

Munna and Others. Vs. State of U.P. and Another

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Court : Allahabad

Decided On : Jan-29-2011

Judge : Surendra Singh, J.

Appeal No. : Criminal Misc. Application No. 36042 of 2010

Appellant : Munna and Others.

Respondent : State of U.P. and Another

Judgement :

1. Heard learned counsel for the applicants and learned AGA for the State and perused the material placed on record.
2. Applicants by way of filing this application under section 482 Cr.P.C. have sought to quash the impugned order dated 21.10.2010 passed by Additional District and Sessions Judge, Court No.8, Bulandshahr in Criminal Revision No. 151 of 2001 as well as order dated 29.03.2010 passed by Additional Chief Judicial Magistrate, Court No.2, Bulandshahr under sections 304, 452, 504, 506 IPC, Police Station Jahangirabad, District Bulandshahr in F.R. No. 391 of 2009, Ram Kumar vs. Munna and others.
3. The relevant facts giving rise to this application are in a very short compass. The opposite party no.2 Raj Kumar had filed an application under section 156(3) Cr.P.C. against the applicants in the court of Chief Judicial Magistrate, Bulandshahr in which a direction was issued to the Station House Officer to

register and investigate the case. Pursuant to the order passed by learned Magistrate the case was registered on 07.03.2007 vide crime no. 78 of 2007, under sections 304, 452, 323, 504, 506 IPC. The final report was, however, submitted by the concerned Investigating Officer. Informant then moved a protest petition before the concerned Magistrate and submitted that police has wrongly given the final report. The complainant has also filed the affidavits of the witnesses namely, Raj Kumar, Dharmendra, Kanchhid and Nem Pal along with his protest petition. It may also be indicated at this stage that earlier the police had submitted final report but the learned Magistrate had directed for further investigation.

4. The police concerned had again submitted the final report 3rd time on 20.03.2010, on which the learned Magistrate expressed his displeasure and observed that the police concerned had deliberately neglected to investigate on the particular aspect of the matter in terms of the direction issued and the learned Magistrate had observed that it appears that due to the influence of the opposite party the police is not investigating the matter in a proper manner. Resultantly the learned court below relying upon the material placed before him rejected the final report dated 19.03.2010 and took cognizance of an offence in exercise of power conferred under section 190(1)b of Cr.P.C. and summoned the applicants under section 304, 452, 504, 506 IPC.

5. Being aggrieved the applicants have preferred revision before the Additional Sessions Judge which was dismissed by order dated 21.10.2010.

6. The main contention of learned counsel for the applicants is that in addition to the statement recorded under section 161 Cr.P.C. the learned Magistrate also took into consideration the affidavit filed by the complainant. The argument proceeded, that once the Magistrate took into consideration the affidavits or material other than the material available in the case diary, the Magistrate has to deal with the case as a complaint case and he could summon the accused only after complying with the provisions of section 200 and 202 Cr.P.C. It was further contended that he could have taken cognizance under section 190(1)c Cr.P.C. as he has done in the present case. Reliance was placed upon the Division Bench judgment of this Court in the case of Mathura Prasad and others vs. State of U.P. And others, 2007(2)

7. On the other hand learned AGA has contended that the Magistrate is competent to take cognizance on the basis of protest petition under clause 1 of 190(1) Cr.P.C. He has further contended that it transpires that the learned Magistrate relying upon the statement of the complainant, medical report and the statement of the injured/deceased available in the police record straightway way summoned the accused-applicants, thus he was not required to follow the procedure laid down under section 200 and 202 Cr.P.C.

8. Heard learned counsel for the applicants and learned AGA and also perused the material placed on record.

9. The main controversy involved in this application centres round the scope of powers by the Magistrate under section 190(1)b Cr.P.C. on the protest petition duly supported by affidavit of the witnesses.

