Father Thomas Vs State of U.P. and Another

Court: Allahabad High Court

Date of Decision: Sept. 28, 2001

Acts Referred: Constitution of India, 1950 â€" Article 226
Criminal Procedure Code, 1973 (CrPC) â€" Section 153(3), 173(8), 190(1), 193, 195

Citation: (2001) 3 ACR 2504

Hon'ble Judges: J.C. Gupta, J

Bench: Single Bench

Advocate: Samit Gopal, G.S. Chaturvedi, K.D. Tiwari, P.R. Maurya, Sunil Kumar, M.K. Shukla and Rajiv Sisodia, for the Appellant; A.G.A, for the Respondent

Judgement

J.C. Gupta, J.
All these revisions have been preferred against the orders of the Magistrate made in exercise of powers conferred u/s 156

(3) of the Code of Criminal Procedure (here-in-after referred to as the "Code") whereby a direction has been issued to police to register first

information reports and investigate the same.

2. The Court has heard Sri G. S. Chaturvedi, senior advocate, Sri K. D. Tiwari, Sri P. R. Maurya, Sri Sunil Kumar, Sri M. K. Shukla and Sri

Rajiv Sisodia for the applicants in the above revisions and the learned A.G.A. for the State.

3. A preliminary objection was raised by learned A.G.A. regarding the maintainability of these revisions. It was submitted by learned A.G.A. that

in all these revisions, orders made u/s 156 (3) of the Code are not open to challenge for two reasons, firstly, an accused has no locus standi in the

matter and is not entitled to be heard until process is issued against him on the basis of report submitted by police after investigation u/s 173, Cr.

P.C. According to him, no revision is maintainable under the Code at the instance of a person against whom neither cognizance of the offence has

been taken nor process issued. Secondly, that by the mere order of registration of case and investigation made u/s 156 of the Code, the rights and

liabilities of a person named therein as an accused are not adversely affected nor such order finally decides the proceedings, therefore, such an

order is "interlocutory" in nature against which no revision lies on account of statutory prohibition as contained in Sub-section (2) of Section 397 of

the Code.

4. On the other hand, relying upon a Division Bench decision of this Court in Ajay Malviya v. State of U.P. and Ors. XIL 2000 ACC 435 , it was

urged by Sri G. S. Chaturvedi that as the order made u/s 156 (3) of the Code requires application of judicial mind, it is open to challenge in

revision before this Court or the Sessions Judge, as the case may be. It was further submitted by Sri G. S. Chaturvedi that in the case of State of

Haryana and others Vs. Ch. Bhajan Lal and others, , it was held that this Court possesses extraordinary inherent powers to quash an F.I.R. or

complaint on limited grounds such as that the allegations made in the first information report/complaint taken at their face value do not disclose

commission of any offence or that the allegations are so patently absurd and inherently improbable that no reasonable man would ever believe them

to be true or that the first information report/complaint has been lodged with a strong mala fide. According to him, on these grounds, therefore, an

order made u/s 156 (3) can be challenged in revision.

5. In reply, learned A.G.A. submitted that the proper remedy open for the applicants was to seek extraordinary jurisdiction of this Court under

Article 226 of the Constitution, if they wanted quashing of the first information report on the grounds enumerated in Bhajan Lal"s case (supra). It

was further submitted that the decision of Division Bench of this Court in Ajay Malviya"s case (supra) requires re-consideration.

6. Chapter XIV of the Code of Criminal Procedure deals with the conditions requisite for initiation of proceedings. u/s 190 (1) of the Code, a

Magistrate is empowered to take cognizance of any offence. Section 190 (1), Cr. P.C. is reproduced below:

190. Cognizance of offence by Magistrates.--(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of

the second class specially empowered in this behalf under Sub-section (2) may take cognizance of any offence:

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

7. The fourth mode for taking cognizance by Sessions Court is provided in Section 193, Cr. P.C., which lays down that ""except as otherwise

expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a

court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

8. Upon receiving a complaint or an application u/s 156 (3) which otherwise tantamounts to complaint within the meaning of Clause (d) of Section

2 of the Code, there are two courses open to the Magistrate, he may take cognizance u/s 190 (1) (a) or instead of taking cognizance at once, he

may send complaint/application u/s 156 (3) for police investigation.

