

AFR
Court No. - 29
Reserved On.- 12.1.2021
Delivered On.- 1.3.2021

Criminal Misc. Writ Petition No.10162/2020

Petitioner :- Namdev Sharma
Respondent :- State of U.P. and others
Counsel for Petitioner :- Manish Tiwari, Kartikeya Saran
Counsel for Respondent :- Ms. Katyayini, Ms. Manju Thakur,
A.G.A.

Hon'ble Pankaj Naqvi, J.
Hon'ble Vivek Agarwal, J.

Heard Sri Manish Tiwari, the learned Senior Counsel assisted by Sri Kartikeya Saran for the petitioner, Ms. Katyayini, learned counsel for the informant and Ms. Manju Thakur, the learned AGA.

1. The dispute between the parties is essentially relating to maladministration and misfeasance of the trust properties situate at Mathura in which both sides are trading allegations against each other.

2. Sri Swami Gopanand Ban Maharaj / respondent no. 4 lodged an FIR against the petitioner on 9.12.2018 as Case Crime No.1783/2018, under Sections 420/467/468/471/506 IPC in which after investigation, a final report came to be submitted on 7.1.2019. Respondent no. 4 filed a protest on 24.4.2019 before the learned CJM, Mathura who on 23.12.2019 rejected the final report and directed the matter to be treated as a complaint fixing dates for statements under Section 200 Cr.P.C. Meanwhile, the petitioner (Namdev Sharma) lodged two FIR's relating to forgeries and illegalities committed against respondent no.4 on 11.10.2019 and 25.10.2019 as Case Crime Nos.930/2019, under Sections 420/467/468/471/504/506/120-B IPC & 964/2019, under Sections 420/406/506 IPC, wherein

after investigation, a charge-sheet came to be submitted on 20.2.2020 in Case Crime No.964/2019 against respondent no.4. It appears that respondent no. 4 not being satisfied with the investigation, preferred an application dated 14.9.2020 before the I.G., Agra Zone in which on the same date, he directed the S.S.P., Agra to get all the 3 matters investigated by the Crime Branch and directed to submit a progress report by 30.9.2020. Consequently investigation of all the 3 cases was handed over to Crime Branch on 16.9.2020. Challenging the orders dated 14.9.2020 and 16.9.2020, the present writ petition has been filed.

3. The learned Senior Counsel for the petitioner assiduously urged that once Case Crime No.1783/2018 after investigation on a protest, has been directed to be treated as a complaint then it was not open for respondent no.2 to transfer the investigation relating to the said case to the Crime Branch. To put it differently once the learned Magistrate under the order dated 23.12.2019 decided to take recourse and proceeded under Chapter XV of the Code then unless the learned Magistrate at the stage of Section 202 Cr.P.C itself directs for investigation to be conducted by police, the matter cannot be investigated by the police, the impugned order passed by respondent no. 2 is not sustainable in law in the garb of further investigation that too with no prior permission of the learned Magistrate.

4. Learned counsel for the informant and the learned AGA vehemently opposed the submissions on the premise that the contentions raised have no force as the option for the petitioner is to approach the Magistrate concerned under Section 210 of the Code.

5. It is well settled that in the event a police report is submitted disclosing commission of no offences before the

Magistrate concerned, then such Magistrate shall have the following options:

- (i) He may reject the report and proceed to take cognizance on available materials.*
- (ii) He before accepting the report shall put the informant to notice as to why the closure report be not accepted, who would be at liberty to file a protest.*
- (iii) He may take cognizance on a protest as a complaint.*
- (iv) He may not accept the report and call for further investigation.*
- (v) He while rejecting the protest may accept the final report.*

Reference is made to the decisions of the Apex Court in **Abhinandan Jha vs. Dinesh Mishra, AIR 1968 SC 117, H.S. Bains vs. State of U.P., AIR 1980 SC 1883, India Carat Pvt. Ltd. vs. State of Karnataka, AIR 1989 SC 885, Bhagwant Singh vs. Commissioner of Police, (1985) 2 SCC 537 and Vishnu Kumar Tiwari vs. State of U.P., (2019) 8 SCC 27.**

6. Admittedly petitioner is an accused in a complaint case which is pending at the stage of Section 200 Cr.P.C as also investigation by Crime Branch is pending against him in Case Crime No.1783/2018 which is the genesis of the said complaint. The resultant scenario is that in respect of same offence, petitioner is facing a complaint case as well as investigation by police authorities.