10. Indisputably section 190(1)b of Cr.P.C. entitles the Magistrate to took cognizance of an offence, even if police report is to the effect that no case is made out against the accused but while doing so the Magistrate shall take into account the statement of the witnesses examined by the police during the investigation and take cognizance of the offence and order the issue of process against the accused but this would apply only when the Magistrate relies upon the evidence, the material submitted before him in the form of case diary along with the final report. This is what observed by the Division Bench of this Court in the case mentioned hereinabove.

11. At the outset it must be clarified that the procedure for complaint case is never be misplaced to the right of the Magistrate to reject the final report which may be done with or without a protest petition. A protest petition cannot and should not be always compared to complaint unless either such statement is made by the complainant/informant that his petition be treated as a complaint within the meaning of section 190 Cr.P.C. or for some reason the Magistrate himself treats it as a complaint and follow the procedure contained in Chapters XV and XVI of the Cr.P.C. but it is to be made clear that if he relies upon the material other than what

the police had produced, the law does not permit him to take cognizance of an offence in exercise of power conferred under section 190(1)(b) Cr.P.C.

12. However, it will be relevant to indicate that merely filing of the protest petition or even some affidavits is not necessarily lead to the conclusion that Magistrate had proceeded to take cognizance under section 190(1)b Cr.P.C. relying upon the material other than material produced by the investigating agency.

13. Here in the present case the Magistrate while rejecting the final report and taking cognizance of an offence in exercise of power conferred under section 190(1)b Cr.P.C. has mentioned both material placed by the police as well as the protest petition accompanied with affidavits of certain witnesses but it has not been clarified by him in so many words that he has only placed evidence upon the material placed by the Investigating Officer before taking cognizance under section 190(1)b of Cr.P.C. which was in fact incumbent upon him. The impugned order transpires that he had placed reliance upon both the material placed by the police as well as the protest petition accompanied by the affidavits of some witnesses. This was not permissible under the law laid down by this Court, to take cognizance under section 190(1)b of Cr.P.C.

14. In such a circumstance, the procedure available to him was to record the statement under section 200 Cr.P.C. and then proceed in the matter in accordance with law. The law does not permit him to take cognizance straightway relying upon both the affidavits filed in support of protest petition as well as the material placed by the Investigating Officer.

15. The result of the above analysis of the legal position is that the Magistrate had power to take cognizance under section 190(1)b of Cr.P.C. on the police report in respect of opinion of the Investigating Officer that prima facie no case is made out upon the perusal of the police papers and statement of the witnesses recorded under section 161 Cr.P.C. as well as the medical report if any, if he is satisfied that there is sufficient material to make out prima facie case against the accused-applicants. He could not take cognizance straightway on the basis of the protest petition duly supported by the affidavits of the witnesses without following the procedure prescribed under Chapter XV and XVI of the Code of Criminal

Procedure for a complaint case. Resultantly the Magistrate had to make clear in so many words while taking cognizance under section 190(1)(b) of the code that he was really influenced and placed reliance only on the material produced by the police. In the instant case, it is not clear that the learned Magistrate was really influenced and placed reliance only on the material produced by the police or the Magistrate was also influenced by the affidavit of the witnesses filed in support of protest petition. Therefore, the impugned orders are not acceptable.

16. Taking note of the above facts and circumstances and the view expressed by the Division Bench of this Court, since the learned court below has not recorded the finding to the effect that by which material placed before him he was influenced before passing the impugned order under challenge in this application, the impugned orders dated 29.03.2010 and 21.10.2010 are, therefore, liable to be set aside.

17. The present application moved under section 482 Cr.P.C. succeeds and is hereby allowed. The impugned orders dated 29.03.2010 passed by Additional Chief Judicial Magistrate, Court No.2, Bulandshahr under sections 304, 452, 504, 506 IPC, Police Station Jahangirabad, District Bulandshahr in F.R. No. 391 of 2009, Ram Kumar vs. Munna and others and order dated 21.10.2010 passed by Additional District and Sessions Judge, Court No.8, Bulandshahr in Criminal Revision No. 151 of 2001 are hereby set aside with the direction to the learned Magistrate to make a fresh look and pass a fresh order in the matter in accordance with law in the light of what has been stated above.

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