigation the I.O. submitted reported in final form vide FRT and challenging the FRT the de facto complainant filed naraji petition, there was direction for further investigation by a separate I.O. but the second I.O. also submitted FRT stating in the report that the minor boy was given in a valid adoption to accused Arun Santhalia and his wife. This report was illegal as without apprehending the principal accused and recovering the boy the I.O. opined that there was valid adoption of the minor. The story of adoption is the defence of accused persons in this case. The I.O. instead of investigating the case of the de facto complainant relating to kidnapping of her minor son Pankaj took up the defence case as true which is illegal. Alibi of accused for defence case cannot be subject matter of investigation and defence case or alibi of accused is a matter to be considered during trial on the basis of evidence.

13. Mr. Mitra further contended that the learned Sub-Divisional Judicial Magistrate applied his mind properly and passed an elaborate order considering all aspects. At the stage of passing direction for further investigation an accused need not be heard and being so an accused cannot challenge order of further investigation. Direction for further investigation over a naraji petition is not bad in law and a naraji petition is nothing but a form of complaint. The whole text of the order of the learned Sub-Divisional Judicial Magistrate if construed properly would reveal that the learned Magistrate applied his mind properly and considering all aspects passed the impugned order for further direction. The said order being correct, proper and legal requires no interference.

14. Mr. Mitra also contended that regarding adoption of Pankaj the law of India would be applicable as the said minor Pankaj was an Indian citizen by birth. Section 13 Clause (f) of CPC prescribes that foreign judgment is not conclusive where it sustains a claim founded on a breach of any law in force in India. Section 11(VI) of the Hindu Adoptions and Maintenance Act, 1956 is very important relating to law of adoption in India. This section prescribes that the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned under their authority with intent to transfer the child from the family of its birth, or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption; provided that performance of Datta Homam shall not be essential to the validity of an adoption. Therefore, the judgment of Supreme Court of Bangladesh is not binding in India and argument of validity of foreign judgment is of no effect in this case. A foreign judgment cannot go beyond Section 13(1) of the CPC of India. The story of adoption is an alibi of accused persons and it cannot be considered during investigation and accused persons have to establish it during the trial.

15. Mr. Mitra further contended that power to direct further investigation was always with the Court and there are several judgments in its support before the Cr PC, 1973 came into force. Now in Cr PC, Section 173(8) has been incorporated prescribing scope of further investigation. The order of the learned

Sub-1 Divisional Judicial Magistrate lying at page 81 of the revisional application shows that a report of I.O. was produced before learned Sub-Divisional Judicial Magistrate wherein the I.O. mentioned that the task of recovery of the minor child has been taken over by and between the two Governments i.e., Government of India and Government of Bangladesh through Department of Ministry of External Affairs, Government of India and Office of the Deputy High Commissioner, Bangladesh at Calcutta. The I.O. also produced correspondence between the Secretary, Home Department and DIG(CID), West Bengal and the information sent to the Deputy High Commissioner, Bangladesh at Calcutta. After such correspondence it is strange how FRT was submitted. The information regarding kidnapping was given at Kaliachak P.S. within two days of kidnapping of minor Pankaj which was entered in G.D. Entry No. 706 dated 17.12.96. When the police did not take any action and did not take step for recovery of the minor boy the de facto complainant filed the complaint in Court which was sent to Kaliachak P.S. for investigation u/s 156(3) of Cr PC In a criminal proceeding in which First Information Report has been lodged containing a story of kidnapping of a minor boy the investigation must confine within the limits of First Information Report story and I.O. is not empowered to take up the defence case or alibi of accused and investigation regarding defence case is illegal. There was no illegality in the impugned order passed by the learned Sub-Divisional Judicial Magistrate directing further investigation particularly when the minor boy was not covered and the I.O. did not proceed further regarding recovery of the minor boy through the Government level or through the Ministry of External Affairs, Government of India and Home Department as well as DIG(CID), West Bengal. There is no merit in the revisional application and there is no ground for quashing the criminal proceedings and the revisional application should be dismissed. In support of his contention Mr. Mitra cited the decisions reported in Lakshman Singh Kothari Vs. Smt. Rup Kanwar, , L. Debi Prasad (Dead) by Lrs. Vs. Tribeni Devi and Others, , Raj Rajendra Sardar Maloji Marsingh Rao Shitole Vs. Sri Shankar Saran and Others, , 2001 SCC (Cri) 1280 (Hemant Dhasmana v. Central Bureau of Investigation), Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj Vs. State of Andhra Pradesh and Others, and 1979 SCC (Cri) (Ram Lal Narang v. State (Delhi Administration)).

