

State Vs. Lal Singh and Others

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Court : Delhi

Decided On : May-16-2012

Judge : The Honourable Ms. Justice Mukta Gupta

Appeal No. : CRL. REV.P. NO. 425 OF 2009

Appellant : State

Respondent : Lal Singh and Others

Judgement :

MUKTA GUPTA, J.

(ORAL)

1. By this petition the State challenges the order of the Learned Additional Sessions Judge dated 12th December, 2008 whereby the Learned Additional Sessions Judge set aside the order of the Learned Metropolitan Magistrate dated 2nd September, 2008 dismissing the application of the Respondents seeking discharge under Section 155 (2) Cr.P.C.

2. Briefly the facts giving rise to the filing of the present petition are that the complainant Madan Gopal Arora was working as a Labour Inspector at Labour Department in Jhilmil Colony, Vishwakarma Nagar, Shadara and on 17th December, 2007 at about 10.30 AM he had gone to deliver a letter of meeting at the Mother Dairy office. After delivering the letter to the Assistant Manager, Mother

Dairy Shri R.T. Wadhwa and Vice-President Shri Rajbir when he was coming back to his office, the Respondents came and abused the complainant and gave beatings. On the allegations of the complainant FIR No. 624/2007 under Section 186/353/34 IPC was registered at PS Mandawali and after investigation charge-sheet was filed for offence punishable under Section 186/353/34 IPC.

3. The Learned Metropolitan Magistrate after hearing the parties on the order on charge came to the conclusion that no offence under Section 186/353/34 IPC was made out and the Respondents were liable to be prosecuted for offence punishable under Section 323/34 IPC. Thus, vide order dated 3rd June, 2008 the Learned Metropolitan Magistrate directed framing of notice against the Respondents under Section 323/34 IPC. The Respondents filed an application before the Learned Metropolitan Magistrate under Section 155 (2) Cr.P.C. seeking discharge in view of the fact that offence under Section 323 IPC is a non-cognizable offence and the Police could not have investigated the offence without the prior permission of the Learned Metropolitan Magistrate. Relying on Chaman Prakash Vs. State 2007 (3) JCC 1983 the Learned Metropolitan Magistrate dismissed the application as not maintainable. Aggrieved by the said order dated 2nd September, 2008 the Respondents filed a revision petition before the Learned Additional Sessions Judge. The Learned Additional Sessions Judge vide the impugned order dated 12th December, 2008 set aside the order of the Learned Metropolitan Magistrate dismissing the application under Section 155 (2) Cr.P.C. on the ground that the Magistrate should not have converted the case under Section 323/34 IPC because neither the cognizance was taken of that offence initially nor Police has alleged that any offence under Section 323/34 IPC was made out nor any permission has been sought by the Police to investigate the case of non-cognizable offence which is mandatory in nature. Hence the present petition.

4. I have heard learned counsel for the parties. The issue whether the investigation stands vitiated warranting quashing of the FIR in a case where initially FIR is registered for cognizable offence however the charge is framed for non-cognizable offence, was referred to the Division Bench of this Court in N.K. Sharma Vs. State CRLMM 2042/2001 in view of the conflict in decisions of the

Learned Single Judges of this Court in Mamchand and Ors. Vs. State 78 1999 DLT 2 and Ranbir Prakash Vs. State 27 (1985) DLT 242. Answering the reference it was held:

“It is one thing to say that the allegations made in the first information report does not disclose a cognizable offence and it is another thing to say that either upon investigation or at the time of trial the Court having regard to the materials on record come to a conclusion that in fact the accused is guilty of offence which was non-cognizable in nature.

Furthermore even at this stage, the accused persons cannot take recourse of the provisions of Section 482 of the Code of Criminal Procedure praying for quashing of first information report inasmuch as not only charge-sheet has been filed but cognizance of the offence has been taken by the Magistrate concerned in exercise of his power under Section 190 of the Code of Criminal Procedure. The very fact that the learned Magistrate upon application of his mind on the basis of the material which was pressed before him pursuant to or in furtherance of the investigation carried out satisfied himself that there exists materials for taking cognizance of a cognizable offence and further more even came to the conclusion that an order directing charge under Section 324/34 IPC should be framed, it cannot be said that in this situation, Section 155(2) of the Criminal Procedure Code would come into play. The decision of the learned Single Judge of this Court in Mam Chand (supra) must be viewed from that angle. In that case the learned Single Judge has come to the conclusion that having regard to the material on record no cognizable offence was found to have committed. In that view of the matter and relying upon the decisions referred to therein it was held:-

“I do not find much substance in the contention urged on behalf of the State that since the FIR was registered under Section 324 IPC and the said offence being cognizable, there was no bar in the police investigating the case. Once, on the circumstances prevalent at the time of registration of the case, it is evident that a non-cognizable offence is not made out, permitting the police to first register a cognizable offence, carry out investigations and ultimately if it is found that a cognizable offence was not made out, would be giving a long rope to the police.

The nature of the offence is to be gathered from the facts available at the relevant time and if there is a doubt as to whether a cognizable offence is made out or not, the police can report it to the Magistrate concerned and obtain appropriate orders. On the one hand, no prejudice will be caused to the prosecution by adopting a safer course and on the other it will eliminate the possibility of misuse of power by the police. This approach will also be in consonance with the spirit and intention of Section 155 of the Code.”

