

(1999) 10 DEL CK 0010
In the Delhi High Court
Case No : Criminal M. (M) . No. 1259/98

Rishi Parkash Tyagi

APPELLANT

Vs

State of Delhi and Another

RESPONDENT

Date of Decision : 27-10-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 482
Delhi Police Act, 1978 — Section 120, 124
Penal Code, 1860 (IPC) — Section 120, 34

Citation : (1999) 6 AD 770 : (1999) 82 DLT 371 : (1999) 51 DRJ 554

Hon'ble Judges : M.S.A. Siddiqui, J

Bench : Single Bench

Advocate : Pt. R.K. Naseem, for the Appellant; Mr. M.S. Butalia and Mr. J.P. Handa Advs., for the Respondent

Judgement

M.S.A. Siddiqui, J.—By this petition u/s 482 Cr.P.C., the petitioner seeks quashing of the order dated 2.4.1994 passed by the Metropolitan Magistrate, Karkardooma, Shahdara directing issue of process against the petitioner.

2. Briefly stated, the facts giving, rise to the present petition are that on 16.8.1987, Constable Rishi Pal was stabbed by Mahinder Kumar as a result whereof FIR No. 294/87 under Sections 307/353/186 I.P.C. was registered against him and his associate Ram Kumar at the Police Station Vivek Vihar. On 24.8.1987, Mahinder Kumar and Ram Kumar were arrested by the police. On that day, the petitioner was posted as SHO of the Police Station Vivek Vihar. It is alleged that Mahender Kumar and Ram Kumar were beaten up in the police lock up of the Police Station Vivek Vihar as a result whereof Mahender Kumar died in the J.P.N. Hospital. After holding inquest on the dead body, the SDM ordered for registration of the case against the concerned police officials. However, on 25.5.1987, FIR No. 59/87 under Sections 304/34 IPC was registered at the Police Station Vivek Vihar in respect of the alleged incident. On 27.11.1987, deceased Mahinder Kumar's father Tikka Ram filed a complaint under Sections 302/34/323/342/343/167/201/217/218/119/120/211/109/114/120-B IPC

against the petitioner and others. The Metropolitan Magistrate, Karkardooma sent the complaint to the police for investigation u/s 156(3) Cr. P.C. vide orders dated 7.12.1987. The enquiry was entrusted to the Inspector Kishan Singh, who submitted his interim report. On 15.10.1988. Inspector Kishan Singh was directed to make further enquiry. Pursuant to the said direction, an enquiry report was submitted before the Metropolitan Magistrate on 5.4.1989. In his report, Inspector Kishan Singh stated that there was a prima facie case against the police officials but some more evidence was required to prosecute them. Thereupon, Inspector Kishan Singh was again directed to make further investigation in the matter vide orders dated 10.4.1991. It appears that despite extension of time granted for further investigation, Inspector Kishan Singh did not submit his final report and so the complainant was directed to produce his witnesses for examination u/s 202 Cr. P.C. vide orders dated 19.10.1991. During the enquiry, the complainant produced certain witnesses before the Metropolitan Magistrate and also filed affidavits of some witnesses. On consideration of the evidence of the witnesses produced by the complainant and the affidavits filed in support of the complaint, the learned Magistrate took cognizance of the offences punishable under Sections 302/34/120-B/325/323/342/343/167/201/217/218 I.P.C. and u/s 124 D.P. Act and directed issue of warrants of arrest against the petitioner and others vide orders dated 2.4.1994. Aggrieved by the said order, the petitioner moved the Additional Sessions Judge, Karkardooma by filing a revision which was dismissed vide orders dated 7.4.1998. Not satisfied with the dismissal of the revision, the petitioner has come up before this Court u/s 482 Cr. P.C.

3. Learned counsel for the respondent has raised a preliminary objection with regard to maintainability of the petition u/s 482 Cr. P.C. According to the learned counsel sub-Section (3) of Section 397 of the Code bars a second revision and this Court cannot act as second revisional Court under the grab of exercising inherent jurisdiction u/s 482 Cr. P.C. It is well settled that inherent power u/s 482 of the Code cannot be invoked to circumvent or to nullify the express provision of the Code. But, if in a case the impugned order clearly brings about a situation where the glaring illegality or injustice stares the Court in the face, then notwithstanding the prohibition contained in sub-Section (3) of Section 397 of the Code, power u/s 482 of the Code can be exercised to annul that illegality or injustice.

