
(2009) 11 DEL CK 0318

In the Delhi High Court

Case No : Criminal Revision Petition 604 of 2009

Rajesh Jain

APPELLANT

Vs

The State (N.C.T. of Delhi) and Others

RESPONDENT

Date of Decision : 24-11-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 156(3), 190, 192, 200

Citation : (2010) 7 RCR(Criminal) 84

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Kuldip Singh and Harpreet Singh, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Mool Chand Garg, J.—This Criminal Revision Petition has been filed by the petitioner against the order dated 06.08.2009 passed by Learned Metropolitan Magistrate, New Delhi in C.C. No. 1084/JM/2009 whereby the application filed by the petitioner u/s 156(3) of the Code of Criminal Procedure (Cr.P.C.) was dismissed by the learned Metropolitan Magistrate by observing that in the facts of this case there is no need to direct police investigation before recording the statement of the complainant and his witnesses in support of the complaint which has been filed u/s 200 of the Cr.P.C. The relevant observation made by the Trial Court in this regard reads as under:

In this order I shall be only dealing with the application u/s 156(3) Cr.P.C. of the complainant. As is clear from the above noted facts revealed from the complaint that the present case involves a sale transaction wherein the property in question was allegedly agreed to be sold to the complainant by the accused persons for Rs. 30 lacs, in pursuance of which the complainant allegedly had made a payment of Rs. 8,51,000/- to the accused persons. It also transpires from record that a receipt-cum-agreement dated 29.02.2008 was also executed between the parties, however, the factum of the same was flatly denied by the accused

persons in their reply to the legal notice issued on behalf of the complainant. From the above noted facts, it is clear that all the evidence which is required by the complainant to prima facie show that the accused persons have cheated him, if the allegations of complainant are prima facie believed to be true, is within the reach of the complainant. Since the evidence required to show prima facie commission of offence of cheating by accused persons against the complainant is within the reach of the complainant, accordingly, then keeping in view of mandate of precedent delivered by the High Court of Delhi speaking through Hon"ble Mr. Justice R.C. Chopra (as he then was) in the case of M/s. Skipper Beverages Pvt. Ltd. Vs. State, wherein it has been laid by his lordship in clear terms that Magistrate should not pass orders u/s 156(3) Cr.P.C. mechanically without judicial application of the mind and further observed that the power u/s 156(3) Cr.P.C. ought to be exercised only in cases where allegations are serious or evidence is beyond the reach of the complainant or custodial interrogation appears to be necessary for some recovery of article or discovery of fact, I am of the view that no specialized investigation by the police or any other like agency is required in the present case since almost all the documentary proof is within the reach of the complainant. The factum of the payment made to the accused by complainant can also be prima facie proved by the complainant by producing the witnesses as named by him in his complaint at the pre-summoning stage. Henceforth, no directions u/s 156(3) Cr.P.C. are called since no purpose would be served by rendering the direction for lodging an FIR and consequent investigation by the Police. The application u/s 156(3) Cr.P.C. is dismissed.

2. It has been submitted on behalf of the petitioner that in the facts of this case it was necessary to direct police investigation by exercising the powers available with the Magistrate u/s 156(3) Cr.P.C. as there was a necessity to conduct specialized investigation such as collecting of voice test etc. Reference has been made to the following judgments.

i. Mohd. Yousuf v. Afaq Jahan and Anr.

ii. Lallan Chaudhary and Ors. v. State of Bihar and Anr.

3. I have given my thoughtful consideration to the submissions made by the petitioner. I have also gone through the orders passed by the Magistrate as well as the complaint filed u/s 200 Cr.P.C. by the petitioner.

4. Briefly stating, the facts of this case are that the complainant entered into an agreement with the accused persons for purchasing the property bearing No. 1108 (part), Pai Walan, Bazar Gulian, Jama Masjid, Delhi (hereinafter referred to as the property in dispute) for a sum of Rs. 30 lakhs. Out of the same it is alleged by the petitioner/complainant that he made the payment of Rs. 8,50,000/- for which a receipt- cum-agreement was executed between the parties on 29.02.2008. It has been submitted that the authenticity of this document has been denied by the accused persons who are not ready to execute the sale deed while replying to the legal notice of the complainant.

