REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 914 OF 2009
(Arising out of SLP (Crl.) No.3813 of 2005)

Dharmeshbhai Vasudevbhai & Ors. … Appellants

Versus

State of Gujarat & Ors. … Respondents

WITH

CRIMINAL APPEAL NOS. 915, 916, 917 and 918 OF 2009
(Arising out of SLP (Crl.) Nos.3839, 3565, 3754 and 3771 of 2005)

J U D G M E N T

S.B. Sinha, J.

1. Leave granted.

2. These appeals arising out of a common judgment were taken up for hearing together.

Appellants herein are depositors in City Cooperative Bank Ltd. (the Bank), a bank incorporated and registered under the Gujarat Co-operative Societies Act, 1962.

3. Some of the borrowers had mortgaged their properties with the bank. Alleging commission of offences under Sections 406, 420, 423, 465, 477, 468, 471, 120(B), 124 and 34 of the Indian penal Code and investigation against the accused persons - respondents herein, the bank filed a complaint petition before the Second Court of Judicial Magistrate First Class, Surat praying for a direction upon the Rander Police Station to register a complaint.

By an order dated 11.6.2004, the learned Magistrate upon consideration of the said allegations directed as under :

> "The complaint is hereby ordered to be registered as the Inquiry Case and is ordered to be sent to Rander Police Station under Section 156(3) for the Police Investigation. On being investigating the offence the Investigating Officer has to submit the report of Investigation on or before 12.7.2004 before this Court."

4. However, the complainant filed an application before the learned Magistrate on or about 6.7.2004 informing the learned Court that a

compromise had been entered into by and between the accused and the bank pursuant whereto and in furtherance whereof, an order was passed, directing:

> "As the compromise has been taken place between the complainant and the accused which is being proclaimed by Ex.4, the complainant don't want to proceed further with the complaint, the order is being passed to withdraw the inquiry. It is to be informed to the concerned Police Station."

5. Questioning the legality and validity thereof, the appellants filed Writ Petitions before the High Court.

The main judgment was passed in the case of Writ Petition No.3771 of 2005. Before the High Court, a contention was raised that once a complaint is sent for registration of the first information report and investigation on the allegations contained therein, the learned Magistrate had no jurisdiction to recall the order. Reliance in this behalf, inter alia, was placed on the decision of this Court in Subramanium Sethuraman v. State of Maharashtra & Anr. [2004 (7) SCALE 733].

The High Court, however, upon taking note of the fact that at the relevant point of time, an administrator had been functioning under the direct control and supervision of the District Registrar, Co-operative Societies, in absence of any allegation that he had exercised his power mala fide, declined to interfere with the said order dated 6.7.2004, stating :

> "It appears that the petitioners were not in the picture, either at the time when the complaint was filed and/or at the time when the learned Magistrate passed the order for investigation under Section 156(3) of Cr.P.C. or at the time when the settlement purshis was filed and the learned Magistrate passed the offer of recalling the inquiry in the month of July 2004. As such in normal circumstances, the petitioners who are depositors of the bank can be said as third party to the programmes of the complaint and subsequent there to in case of S.M.S. Jayaraj (Supra), the case before the Apex Court was pertaining to the grant of licence for liquor and, therefore, while considering the question of locus standi it was observed that the appellant before the Apex Court was the person, who was having the business in the area can have locus. In any case, it was not matter for considering the question of locus standi in criminal prosecution and, therefore, the said decision is of no help to the petitioners."

6. Mr. U.U. Lalit, learned senior counsel appearing on behalf of the appellant, would submit that the High Court committed a serious error in passing the impugned order insofar as it failed to take into consideration that the learned Magistrate could not have recalled his earlier order passed in terms of sub-section (3) of Section 156 of the Code of Criminal Procedure.

7. Mr.R.S. Suri, learned counsel appearing on behalf of the respondent, on the other hand, supported the impugned judgment.

8. It is well settled that any person may set the criminal law in motion subject of course to the statutory interdicts. When an offence is committed,

a first information report can be lodged under Section 154 of the Code of Criminal Procedure (for short, 'the Code'). A complaint petition may also be filed in terms of Section 200 thereof. However, in the event for some reasons or the other, the first information report is not recorded in terms of sub-section (1) of Section 156 of the Code, the magistrate is empowered under sub-section (3) of Section 156 thereof to order an investigation into the allegations contained in the complaint petition. Thus, power to direct investigation may arise in two different situations – (1) when a first information report is refused to be lodged; or (2) when the statutory power of investigation for some reason or the other is not conducted.

When an order is passed under sub-section (3) of Section 156 of the Code, an investigation must be carried out. Only when the investigating officer arrives at a finding that the alleged offence has not been committed by the accused, he may submit a final form; On the other hand, upon investigation if it is found that a prima facie case has been made out, a charge-sheet must be filed.

9. Interference in the exercise of the statutory power of investigation by the Police by the Magistrate far less direction for withdrawal of any investigation which is sought to be carried out is not envisaged under the Code of Criminal Procedure. The Magistrate's power in this regard is

limited. Even otherwise, he does not have any inherent power. Ordinarily, he has no power to recall his order.

