

(2003) 09 AHC CK 0285

Allahabad High Court

Case No: Criminal M.W.P. No. 1708 of 2003

Rana Lal Virendra Vikram Narain
Singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision: Sept. 5, 2003

Acts Referred:

- Constitution of India, 1950 - Article 226
- Criminal Procedure Code, 1973 (CrPC) - Section 156(3), 164, 167, 173, 210

Citation: (2004) 2 ACR 1544

Hon'ble Judges: K.N. Sinha, J

Bench: Single Bench

Advocate: Gyanendra Sirvastava, for the Appellant; A.G.A., for the Respondent

Final Decision: Dismissed

Judgement

K.N. Sinha, J.

By means of present writ petition under Article 226 of the Constitution of India, the Petitioner has prayed for issue of the writ in the nature of certiorari for quashing of the orders dated 28.2.2003 and 11.3.2003 (Annexures-3 and 4 to the writ petition).

2. The brief facts giving rise to the present writ petition are that the Petitioner filed an application u/s 156(3), Cr. P.C. against Respondent Nos. 4 and 5 in the Court of Additional Chief Judicial Magistrate I, Ballia. The Additional Chief Judicial Magistrate I, Ballia by order dated 22.2.2003 directed the concerned S.O. to register and investigate the case. In pursuance of the said order, the F.I.R. No. 14 of 2003 was lodged against Respondent Nos. 4 and 5. The Respondent Nos. 4 and 5 approached the Additional Chief Judicial Magistrate I, Ballia with request that the arrest may not be made during the investigation. The Additional Chief Judicial Magistrate I, Ballia by order dated 28.2.2003 directed the S.O. Gadwar not to arrest the Respondent Nos. 4 and 5 without obtaining warrant from the Court. The Petitioners filed revision

against the said order which was dismissed by incharge Sessions Judge, Ballia on 11.3.2003.

3. The Petitioner filed the writ petition on the ground that by passing the order for investigation (Annexure-1 to the writ petition), the Court became functus officio. No revision was preferred against the order dated 22.2.2003, hence, the order became final. There is express bar contained in Section 362, Cr. P.C. that the criminal court cannot review or amend its order. The Magistrate has over-stepped in the jurisdiction of police. Hence the order for stay of arrest is illegal and bad in the eye of law.

4. I have heard the learned Counsel for the Petitioner, learned A.G.A. and have perused the record of the case.

5. The investigation was ordered on the application of the Petitioner and F.I.R. was also lodged. However, when the proposed accused, Respondent Nos. 4 and 5, approached the Magistrate, the Magistrate directed the concerned S.O. not to arrest them without obtaining warrant from the Court. This order has been termed to be a review of the original order of investigation. The learned Counsel for the Petitioner has taken me through Section 362, Cr. P.C. Section 362, Cr. P.C. runs as follows:

Court not to alter judgment.--Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.

6. The learned Counsel for the Petitioner has also relied upon a judgment in the case of Sabir v. Jaswant and Ors. 2002 (2) ACR 1752: 2002 (45) ACC 394, which only lays down that the order directing the investigation is not an interlocutory order but a final order against which a revision lies. Similar view was expressed in Shanker Agarwal v. Chief Judicial Magistrate Ballia and Ors. (30) 1993 ACC 28. It appears that on the strength of above two judgments of this Court the learned Counsel for the Petitioner wants to convey that order u/s 156(3), Cr. P.C. had become final and the Magistrate could not pass the order dated 28.2.2003.

7. In this connection the learned Counsel for the Petitioner has relied upon a case [State of Kerala Vs. M.M. Manikantan Nair](#), . This authority lays down that Section 362, Cr. P.C. prohibits the Court, after it has signed its judgment or final order disposing a case, from altering or reviewing the said judgment or order except to correct a clerical or arithmetical error. The facts of the case before the Apex Court were, that by the first order, the High Court rejected the prayer of the Respondent for quashing the criminal proceeding. This order attained its finality. By the impugned order, the High Court reversed its earlier order and quashed the criminal proceeding for want of proper sanction. The Apex Court, on the fact of the above case held that by no stretch of imagination it can be said that by the impugned order the High Court only corrected any clerical or arithmetical error. In fact the

impugned order is an order of review, as the earlier order was reversed, which could not have been done as there is no such provision under the Code of Criminal Procedure, but there is an interdict against it.

8. I have carefully perused the above judgment of Hon"ble Apex Court and find that the facts of the case at hand are quite different. The application u/s 156(3), Cr. P.C. was no doubt disposed of finally by directing the concerned S.O. to investigate the matter, but the said order remains intact even if the Court ordered that the arrest should not be made without warrant from the concerned Magistrate.

9. In *Masuriyadin and Ors. v. Additional Sessions Judge, Allahabad and Ors.* 2001 (3) ACR 2843 this Court had dealt with the question of arrest in such case and observed as follows:

In view of what has been stated above, it is directed that for the investigation, pursuant to the Magistrate's order dated 25.4.2001, the police will not arrest the applicants without first obtaining the warrant of arrest from the Magistrate, if the arrest is considered necessary.

10. This view was further elaborated by this Court in *Gulab Chand Upadhyaya v. State of U. P. and Ors.* 2002 (1) ACR 644. This Court held that the arrest is no doubt a part of investigation but the Magistrate can place restriction upon the power of arrest of police. This question was dealt with, in paras 15, 16 and 17 of the judgment and concluded that this will not amount to interference by the Magistrate in the investigation as during the investigation the Magistrate has to discharge many functions. The answer, to the argument of the learned Counsel for the Petitioner that it will amount to interference in the investigation, is contained in para 16 of the above judgment in the case of *Gulab Chand Upadhyaya's case (supra)*, which is quoted as follows:

Now about the powers of Magistrate to override the investigating agency even during pendency of investigation. Firstly, he can release the accused by refusing remand (Section 167). Secondly, he can grant bail to accused (Section 437). Thirdly, he can release seized property (Section 457). Fourthly, during progress of investigation by police, the Magistrate is empowered by Section 164 to record any confessional statement. He is also empowered by the same section to record on oath any statement other than confession, and that statement would form an important part of investigation. Fifthly, if investigation is in progress and in the meantime a criminal complaint is filed, the Magistrate can require the "Investigating Officer" to submit a "report" u/s 210(1). The proposition that the word "report" in Sub-section (1) of Section 210 means a "report" u/s 173, is supported by some precedents, with exceptions also. But I am of the view that it could only mean a charge-sheet or final report (under Section 173). This view is based upon Sub-section (2) of Section 210 which expressly refers to Section 173, and also upon the fact that Sub-section (3) of Section 210 can come into play only if the police report called u/s

210(1) is a charge sheet or final report. From all these provision, it is clear that though the Magistrate is not expected to intervene in day-to-day investigation but he is not completely deprived of his powers till the end of investigation.

11. Thus, the direction of the Magistrate not to arrest the Respondent Nos. 4 and 5 without obtaining warrant would not amount to altering or reviewing the order dated 22.2.2003 (Annexure-1 to the writ petition) and it is not hit by the provision of Section 362, Cr. P.C. It is now settled that this kind of order does not amount to override the power the investigating agency.

12. The writ petition, therefore, lacks merit and is hereby dismissed.