5. It is in these circumstances the petitioner was compelled to file a police complaint on 16.12.2008 at P.S. Jama Masjid but no FIR was registered and thereafter he filed the complaint u/s 200 Cr.P.C. along with an application u/s 156(3) Cr.P.C. whereby he sought direction to the Police for registration of the case and to investigate the circumstances alleging conspiracy between the accused persons to illegally withhold the money paid to them as well as the original receipt-cum-agreement which is also stated to be with them. However, as stated above, this application has been dismissed by the Trial Court. The law with regard to exercise of the discretion u/s 156(3) Cr.P.C. is well settled. The said power is available to the Magistrate while dealing with a complaint u/s 200 Cr.P.C. It is only when the Magistrate decides not to enquire into the allegations made in the complaint himself he can direct an investigation to be made by Police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceedings. However, this stage comes after the examination of the complainant and his witnesses u/s 200 Cr.P.C. Such discretion is not available to the Magistrate unless and until he passes through the stage u/s 200 Cr.P.C. In the present case merely because an application has been filed along with the complaint u/s 156(3) Cr.P.C. it may not give a discretion to the Magistrate to direct Police investigation unless & until the evidence of the complainant and his witnesses u/s 200 Cr.P.C. has been recorded, which appears to have not been done.

6. Insofar as the powers vested with the Magistrate u/s 156(3) Cr.P.C. are concerned, the said provision is circumscribed by the provisions contained u/s 190 of Cr.P.C. and reads as under:

190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, specially empowered in this behalf under Sub-section (2), may take cognizance of any offence-

(a) Upon receiving a complaint of facts which constitute such offence;

(b) Upon it police report of such facts;

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under Sub-section (1) of such offences as are within his competence to inquire into or try.

7. In the present case once an FIR has not been registered u/s 154 Cr.P.C. the cognizance can only be taken by the Magistrate on the basis of the complaint filed by the petitioner and for that purpose the Magistrate is required to follow the provision as detailed in Chapter XV of the Code which comprises of Sections 200 to 203 Cr.P.C.

Those provisions for the sake of reference are reproduced hereunder:

200. Examination of complainant.

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) If a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) If the Magistrate makes over the case for inquiry, or trial to another Magistrate u/s 192:

Provided further that if the Magistrate makes over the case to another Magistrate u/s 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

201. Procedure by Magistrate not competent to take cognizance of the case.

If the complaint is made to a Magistrate who is not competent to take cognizance of the offence he shall, -

(a) If the complaint is in writing, return it for presentation to the proper court with to that effect;

(b) If the complaint is not in writing, direct the complainant to the proper court.

202. Postponement of issue of process.

(1) Any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognizance or which has been made over to him u/s 192, may, if he thinks fit, postpone the issue of process against the accused, 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 whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made, -

(a) Where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions or

(b) Where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath u/s 200.

(2) In an inquiry under Sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is

triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under Sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Court on an officer in charge of a police station except the power to arrest without warrant.

203. Dismissal of complaint.

If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) u/s 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

8. The issue has been dealt with by the Hon'ble Supreme Court in the case of Raghu Raj Singh Rousha Vs. Shivam Sundaram Promoters (P) L and Another, .

In the said case while dealing with the discretion available to the Magistrate to direct Police investigation u/s 156(3) Cr.P.C., it has been observed:

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.