9. Where the first course is adopted, the Magistrate has to proceed in the manner provided in Chapter XV of the Code. Section 200 provides that

a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any. If the

Magistrate finds that there is sufficient ground for proceeding, he may issue process u/s 204 of the Code. However, when the Magistrate is not so

satisfied, he may either dismiss the complaint u/s 203 or postpone the issue of process and take recourse to Section 202, which provides that he

may inquire into the case himself or may direct an investigation to be made by a police officer or such other person as he thinks fit for the purpose

of deciding whether or not there are sufficient grounds for proceeding, provided that no such direction for investigation can be issued where the

offence complained of is triable exclusively by the Court of Session.

10. The question of making compliance of the proviso to Sub-section (2) of Section 202 will arise only in cases where the Magistrate before taking

cognizance of the case decides to hold the inquiry himself. The matter was thoroughly examined by the Apex Court in Rosy and Another Vs. State

of Kerala and Others, Observations made in paragraph 37 of the report are quoted below:

Therefore, the question of complying with the proviso to Sub-section (2) of Section 202 would arise only in cases where the Magistrate before

taking cognizance of the case decides to hold the inquiry and secondly in such inquiry by him, if he decides to take evidence of witnesses on oath.

But the object and purpose of holding inquiry or investigation u/s 202 is to find out whether there is sufficient ground for proceeding against the

accused or not and that holding of inquiry or investigation is not an indispensable course before issue of process against the accused or dismissal of

the complaint. It is an enabling provision to form an opinion as to whether or not process should be issued and to remove from his mind any

hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant"s evidence on oath.

11. In paragraph 40 of the report, it was further held that inquiry u/s 202 is discretionary for deciding the issue of process or to dismiss the

complaint.

12. Where the other course is resorted to, i.e., where instead of taking cognizance, the complaint/ application is forwarded to police for registration

and investigation in exercise of powers conferred on Magistrate u/s 156 (3) of the Code, police will have to investigate the matter according to the

procedure laid down in the Code. Upon investigation, the police may come to the conclusion that there is no sufficient evidence or any reasonable

ground of suspicion to justify the forwarding of accused for trial, and may submit "final report" for dropping the proceedings or it may submit

charge-sheet where there is sufficient evidence or reasonable ground of suspicion to justify forwarding of accused to a Magistrate empowered to

take cognizance of the offence on a police report for trial by him or for commitment to the Court of Session.

13. Where final report is submitted for dropping the proceedings, three courses are open before the Magistrate, i.e., he may accept the report and

drop the proceedings; or he may, disagreeing with the conclusions of the investigating officer, take a decision that there is sufficient ground for

proceeding further and then take cognizance of the offence and issue process; or he may direct further investigation to be made by the police under

Sub-section (3) of Section 156.

14. It was held in Bhagwant Singh v. Commissioner of Police XXII 1985 ACC 246 (SC), that where the Magistrate is not inclined to take

cognizance of the offence and issue process on a consideration of the report made by the Officer-in-charge of a Police Station under Sub-section

(2) of Section 173, the informant must be given an opportunity of being heard so that he can make his submission to persuade the Magistrate to

take cognizance of the offence and issue process.

15. Under the Code, there is only one provision dealing with the issue of process to an accused and that is contained in Section 204, which

empowers the Magistrate taking cognizance of an offence to issue summons in a summons case, or a warrant or summons in a warrant case.

16. There are number of decisions of the Supreme Court in support of the contention that the right of the accused to raise objection is recognized

only after he has been summoned and process issued and not before that.

17. In Smt. Nagawwa v. V. S. Konjalgi 1976) ACC 225 (SC), it was held:

the scope of the inquiry u/s 202 of the Code is extremely limited - limited only to the ascertainment of the truth or falsehood of the allegations made

in the complaint- (i) on the materials placed by the complainant before the Court; (ii) for the limited purpose of finding out whether a prima facie

case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all

adverting to any defence that the accused may have."" It was also specifically held that ""in proceedings u/s 202, the accused has got absolutely no

locus standi and is not entitled to be heard on the question whether the process should be issued against him or not.