16. I have duly considered the submissions made by the learned advocates of the parties and carefully perused the revisional application, its annexure and materials on record. Opposite party No. 2 as de facto complainant lodged complaint in the Court of learned Chief Judicial Magistrate, Malda on 4.12.97 alleging that her minor son Pankaj was kidnapped by the accused persons on 15.12.96 at 1 P.M. from thehs of Kailash Agarwal. Learned Chief Judicial Magistrate sent the complaint to O.C., Kaliachak P.S. for investigation u/s 156(3) of Cr PC and on the basis of it Kaliachak P.S. Case No. 206 dated 4.12.97 under Sections 363/365/34 of Indian Penal Code was started against seven accused including the present petitioners. It further appears that on 17.12.96 an information was lodged at Kaliachak P.S. regarding missing of the minor boy

Pankaj by Damodar Santhalia, husband of de facto complainant but, the O.C., Kaliachak P.S. did not attach importance to it and did not register any First Information Reports. The police officer simply recorded the said written information into G.D. Entry No. 706 dated 17.12.96. Another written complaint was lodged on 24.12.96 but the police officer did not take any step. It further appears that thereafter the de facto complainant and her husband went door to door including higher authorities from 17.12.96 to 3.12.97 and finally finding no other way lodged the complaint in the Court of learned Chief Judicial Magistrate on 4.12.97. The contents of the First Information Report clearly makes out a cognizable case disclosing serious allegations of kidnapping of a minor boy against the accused persons. In view of the settled principles of law this is not at all a case to quash the First Information Report or to quash the criminal proceeding at the initial stage.

17. It further appears that the alleged kidnapped minor boy Pankaj Santhalia was Indian citizen by birth. If the said boy was given in adoption Indian law will prevail. Section 11 of the Hindu Adoption and Maintenance Act, 1956 prescribes the conditions for valid adoption. Section 6 of the said Act deals with requisites of a valid adoption. Section 7 deals with capacity of male Hindu to take in adoption and Section 8 deals with capacity of a female Hindu to take in adoption. Section 9 prescribes who are the persons capable of giving in adoption and Section 10 deals with persons who may be adopted. Clause (VI) of Section 11 prescribes that the child to be adopted must be actually given and taken in adoption by the parent or guardian concerned or under their authority with intent to transfer the child from the family of its birth. This section clearly signifies that performance of ceremonies including performance of Datta Homam is not essential for the validity of an adoption. It signifies that the child to be adopted must be actually given and must be taken in adoption and guardian concerned must give in adoption with intent to transfer the child from the family of its birth. Pankaj Santhalia was the son of Bina Devi and Damodar Santhalia. If there was valid adoption and actual giving with intent to transfer Pankaj from their family to the family of Arjun Santhalia, Bina Devi Santhalia, the mother would not have lodged First Information Report against the accused persons and the father would not have lodged written information regarding kidnapping of the boy on 17.12.96, two days after the incident dated 15.12.96. Another condition for valid adoption is that without consent of the mother the child cannot be given in adoption. If the mother i.e. Bina Devi had consent in the adoption as alleged she would not have lodged First Information Report against accused persons making allegation of kidnapping of her minor son. In view of this position behind the story of kidnapping and considering provisions of Section 13(f) of the CPC the decision of the Bangladesh Supreme Court regarding adoption cannot play any role in the investigation of this case.

