
(2016) 03 AHC CK 0073
In the Allahabad High Court
Case No : U/s. 482/378/407 No. 1927 of 2015

Surendra Pal Kushwaha

APPELLANT

Vs

The State of U.P. and Others

RESPONDENT

Date of Decision : 14-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190 (1) (b), Section 190(1) (b),
Section 190(1)(b), Section 200, Section 202, Section 482

Citation : (2016) 03 AHC CK 0073

Hon'ble Judges : Mahendra Dayal, J.

Bench : Single Bench

Advocate : Hemant Kumar Misra and Arti Ganguly, for the Appellant;

Final Decision : Dismissed

Judgement

Mahendra Dayal, J.—1. Heard Sri Hemant Kumar Mishra, learned counsel for the applicant and the learned AGA for the State.

2. The applicant has approached this Court by way of filing an application under Section 482 Cr.P.C. challenging the judgment and order dated 4.3.2015 passed by the Additional Sessions Judge Court No. 3, Unnao in Criminal Revision No. 106 of 2012 whereby the revision has been dismissed and the order dated 24.2.2012 passed by the Additional Chief Judicial Magistrate Court No. 5, Unnao has been confirmed.

3. The facts in brief are that the opposite party No. 2 lodged an FIR upon which the police conducted investigation and submitted final report. When the notice was issued to the opposite party No. 2, he appeared before the court below and filed a protest petition. The learned Magistrate after going through the material on record, came to the conclusion that there was sufficient evidence to proceed against the applicant and other accused persons and thereupon passed the summoning order taking cognizance under Section 190(1)(b) Cr.P.C. This order was challenged by the applicant by filing Criminal Revision No. 106 of 2012 which

was also dismissed.

4. It has been contended by the learned Counsel for the applicant that the law with regard to taking cognizance is that when after submission of final report, the court considers that final report submitted by the police should be accepted, a notice to the complainant will be issued. If the Magistrate finds that the material collected by the investigating officer is sufficient to proceed against the accused persons, he can straightway pass summoning order after taking cognizance under Section 190(1) (b) Cr.P.C. In that case he is not required to issue any notice to the complainant. In the present case, since the Magistrate was of the opinion that the final report was not to be accepted, therefore, he issued notice to the complainant upon which he filed a protest petition which was also taken into consideration by the Magistrate and thereafter he passed the impugned summoning order dated 24.2.2012.

5. The submission on behalf of the applicant is that when the final report is submitted by the police after investigation, the Magistrate has three options. The first option open for the Magistrate is to accept the final report but before accepting the final report, a notice has to be given to the complainant. The second option open to the Magistrate is that if he finds that investigation has not been done properly, the Magistrate can order for further investigation in the matter. The third option which is open to the Magistrate is that if on perusal of the case diary, he finds that there is sufficient evidence against accused persons, he can straightway take cognizance of the offence under Section 190(1)(b) Cr.P.C. According to the learned counsel for the applicant, once the Magistrate exercises his option to issue notice to the complainant, it would mean that he does not propose to accept the final report. If upon notice issued to the complainant, he files a protest petition, the Magistrate has to follow the procedure of complaint case and examine the complainant under section 200 Cr.P.C. and then make an inquiry under Section 202 Cr.P.C. and only after that he could take decision as to whether accused persons should be summoned or not. It is a settled law that if the Magistrate chooses to take cognizance on the basis of case diary under Section 190(1)(b) Cr.P.C., the Magistrate cannot take note of any material except those collected by the investigating officer during investigation. According to the learned counsel for the applicant, the Magistrate in the present case, has taken cognizance under Section 190(1) (b) Cr.P.C. but simultaneously he has also taken into account, the protest petition filed by the opposite party No. 2 complainant. This procedure adopted by the Magistrate is erroneous and is not permissible under the law.

6. In support of his arguments, the learned counsel for the applicant has relied upon a decision of this court reported in , 2015 Legal Eagle (Ald) page 1432 Mukeem & 2 Others v. State of U.P. & Another. In this case the Hon'ble Allahabad High Court while considering the cognizance order of the Magistrate, has held that if the accused is summoned on the basis of protest petition, the Magistrate has to follow the procedure of complaint case laid down in the Cr.P.C. and treat

the protest petition as complaint case. Similar, view has been expressed in the case of Ram Kumar Pandey @ Bachu Dayal @ Anr. v. State of U.P. reported in 2013, Legal Eagle 768.