18. In Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker and Another, , it was held that inquiry envisaged in Sections 200 to 203 is for

ascertaining the truth or the falsehood of the complaint, that is, for ascertaining whether there is evidence in support of the complaint so as to justify

the issue of process. The section does not say that a regular trial of adjudging the truth or otherwise of the person complained against should take

place at that stage, for such a person can be called upon to answer the allegation made against him only when a process has been issued.

(Underlined by Court)

19. Similarly, in Chandra Deo Singh v. Prakash Chandra Bose (1963) 1 SCR 202, it was held that the test for issue of process is whether there

was sufficient ground for proceeding and not whether there was sufficient ground for conviction. Where there is a prima facie evidence, even

though the person charged of an offence in the complaint might have a defence, the matter has to be left to be decided by the appropriate forum at

the appropriate stage and issue of process could not be refused. It was further held that permitting an accused person to intervene during the

enquiry would frustrate its very object and that is why the Legislature has made no specific provision permitting an accused person to take part in

the inquiry.

20. In support of the above proposition, reference may also be made to the Apex Court decisions in Mansukh Lal V. Chauhan v. State of Gujarat,

XXXV (1997) ACC 501 (SC) and Central Bureau of Investigation Vs. V.K. Sehgal and another,

21. In the case of Arun Vyas and Ors. v. Anita Vyas XXXIX(1999) ACC 247 (SC), it was held that in a case where the Magistrate finds that

taking cognizance of the offence itself was contrary to any provision of law like Section 468, Cr. P.C., the complaint being barred by limitation, he

is unable to frame the charge, on that ground he is to discharge the accused. Where the Magistrate takes cognizance of an offence without taking

note of Section 468, the most appropriate stage at which the accused could have any say is the stage of framing charge.

22. From the above decisions it would thus follow that before process is issued against an accused, he has no locus standi to be heard in

proceedings pending either on the basis of complaint or on the basis of an F.I.R. registered against him with regard to their maintainability.

23. In the case of State of Punjab v. Raj Singh and Ors. JT 1999 SC 145, it was held that if F.I.R. discloses cognizable offence, the statutory

power of the police to investigate under the Code is not in any way controlled or circumscribed by Section 195 of the Code. At the stage when the

Court intends to take cognizance of an offence u/s 190 (1), Cr. P.C., it has nothing to do with the statutory power of the police to investigate.

In this case as well the Apex Court did not entertain the objection of the accused regarding the maintainability of proceeding pending before the

police on the basis of F.I.R. and the matter regarding bar of Section 195, Cr. P.C. was left to be decided at appropriate stage after the accused is

summoned.

24. The Apex Court in Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj Vs. State of Andhra Pradesh and Others, ,

held that the powers of the police to conduct further investigation after laying final report, is recognized u/s 173 (8) of the Code of Criminal

Procedure. Even after the Court takes cognizance of any offence on the strength of the police report first submitted, it is open to the police to

conduct further investigation but it is desirable that the police should inform the Court and seek formal permission to make further investigation. In

such a situation, the power of the Court to direct the police to conduct further investigation cannot have any inhibition. There is nothing in Section

173 (8) to suggest that the Court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the Court

would only result in encumbering the Court with the burden of searching for all the potential accused to be afforded with the opportunity of being

heard. (Emphasis supplied) 25. In the case of Karan Singh v. State, XXXIV (1997) ACC 163 , decided by me, it was held that neither Cr. P.C.

nor the principle of natural justice requires that a notice be issued to the accused for giving him an opportunity of hearing before an order of

summoning is made by the Magistrate disagreeing with the conclusions arrived at by the police in the final report submitted after investigation. The

same view was expressed in Vareli Weaves Pvt. Ltd. and another Vs. Union of India and others, ; Anil Kumar v. State XXXI 1994 ACC 535

and Pratap Singh v. State of U.P. XXVIII 1991 ACC 422.