On the other hand the Apex Court in H.N. Rishbud (supra) categorically held that even if there was certain irregularities at the time of first information report or complaint, the same would not vitiate the trial in the following terms:-

“The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises.

A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 Cr.P.C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190 Cr.P.C. is one out of a group of sections under the heading “Conditions requisite for initiation of proceedings”. The language of this section is marked contrast with that of the other sections of the group under the same heading, i.e., Section 193 and 195 to 199.

These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, Clauses (a), (b) and (c) of Section 190(1) are

conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either Clause (a) or (b) of Section 190(1). (whether it is the one or the other we need not pause to consider and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537 Cr.P.C. which is in the following terms is attracted:

“Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge proclamation, order, judgment or other proceedings before or during trial or in an enquiry or other proceedings under this code, unless such error omission or irregularity has in fact occasioned a failure of justice.”

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in ‘Prabhu v. Emperor, AIR 1944 PC 73 (C) and ‘Lumbhardar Zutshi v. The King. AIR 1950 PC 26 (D). These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present case with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby.”

There is another aspect of the matter which must also be taken note of viz. the definition of “complaint” as contained in Section 2(d) of the Code of Criminal Procedure, which reads as under:-

“2(d) “complaint” means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation - A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant.;

The functions of explanation as stated by the Apex Court in S.Sundaram Pillai etc., Vs. R. Pattabiraman AIR 1985 Supreme Court 582 are:-

“The object of an explanation to a statutory provision is-

- a) to explain the meaning and intendment of the Act itself
- b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserved.
- c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful.
- d) an explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purpose and intendment of the enactment, and right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.”

Thus by reason of the aforementioned explanation appended to Section 2(d); intendment of the Act itself has been manifested. Thus even if the learned Magistrate could not have taken cognizance on the basis of the report filed by the police authorities under Section 173 of the Code of Criminal Procedure he could have treated the said charge-sheet to be a complaint and take cognizance

thereupon. This is pointed out only for the purpose of showing that even if the matter is considered from this angle we have no other option but to reach to the conclusion that the trial in a case of this nature would not be vitiated.”

5. In the present case the FIR was registered under Section 186/353/34 IPC. Charge-sheet was filed for offences under Section 186/353/34 IPC and the cognizance was taken thereon for the said offences. Thus, prima facie Learned Metropolitan Magistrate was of the view that offences under Section 186/353/34 IPC are made out. It is eventually at the time of charge that the Learned Metropolitan Magistrate came to the conclusion that only offences under Section 323/34 IPC are made out. In view of the fact that no permission to investigate the same under Section 155 (2) Cr.P.C. was taken from the Learned Metropolitan Magistrate the entire investigation cannot be said to have vitiated as held by the Hon'ble Supreme Court in H.N. Rishbud (supra) nor the Respondents can claim discharge on that basis. In such a situation the charge-sheet has to be treated as a complaint in view of the explanation to Section 2(d) Cr.P.C. and the Police officer filing the charge-sheet as complainant. Thus, the order of the Learned Additional Sessions Judge setting aside the order of the Learned Metropolitan Magistrate is illegal.

6. There is yet another illegality in the order of the Learned Additional Sessions Judge. The Learned Additional Sessions Judge held that the Learned Magistrate could not have converted the case to one under Section 323/34 IPC because neither cognizance was taken of that offence nor the Police had alleged that any offence under Section 323/34 IPC was made out. The law on the point is well-settled. Even if the Police does not file a charge-sheet for a particular offence, though made out on the facts of the case, nor does the Magistrate take cognizance thereon, at the stage of framing of the charge the Learned Trial Court is supposed to apply its independent mind and come to the conclusion as to what offences are made out from the evidence collected by the prosecution. At that stage the Trial Court is not bound by the offences invoked in the charge-sheet or the offences for which cognizance has been taken.

7. In *Century Spinning and Manufacturing Co. Ltd. and Ors. Vs. State of Maharashtra* (1972) 3 SCC 282 their Lordships held:

17. Coming now to the facts of this case, in our view, the question principally depends on the scope and effect of the notification, dated September 22, 1949, the circular, dated November 2, 1964, and the Deviation Order, dated June 25, 1965. If, on this material, the Court comes to the conclusion that there is no ground for presuming that the accused has committed an offence, then it can appropriately consider the charge to be groundless and discharge the accused. The argument that the Court at the stage of framing the charges has not to apply its judicial mind for considering whether or not there is a ground for presuming the commission of the offence by the accused is not supportable either on the plain language of the section or on its judicial interpretation or on any other recognized principle of law. The order framing the charges does substantially affect the person's liberty and it is not possible to countenance the view that the Court must automatically frame the charge merely because the prosecuting authorities, by relying on the documents referred to in Section 173, consider it proper to institute the case. The responsibility of framing the charges is that of the Court and it has to judicially consider the question of doing so. Without fully advertent to the material on the record it must not blindly adopt the decision of the prosecution.

8. In view of the aforesaid discussion the impugned order dated 12th December, 2008 is set aside. The Learned Trial Court will now proceed against the Respondents for offence under Section 323/34 IPC treating the charge-sheet as a complaint in terms of Section 2(d) of the Cr.P.C. Petition is accordingly disposed of.

9. Trial Court Record be sent back.

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