7. Section 210 of the Code is a self-contained provision which provides a mechanism to deal with such situations where a complaint case and police investigation in respect of same offence is being proceeded. Section 210 of the Code is extracted hereunder:

210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.

(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code.

8. A perusal of the aforesaid provision indicates that in a case which is instituted on a complaint, the Magistrate is made to appear during the inquiry or trial that a police investigation is also in progress in respect of same offence, he shall stay the proceedings of the complaint case and call for a report from the Investigating Officer and upon receipt of such report if he takes cognizance of offence against a person who is an accused in complaint case, both the cases shall be tried together as a police case and if the police report is not related to the accused in complaint or no cognizance has been taken then complaint case shall proceed in accordance with law.

9. We, in view of above provisions, are of the considered view that as a complaint case and a police investigation against

the petitioner are being proceeded in respect of same offence, the provisions of Section 210 are squarely attracted and thus the contention of the learned Senior Counsel for the petitioner that provision of Section 210 would not be attracted as the proceedings had originally not arisen on a complaint rather on an FIR is liable to be rejected outrightly as the cognizance of the offence was taken on a protest now treated as a complaint. To attract the applicability of Section 210 of the Code, the case before the Magistrate is to be instituted on a complaint. To ascertain as to whether a protest petition can be treated as complaint or not, it would be noteworthy to place reliance on the decision of the Apex Court in **Vishnu Kumar Tiwari (supra)** wherein it is held in paragraph-46 thereof that if a protest petition fulfills the requirement of a complaint, the Magistrate may treat the protest as a complaint and deal with the same as required under Section 200 read with Section 202 of the Code.

10. The next submission of the learned Senior Counsel is that even though the matter is pending before the Magistrate yet police investigation is being carried on without any approval of the Magistrate which cannot be countenanced in law. The submission appears to be attractive but deserves to be rejected only on the premise that Section 210 of the Code itself contemplates such a scenario wherein the learned Magistrate is vested with the powers to consolidate and proceed as a police case while staying the complaint proceedings and after calling a police report from the Investigating Officer.

11. We now propose to deal with the judgments cited by the learned Senior Counsel for the petitioner. The judgments of the learned Single Judges in **Dharmendra Swami vs. State of U.P. (2007) 2 JIC 275** and **Harkesh vs. State of U.P., (2002) Cr.L.J. 285** and the decisions of the Apex Court in **H.S. Bains (supra)**, **India Carat Pvt. Ltd. (supra)** essentially rely on **Abhinandan Jha (supra)** that Magistrate is not bound with the

conclusion of the police report, opining that no offence is made out and that in an appropriate case the Magistrate can take cognizance under Section 190(1)(a) on the basis of protest petition, which is an undisputed position. The decision in **A.R. Antulay vs. R.S. Nayak, AIR 1984 SC 718** deals with an issue involving a private complaint lodged under Prevention of Corruption Act, 1947, before a Special Court wherein the Apex Court inter alia held that Special Judge was competent to take cognizance on a private complaint. Lastly reliance is placed on **Suresh Chand Jain vs. State of Madhya Pradesh, AIR 2001 SC 571** which unfortunately has no relevance with the fact in issue.

12. We, in the ultimate analysis, are of the view that the orders impugned relating to transfer of investigation and handing over the cases to the Crime Branch do not suffer from any error apparent on the face of record.

13. The writ petition is dismissed.

Order Date:- 1.3.2021

Chandra

(Vivek Agarwal, J) (Pankaj Naqvi, J)