26. These decisions found approval of a Full Bench of this Court in Ranjeet Singh v. State of U.P. I (2001) ACC 342. The Full Bench also

overruled the decision of a learned single Judge of this Court in Gajendra Kumar Agrawal v. State of U.P. and Ors. XXXI (1994) ACC 341. In

the aforesaid case of Ranjeet Singh (supra), it was further opined by the Full Bench that no police officer is expected to call the accused before

registering an F.I.R. on the ground that action against the accused starts by. Till the stage of summoning the concerned parties are the informant

and the police only and the accused has no locus standi. The principle of audi alteram partem rule stands excluded by the provisions of the Code

till the stage to which the hearing of the case becomes necessary under the Code.

27. Where an order is made u/s 156 (3), Cr. P.C. directing the police to register F.I.R. and investigate the same, the Code nowhere provides that

the Magistrate shall hear the accused before issuing such a direction, nor any person can be supposed to be having a right asking the court of law

for issuing a direction that an F.I.R. should not be registered against him. Where a person has no right of hearing at the stage of making an order

u/s 156 (3) or during the stage of investigation until Court takes cognizance and issues process, he cannot be clothed also with a right to challenge

the order of the Magistrate by preferring a revision under the Code. He cannot be termed as an ''aggrieved person'' for the purpose of Section 397

of the Code.

28. This issue may be viewed from another angle. It is well settled law that where a complaint is made to a Magistrate and he takes cognizance u/s

190 (1) (a) of the Code, the accused has no right of hearing or of participation in those proceedings until he is summoned and process issued.

Similarly in police challani cases, the accused has not been given any such right even where a final report in his favour has been submitted by police

after investigation. He cannot come forward before the Magistrate to support the conclusion of the investigating officer or to say that the final

report be accepted and proceedings be dropped. He gets the hearing right only when Court takes cognizance and issues process. Thus, where an

accused placed in the above noted situations has not been vested with any right of hearing, how such a right can be presumed in favour of an

accused against whom only an order u/s 156 (3) has been made because such a person stands on a much lower pedestal than a person against

whom either cognizance has been taken or in whose favour, police has submitted final report after investigation.

29. Learned A.G.A. further submitted before the Court that the impugned order passed in exercise of powers u/s 156 (3) of the Code is

interlocutory in nature and, therefore, revision against such order would not be maintainable because of the bar contained in Sub-section (2) of

Section 397 of the Code. In support of his submission, he placed reliance upon the decisions in Amarnath v. State of Haryana (1997) 4 SCC 137;

Madhu Limaye v. State of MaharashtraXV 1978 ACC 184 (SC); V.C. Shukla Vs. State through C.B.I., and Rajendra Kumar Sita Ram Pandey

v. Uttam, XXXVIII 1999 ACC 438 (SC).

30. In the latest decision in K.K. Patel v. State of Gujarat XIIL 2000 ACC 351 (SC), it was held that it is now well neigh settled that in deciding

whether an order challenged is interlocutory or not as for Section 397 (2) of the Code, the sole test is not whether such order was passed during

the interim stage. It was also observed:

The feasible test is whether by upholding the objections raised by a party, would it result in culminating the proceedings, if so any order passed on

such objections would not be merely interlocutory in nature as envisaged in Section 397 (2) of the Code.

In that case a complaint was filed and the Metropolitan Magistrate after taking the sworn statement of the complainant took cognizance of the

offence alleged and issued process to the accused persons. On appearance before the Magistrate, accused persons filed a petition for discharging

them on the premise that no sanction was obtained to prosecute them. The Magistrate dismissed the said petition with a rider that ""appropriate

decision regarding prior sanction shall be taken on merits after considering the evidence that may be produced by the parties. Accused persons

filed a revision before the Sessions Court. By a well considered order, the Additional Sessions Judge upheld the objection of the Appellants and

consequently, the process issued by the trial court was quashed and the complaint itself stood dismissed. The High Court in the revision moved by

complainant-police officer set aside the order of the revisional court mainly on the ground that the Sessions Judge should not have entertained the

revision at all as the order challenged before it was only interlocutory. The Apex Court set aside the order of the High Court holding that the order

passed by the Magistrate was not interlocutory in nature on the premise that if the objections raised by the accused were upheld by the Court, the

entire prosecution proceedings would have been terminated and, therefore, the order was revisable. It may be noted that in that case, the Court

had issued process against the accused and on appearance, they had moved an application for discharging them. The Apex Court in this decision

has no where recognized the right of the accused to challenge any order passed by a magisterial court before process was issued or for recalling or

reviewing the summoning order. The order disallowing the objection of the accused filed after his appearance in persuance of the process issued

for discharging him, was held to be revisable and not an interlocutory order.