This aspect of the matter has been considered by this Court in S.N. Sharma v. Bipen Kumar Tiwari & Ors. [(1970) 1 SCC 653], wherein the law has been stated as under :

> "**6.** Without the use of the expression "if he thinks fit", the second alternative could have been held to be independent of the first; but the use of this expression, in our opinion, makes it plain that the power conferred by the second clause of this section is only an alternative to the power given by the first clause and can, therefore, be exercised only in those cases in which the first clause is applicable.
>
> **7.** It may also be further noticed that, even in sub-section (3) of Section 156, the only power given to the Magistrate, who can take cognizance of an offence under Section 190, is to order an investigation; there is no mention of any power to stop an investigation by the police. The scheme of these sections, thus, clearly is that the power of the police to investigate any cognizable offence is uncontrolled by the Magistrate, and it is only in cases where the police decide not to investigate the case that the Magistrate can intervene and either direct an investigation, or, in the alternative, himself proceed or depute a Magistrate subordinate to him to proceed to enquire into the case. The power of the police to investigate has been made independent of any control by the Magistrate."

Interpreting the aforementioned provisions vis-a-vis the lack of inherent power in the Magistrate in terms of Section 561-A of the Old Criminal procedure Code (equivalent to Section 482 of the new Code of Criminal procedure), it was held :

> "**10.** This interpretation, to some extent, supports the view that the scheme of the Criminal Procedure Code is that the power of the police to investigate a cognizable offence is not to be interfered with by the judiciary. Their Lordships of the Privy Council were, of course, concerned only with the powers of the High Court under Section 561-A CrPC, while we have to interpret Section 159 of the Code which defines the powers of a Magistrate which he can exercise on receiving a report from the police of the cognizable offence under Section 157 of the Code. In our opinion, Section 159 was really intended to give a limited power to the Magistrate to ensure that the police investigate all cognizable offences and do not refuse to do so by abusing the right granted for certain limited cases of not proceeding with the investigation of the offence."

Yet again in Devarapalli Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors. [(1976) 3 SCC 252], this Court, upon comparison of the provision of the old Code and the new Code, held as under :

> **"7. S**ection 156(3) occurs in Chapter XII, under the caption : "Information to the Police and their powers to investigate"; while Section 202 is in Chapter XV which bears the heading: "Of complaints to Magistrates". The power to order police investigation under Section 156(3) 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. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate *before* he takes cognizance of the offence under Section 190(l)(*a*). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding". Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him."

10. The learned Magistrate directed carrying out of an investigation by the investigating officer and submit a report to it. If an investigation was to be

carried out in terms of Section 156(3) of the Code, the same could not have been equated with an enquiry as the two expressions have differently been defined in Section 3(h) and 3(i) of the Code. In any event, the learned Magistrate did not have any jurisdiction to recall the said order. The High Court, therefore, in our opinion was not correct in refusing to consider the contention raised on behalf of the appellants that the Magistrate had no jurisdiction in that behalf. The High Court, apart from exercising its supervisory jurisdiction under Articles 227 and 235 of the Constitution of India, has a duty to exercise continuous superintendence over the Judicial Magistrates in terms of Section 483 of the Code of Criminal Procedure. It reads as under :

> **"Section 483—Duty of High Court to exercise continuous superintendence over Courts of Judicial Magistrates—**Every High Court shall so exercise its superintendence over the Courts of Judicial Magistrates subordinate to it as to ensure that there is an expeditious and proper disposal of cases by such Magistrates."

11. When an order passed by a Magistrate which was wholly without jurisdiction was brought to the notice of the High Court, it could have interfered therewith even suo motu.

In Adalat Prasad v. Rooplal Jindal & Ors. [(2004) 7 SCC 338], although this aspect of the matter has not been considered but having regard

to the power exercised by the Magistrate under Chapter XVI and XVII of the Code, it was held :

> "**14.** But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under Section 204 of the Code. Therefore, what is necessary or a condition precedent for issuing process under Section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under Section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under Section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in *Mathew case*1 that before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Sections 200 and 202, and the only stage of dismissal of the complaint arises under Section 203 of the Code at which stage the accused has no role to play, therefore, the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under Section 203 of the Code on a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage."

Adalat Prasad has been followed by this Court in Everest Advertising (P) Ltd. v. State, Government of NCT of Delhi & Ors. [(2007) 5 SCC 54] and Dinesh Dalmia v. CBI [(2007) 8 SCC 770].

To the same effect is the decision of this Court in S. Suresh v. Annappa Reddy (Dead) by LRs. [(2004) 13 SCC 424].

12. For the reasons aforementioned, the impugned judgments cannot be sustained which are set aside accordingly. Other impugned judgments have been passed by the High Court relying on the judgment and order passed in SCRLA No.701 of 2005. It is, however, made clear that we have not entered into the merit of the matter. We furthermore make it clear that in the event the accused persons intend to question the legality of the order passed by the learned Magistrate dated 11.6.2004, they will be at liberty to take recourse to the remedies available to them in law.

13. The appeals are allowed accordingly.

……..…….J.
[S.B. Sinha]

..……..……J.
[Cyriac Joseph]

New Delhi;
May 5, 2009