7. Reliance has also been placed on a decision of this Court which was rendered in the case of Pakhandi & others v. State of U.P. & Anr., in this case also this court has held that while taking cognizance of offence under Section 190 (1) (b) Cr.P.C. the Magistrate cannot consider any other material except the material collected by the I.O.

8. In other case relied upon by the applicant is reported in , 2012(2) SCC page 731 Vasanti Dubey v. State of Madhya Pradesh. In this case, the Hon''ble Supreme Court while accepting ratio laid down in the case of Abhinandan Jha, held that when the police submits a final report, the Magistrate cannot direct the police to straightway submit the charge-sheet. It has also been held that even if the police report indicates that no case is made out against the accused, the Magistrate can ignore the same and take cognizance on applying his mind independently of the case.

9. Lastly, reliance has been placed on a land mark decision on the subject which is reported in , 1989(2) Legal Eagle (SCC) page 132 India Carat Private Ltd. v. State of Karnataka. In this case also the Hon''ble Supreme Court has held that it is open for the Magistrate to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statement of the witnesses as revealed by the police report. He is not bound to follow the procedure laid down in Sections 200 and 202 Cr.P.C.

10. The learned counsel has referred to the impugned order passed by the Magistrate on 24.2.2012 and has submitted that in the opening paragraph of the order, the learned Magistrate has referred to the contents of the protest petition. This prima facie suggests that the Magistrate has taken into account, the protest petition and as such he was bound to follow the procedure of complaint case as held by the Hon''ble Supreme Court. The Magistrate cannot adopt both the options simultaneously.

11. Learned AGA has opposed the application and has submitted that whenever the police after investigation submits closure report, the complainant who lodged the FIR, has a right to be heard. It is for this purpose that a notice is issued to him on submission of final report by the police. Since he is a victim of the wrong committed, he has right to file objection against the submission of final report. There is no procedure in the Code of Criminal Procedure for filing of protest petition. The complainant only makes protest by way of filing objection informing the Magistrate that the police has not submitted the final report correctly and there is evidence on record to take cognizance of the offence. The Magistrate in such a case, may either accept the final report or treat the protest petition as complaint or if there is sufficient evidence in the case diary, he may straightway

pass under Section 190(1)(b) Cr.P.C. In the present case, a perusal of the order passed by the Magistrate reveals that although it has been referred in the order that the complainant filed protest petition but while taking cognizance, the Magistrate has clearly observed that from the evidence collected by the I.O., there was sufficient material against the accused persons and thereupon he took cognizance of the offence. Merely by accepting protest petition, it cannot be said that the protest petition was considered. The acceptance of protest petition means that the Magistrate has accepted the objections of the complainant and has not accepted the final report.

12. The learned AGA has placed reliance on a judgment of this Court reported in , 2014 (1) ACR page 573 Naresh Pal Singh v. State of U.P and Others. In this case a coordinate bench of this court has held that merely because protest petition has been allowed by the Magistrate, it would not mean that procedure of complaint should have been followed. If the Magistrate has not taken into account the contents of the protest petition or the affidavit filed in support thereof but has only taken into account the evidence collected by the I.O., it was not obligatory on the part of the Magistrate to follow the procedure of complaint case.

13. Having heard the learned counsel for the applicant and the learned AGA and also on perusal of the law cited by them, the law which emerges out is that the Magistrate, if chooses to take cognizance under Section 190(1) (b) Cr.P.C. he is prohibited from taking into consideration any material other than the case diary. The contents of the protest petition or the affidavits filed in support thereof, cannot be taken into account by the Magistrate. If the Magistrate intends to take into consideration the protest petition or the affidavits filed in support thereof, he has to follow the procedure of complaint case.

14. In the present case, from the perusal of the impugned order, I find that the learned Magistrate has not taken into consideration the contents of the protest petition or any other material brought by complainant, but has only taken into account the statement of the witnesses who were interrogated during investigation. I, therefore, do not find any illegality or infirmity in the order passed by both the courts below and as such, the application under Section 482 Cr.P.C. lacks merit and is accordingly dismissed.