4. Assailing validity of the impugned order dated 2.4.1994, learned counsel for the petitioner vehemently contended that the Magistrate having once ordered investigation u/s 156(3) of the Code was not competent to revive the complaint, take cognizance and issue process against the accused. I am unable to accept the said submission of the learned counsel. In Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others, , it was held that power to order police investigation u/s 156(3) of the Code is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage,

the second at the post cognizance stage when the Magistrate is in seisin of the case. In the instant case, the action of the learned Metropolitan Magistrate in ordering investigation u/s 156(3) Cr. P.C. does not amount to taking cognizance of the offence.[Superintendent and Remembrancer of Legal Affairs Vs. Abani Kumar Banerjee, ; Tula Ram and Others Vs. Kishore Singh,].

5. It is relevant to mention that the present case pertains to custodial death and on the allegations of the complainant the offence complained of was clearly triable exclusively by the Court of Session and, Therefore, the learned Magistrate was completely debarred from directing the complaint filed before him to be investigated by the police u/s 156(3) of the Code. However, in the instant case there is nothing to show that the learned Magistrate had taken cognizance of the offence before ordering police investigation u/s 156(3) of the Code. In the context, it would be appropriate to extract the order dated 7.12.1987 passed by the learned Magistrate:-

"Present: complainant Shri O.P. Kalra, Advocate. It is stated by Shri Kalra that there is copy of the finding of the Lrd. SDM/Shahdara who conducted the enquiry about the occurrence was referred to DCP/Crime and it was directed by DCP/ Crime that the case shall be registered. So before recording the evidence in this case, it would be proper if copy of the complaint is sent to DCP/Crime for making investigation and to report by 18.1.88."

6. The aforesaid order clearly shows that the learned Magistrate did not pass any order indicating that he had applied his mind to the facts of the case for the purpose of proceeding with the complaint. What he had done was to keep the complaint aside and order investigation even before deciding to take cognizance on the basis of the complaint. In the case of Tula Ram (supra), their Lordships of the Supreme Court, after analysing the scope and ambit of Sections 156(3), 190, 200 and 202 of the Code, have laid down the following legal propositions.

"1. That a Magistrate can order investigation under S. 156(3) only at the pre-cognizance stage, that is to say, before taking cognisance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation u/s 156(3) though in not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Sec. 202 of the Code.

2. Where a Magistrate chooses to take cognisance he can adopt any of the following alternatives:

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceedings he can straightaway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquiry by

himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

3. In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

4. Where a Magistrate orders investigation by the police before taking cognizance under S. 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action u/s 190 as described above."

7. As noticed earlier, in the instant case, as the allegations made in the complaint made out a case exclusively triable by the Court of Session, learned Magistrate was clearly debarred from ordering any investigation u/s 156(3) Cr.P.C. It is an admitted position that on 25.5.1987, FIR No.59/87 u/s 304/34 IPC was registered at the Police Station Vivek Vihar in respect of the incident which was the subject matter of the complaint filed before the learned Magistrate. In this context, the order dated 7.12.1987 passed by the learned Magistrate directing investigation into the matter could be treated as a peremptory reminder or intimation to the police to exercise their plenary powers of investigation u/s 156(1) Cr.P.C. Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others, . That apart, learned Magistrate has observed in para No. 36 of the impugned order that the case pertaining to the FIR No. 59/87 has gone untraced. That being so, provisions of the Section 210 of the Code were not attracted to the present case. In this view of the matter, the magistrate was not debarred from making any enquiry himself into the truth of the complaint. It needs to be highlighted that while taking cognizance of the offence, learned Magistrate has also taken into consideration the affidavits filed by certain witnesses. It bears repetition that on the allegations of the complaint, the offence complained of was clearly triable exclusively by the Court of Session. It has to be borne in mind that the proviso to sub-Section (2) of Section 202 of the Code is couched in a mandatory form and it commands the Magistrate to examine all witnesses that the complainant proposes to examine during trial. Thus, the filing of affidavit by a witness cannot be a substitute for examining a witness on oath. In Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, , it was held that summoning of an accused in a criminal case is a serious matter. Therefore, the Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused. Thus, the learned Magistrate has acted irregularly in taking into consideration the affidavits filed by some of the witnesses but that irregularity

has not resulted in any failure of justice.

8. In the instant case, the learned Magistrate has recorded the statements of the complainant and his witnesses and after perusing the same he acted u/s 204 of the Code by issuing process to the petitioner as he was satisfied that there were sufficient grounds for proceeding against him under Sections 302/34/120-B/325/323/342/343/167/201/217/218 IPC and Section 124 D. P. Act. I am, Therefore, of the opinion, that the impugned order does not suffer from any legal infirmity warranting interference of this Court u/s 482 Cr. P.C.

In the result, the petition is dismissed. Record of the lower court be sent back forthwith.