18. The judgment of the Supreme Court of Bangladesh cannot be a bar in the matter of investigation into the story depicted in the First Information Report. The I.O. acted illegally by relying upon the story of adoption as he was not

entrusted with the duty of investigation of adoption of the minor boy. The I.O. was entrusted to make investigation regarding the story depicted in the First Information Report. An alibi of accused or defence case cannot be a matter of investigation by the I.O. The story of adoption is the defence or alibi of accused persons and this Court at this stage would not enter into discussion whether adoption was valid or not. The above discussion regarding essential conditions of valid adoption of a boy who was citizen of India by birth would make it clear that the I.O. misdirected himself in this matter by taking up the story of adoption pleaded by the accused persons. The story of adoption whether acceptable or not or, whether there was valid adoption or not are to be considered by the Court during trial on the basis of evidence and not during the stage of investigation. Submission of final reports by two successive I.Os were not in accordance with law as they failed to realise the proper aspect of the matter and true position of law. The second I.O, also made error by seeking permission to prosecute informant, i.e. de facto complainant u/s 211 of Indian Penal Code as the I.O. himself was in error by misdirecting himself into the matter of investigation. Due to his wrong impression and ignorance of law of adoption, the I.O. believed the alibi of accused persons and submitted final report which was not proper. It is also strange how the I.O. could submit final report after he placed correspondence papers before the learned Sub-Divisional Judicial Magistrate, Malda intimating him that regarding matter of recovery of kidnapped boy the task of such recovery has been taken over by the two Governments i.e. Government of India and Government of Bangladesh and Department of Ministry of External Affairs is looking into the matter. The aforesaid discussion makes it clear that the I.O. proceeded in a wrong way and made error by placing reliance on the alibi of accused persons during the stage of investigation which resulted into illegality and miscarriage of justice.

19. The learned Sub-Divisional Judicial Magistrate by his impugned order dated 4.9.03 discussed the entire matter elaborately and considered all aspects. I have gone through the case diary, papers and documents and the papers, documents and materials lying in it do not prima facie show that there is no material in support of First Information Report story. The I.O. also made mistake by departing from the stage of recovery of the minor boy through Government level. It should be remembered that the said minor boy Pankaj would be a vital witness in this case and his recovery would enlighten the Court into the allegation of First Information Report. Section 173(8) of Cr PC empowers Officer in Charge of a police station to make further investigation. A Magistrate has always power to direct further investigation and such power has been strengthened by Cr PC, 1973 through Section 173(8). It is clear that in the instant matter investigation was not proper and the I.Os misdirected themselves into the matter of investigation and erroneously submitted final report. During the stage of naraji petition and before taking cognizance learned Magistrate is not bound to hear the accused. Accordingly, after receiving a report in final form from police officer after investigation, if a Magistrate considering the entire matter and applying his

mind decides that investigation so far made was not proper, he had every authority to direct further investigation. It is true that the investigation so far made, if reveals elements of offence, Magistrate is empowered to take cognizance. It is also true that on the basis of naraji petition the learned Magistrate may proceed u/s 200 Cr PC to examine the complainant and his witnesses and thereafter to take necessary action in accordance with law. But in a case of such serious nature in which a minor Indian boy was taken away from the custody of his mother as alleged and was taken away into a different country i.e. foreign country, namely, Bangladesh scope of further investigation remains, particularly relating to recovery of the minor boy and other important matters. In such a situation Magistrate rightly may refuse to take cognizance and may also direct further investigation instead of proceeding with the naraji petition as a complaint and to examine the complainant and his witnesses. Discussion of reported decisions is not important in this case as I think that by the impugned order the learned Sub-Divisional Judicial Magistrate, Malda made no illegality or irregularity directing further investigation. The impugned order cannot be regarded as without jurisdiction and the learned Magistrate rightly passed the order for further investigation.