9. It is on the basis of the aforesaid observation that the SLP filed by the petitioner against the order refusing to exercise powers u/s 156(3) Cr.P.C. was dismissed. Relying upon the aforesaid judgment this Court has also taken a

similar view in the case of Gopal Krishan Dua v. State in Cr. Rev. P. 571/2008 by observing that:

12. The decision of the learned MM in the present case declining to issue a direction to the police u/s 156(3) CrPC and instead fixing the case for the recording of the complainant's evidence, reflects the cautious approach that is necessary in matrimonial disputes. The judgments cited by learned Counsel for the Petitioner in fact require the learned MM to be cautious while taking proceeding to take cognizance of an offence on a complaint. The learned MM had the discretion to either forward the complaint to the police for registering an FIR or to direct the complainant's evidence to be recorded. The decision of the learned MM to opt for the latter course cannot, in the facts of the present case, be held to be erroneous or illegal.

14. if the learned MM after considering the pre-summoning evidence, proceeds to take cognizance, and at the post-cognizance stage considers it necessary to require further investigation or inquiry to be undertaken before issuing process to the accused, it would be open to the learned MM to invoke the powers u/s 202 CrPC. However, as the instant case is still at the pre-cognizance stage it is premature to speculate about the course that the learned MM should adopt. No illegality in the impugned order dated 14th August 2008 passed by the learned MM. The petition is, accordingly, dismissed. The pending application also stands dismissed.

10. It was further observed that taking into consideration the facts of that case and the observation made by the Magistrate it was held that:

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.

11. In this petition the grievance of the petitioner stands mentioned in the III ground of the petition where it has been alleged that, it is further most respectfully submitted that, the learned Magistrate seems to have been swayed by the fact that the payment made by the petitioner to the respondents could prima facie be proved by the petitioner by producing the witnesses named by him but the fact remains that for proving cheating and commission of various cognizable offences, some payment is not enough. It is in such circumstances that investigation by the Police including custodial interrogation of Respondent Nos 2 and 3 would be necessary and important in order to bring to light, the factum of commission of cognizable offences by respondent Nos. 2 and 3. The evidence in the shape of telephone talks as well as the documentary evidence

which is written in the hands of respondent No. 3 is also a necessary document to prove the commission of offence by the respondents. For that the evidence cannot be collected and produced by the petitioner in original manner for which a specialized investigation by the police is required. This aspect of the case has completely been ignored by the learned Magistrate and he has passed the impugned order without any application of mind.

12. However, for the reasons stated above it is necessary for the complainant to examine himself and to produce on record all the documents in his power and possession including the copy of the agreement-cum-receipt and to say on oath that the said agreement-cum-receipt was signed by the accused persons. The complainant is also required to prove the notice sent by them and reply filed thereof. If on the basis of such evidence the Court decides either to call for a Police investigation or to issue the process after being satisfied with the evidence of the complainant the Magistrate will be well within his jurisdiction to issue process to the respondents. If at that stage the Magistrate feels that there is also a necessity to have any expert evidence such as the report of FSL etc. then he can direct the Police to take into possession the other documents for the purpose of comparing the signatures of accused persons by calling upon them to appear before the Police for the purpose of investigation and to send the relevant documents to FSL for comparison and to file a report before the Magistrate but that stage will come only after the evidence of the complainant and his witnesses are recorded. This is what has been done by the Magistrate. I do not find any infirmity in the approach.

13. Insofar as the judgment cited on behalf of the petitioner are concerned, I have examined those two judgments and I am of the considered opinion that those judgments are of no help to the case of the petitioner. In the case of Mohd. Yousuf (supra) what has been stated by the Hon"ble Supreme Court is regarding the power available with the Magistrate to direct Police investigation in an appropriate case but exercising such power is the discretion of the Magistrate. This judgment does not say that the Court must direct investigation at the first instance. Similarly, in the case of Lallan Chaudhary (supra) the grievance of the complainant was that some of the offences committed by the accused persons as alleged by him were not taken care of by the SHO who registered FIR only in relation to some of the offences. In that case the directions which were given by the Magistrate was in the nature of asking the SHO concerned to carry out further investigation. So on facts neither of the judgment comes to the rescue of petitioner.

14. Taking into consideration all the facts and circumstances of this case, I do not find any illegality or impropriety or irregularity in the order under challenge which calls for an interference by this Court u/s 397 Cr.P.C.

15. The revision petition is accordingly dismissed.