31. It has already been pointed out above that the Full Bench decision in Ranjeet Singh''s case (supra) has taken the view that until the stage of

summoning is reached, the concerned parties before the court of Magistrate are the informant and the police and the accused has no right either to

participate in those proceedings or to raise objection therein. Thus, judging from any standard, it cannot be said that an order made u/s 156 (3),

Cr. P.C. adversely affects rights and liabilities of a person against whom an F.I.R. is registered pursuant to that order nor by such order proceeding

culminates. It is only when a report u/s 173 of the Code is submitted by the police, the Magistrate makes up his mind whether to take cognizance

or drop the proceedings. If ultimately the cognizance is taken and process issued, then only the accused gets the right of hearing. Any order passed

before that stage including an order made u/s 156 (3) of the Code will be "interlocutory" as envisaged u/s 397 (2) of the Code.

32. In the case of Ajay Malaviya v. State of U.P. and Ors. (supra), an F.I.R. was registered pursuant to an order u/s 156 (3) of the Code directing

the police to register and investigate the case. The accused approached this Court under Article 226 of the Constitution seeking a direction not to

arrest him besides the relief of certiorari for quashing the first information report of the said case. At the very outset, a question arose before the

bench as to whether the writ petition for quashing the first information report sans any challenge to the order u/s 156 (3), Cr. P.C. passed by the

Magistrate is maintainable. It was urged on behalf of the accused Petitioner that the order u/s 156 (3) of the Code has the complexion of an

administrative order and hence it was neither revisable u/s 397 of the Code nor open to challenge u/s 482 of the Code and, therefore, the F.I.R.

could be quashed by this Court under Article 226 of the Constitution in case the Court was of the opinion that taken in its entirety the F.I.R. did

not disclose commission of cognizable offence.

The Division Bench took the view ""Having given our anxious consideration to submissions of the learned Counsel for the Petitioner, we are of the

considered view that an order u/s 156 (3) of the Code has the complexion of a judicial order amenable to revisional jurisdiction u/s 397 of the

Code."" Accordingly, the writ petition for quashing the first information report was dismissed as not maintainable.

A perusal of the aforesaid decision as reported indicates that perhaps the aforesaid two aspects, which I have referred to above were not placed

before the bench for consideration with the result that the same has escaped in the judgment.

33. In the case of State of U.P. v. Synthetics and Chemical Ltd., JT 1991 (3) SC 268 and Arnit Das v. State of Bihar XIL 2000 ACC 191, it has

been held that what has escaped in the judgment is not ratio-decidendi. This is the rule of sub-silentio, in the technical sense when a particular point

of law was not consciously determined.

34. As the controversy raised by the learned A.G.A. in these revisions is of great importance affecting legal rights of public at large, it requires

serious consideration and a decision by a larger Bench on the following questions:

1. Whether the order of the Magistrate made in exercise of powers u/s 156 (3), Cr. P.C. directing the police to register and investigate is open to

revision at the instance of a person against whom neither cognizance has been taken nor any process issued?

2. Whether an order made u/s 156 (3), Cr. P.C. is an "interlocutory order" and remedy of revision against such order is barred under Sub-section

(2) of Section 397 of the Code of Criminal Procedure, 1973?

3. Whether the view expressed by a Division Bench of this Court in the case of Ajay Malviya v. State of U.P. and Ors. XIL 2000 ACC 435, that

as an order made u/s 156 (3) of the Code of Criminal Procedure is amenable to revision, no writ petition for quashing an F.I.R. registered on the

basis of the order will be maintainable, is correct?

35. Let papers be placed before the Hon"ble the Chief Justice for constituting a larger Bench for consideration of the above mentioned questions.

The interim orders if any, in all these cases shall stand vacated.