20. Citation of decisions do not always make out a case either in favour of petitioner or the opposite party. In the instant matter the principles of law involved is well settled which has already been discussed. Therefore, detailed discussion of the decisions cited by the learned advocates of the parties is not necessary. However, to make the position more clear I intend to discuss some of the decisions. In *Abhinandan Jha* (supra) cited by learned advocate for petitioner it was held by the Supreme Court that after police submitted a report completing investigation that no case made out for sending up accused for trial, the Magistrate cannot direct police to submit charge sheet. It was held that the Magistrate, however, disagreeing with the report can take cognizance or may order further investigation. In *H.S. Bains* (supra) the police after investigation submitted report that no case was made out. In that matter the Supreme Court observed that after receiving a police report the Magistrate may decide that there is no sufficient ground to proceed further and drop action; he may take cognizance of the offence on the basis of the police report u/s 190(1)(b) Cr PC, or he may take cognizance u/s 190(1)(a) of Cr PC and proceed to examine upon oath the complainant and his witnesses u/s 200 Cr PC. These two decisions do not favour the case of the petitioners in view of the discussions already made. It has been already observed that the Magistrate is not bound to accept the report in final form submitted as FRT and Magistrate is empowered to take cognizance or he may direct further investigation or he may examine the complaint and his witnesses u/s 200 Cr PC treating the naraji as complaint.

21. If the Magistrate directs further investigation he is not obliged to hear the accused before making such direction. The view was expressed by the Supreme Court in *Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj* (supra). It is well settled law that if the Magistrate decides to direct

further investigation it would not be proper for the High Court to interfere in exercise of revisional powers. Further investigation, in either result, would be for ends of justice. This view was expressed by the Supreme Court in Hemant Dhasmana (supra).

22. I have already discussed the point of law regarding adoption and to strengthen my observation I cite the decision of the Supreme Court in Lakshman Singh Kothari (supra) cited by the learned advocate for the de facto complainant opposite party. In that decision the Supreme Court held that, "There cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking No particular form is prescribed for the ceremony, but the law requires that the natural parent shall handover the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it." This decision makes it clear that performance of any particular ceremony is not essential but the factum of giving of the adoptive boy by a natural parent to the adoptive parent is necessary. In the instant matter the lodging of written information at the police station two days after the incident of kidnapping as alleged makes out that at this stage story introduced by the accused regarding adoption is difficult to accept and it can be established only in trial.

23. In Hemant Dhasmana (supra) the Supreme Court made it clear by observing that the Magistrate in exercise of power u/s 173(8) of Cr PC to order further investigation to be made by a police, cannot direct that a particular police officer or even an officer of a particular rank should conduct such further investigation. In the instant matter as I find, the learned Sub-Divisional Judicial Magistrate, Malda by the impugned order has indicated that further investigation should be made by some other police agency other than the D.D., Malda. He directed the S.P., Malda to reinvestigate the case by an officer not below the rank of inspector. This portion of the order passed by the learned Sub-Divisional Judicial Magistrate being not in accordance with law is set aside and accordingly learned Sub-Divisional Judicial Magistrate is directed to modify this portion of the order in view of the guidelines of the Supreme Court in Hemant Dhasmana (supra). The learned Sub-Divisional Judicial Magistrate is empowered to direct further investigation but, he cannot direct an officer of a particular rank to conduct further investigation. It is expected that after receiving copy of order of this Court the learned Sub-Divisional Judicial Magistrate, Malda shall modify the order and shall pass the necessary order in accordance with law.

24. Considering the First Information Report and materials in case diary I find that this is not, a fit case at all to quash the impugned proceeding being G.R. Case No. 1604 of 97 arising out of Kaliachak P.S. Case No. 206 dated 4.12.97. The order of learned Sub-Divisional Judicial Magistrate, Malda directing further investigation into the case being correct, proper and legal requires no interference. The revisional application accordingly having no merit fails and is

dismissed. Learned Sub-Divisional Judicial Magistrate is directed to insist upon the police officer concerned including the S.P. for completion of further investigation early so that report in final form is received by him as expeditiously as possible as the matter is pending for a long time. The revisional application is accordingly disposed of in the light of observations made above.

25. Further I make it clear that whatever I have stated above or observed should not be considered as opinion regarding merit of the case and the concerned Court at appropriate stage would act in accordance with law and the learned Court below would arrive at his own conclusion and would not be guided by the observations made by this Court in this revisional application as the observations have been made only for the purpose of this revisional application.

All intention orders passed earlier stand vacated.

Send a copy of this order to the learned Sub-Divisional Judicial Magistrate, for information and necessary action.

Urgent xerox certified copy be given to the parties, if applied for, expeditiously.