Criminal Revision No.712/2014
(Himanshu Adya v. State of M.P. & Anr.)

01/03/2017

Shri Pavan Kumar Vijayvargiya, counsel for the applicant.

Shri Girdhari Singh Chauhan, Public Prosecutor for the respondent No.1/State.

Shri S.K. Shrivastava, counsel for the respondent No.2.

The present petition under Section 482 of Cr.P.C. has been filed against the order dated 19-8-2014 passed by 2nd A.S.J., Shivpuri, in Criminal Revision No. 78/2014.

The facts necessary for the disposal of the present application in short are that the applicant had filed a criminal complaint against the respondent no. 2 on the allegation that an agreement to sell was executed by the respondent no.2 and at that time the applicant had given an amount of Rs. 5 lacs by way of advance. However, the respondent no.2 thereafter didnot execute the sale deed.

The Magistrate took cognizance of the offence against the respondent no.2, for the offences punishable under Sections 420,406 of I.P.C.

It appears, that being aggrieved by the order of the Magistrate, the respondent no. 2 filed a criminal revision and the applicant was not made a party to the revision. The revision was allowed and the respondent no. 2 was discharged.

Being aggrieved by the order of the Revisional

Court, the applicant has filed the present revision. A singular contention has been made by the Counsel for the applicant, that the applicant was not made a party to the criminal revision which was filed by the respondent no.2, and the Court below without hearing the applicant, allowed the revision and set aside the order of the Magistrate and discharged the respondent no.2.

Per contra, the Counsel for the respondent no.2 submitted that as the Public Prosecutor had appeared and argued the matter, therefore, no prejudice has been caused to the applicant and the Revisional Court rightly allowed the revision.

Heard the learned Counsel for the parties.

The centripetal question in the present case is that whether the complainant is entitled for hearing in a proceedings filed for discharge of the accused or not?

The Supreme Court in the case of **Bhagwant Singh Vs. Commissioner of Police & Anr.** reported in **(1985) 2 SCC 537**, has held as under:

> "4. Now, when the report forwarded by the officer-in-charge of a police station to the Magistrate under sub-section (2)(i) of Section 173 comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things: (1) he may accept the report and take cognizance of the offence and issue process or (2) he may

disagree with the report and drop the proceeding or (3) he may direct further investigation under sub-section (3) of Section 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses: (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under sub-section (3) of Section 156. Where, in either of these two situations, the Magistrate decides to take cognizance of the offence and to issue process, the informant is not prejudicially affected nor is the injured or in case of death, any relative of the deceased aggrieved, because cognizance of the offence is taken by the Magistrate and it is decided by the Magistrate that the case shall proceed. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the First Information Report, the informant would certainly be prejudiced because the First Information Report lodged by him would have failed of its purpose, wholly or in part. Moreover, when the interest of the informant in prompt and effective action being taken on the First Information Report lodged by him is clearly recognised by the provisions contained in sub-section (2) of Section 154, sub-section (2) of Section 157 and sub-

section (2)(ii) of Section 173, it must be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the First Information Report lodged by him. There can, therefore, be no doubt that when, on a consideration of the report made by the officer-in-charge of a police station under sub-section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. It was urged before us on behalf of the respondents that if in such a case notice is required to be given to the informant, it might result in unnecessary delay on account of the difficulty of effecting service of the notice on the informant. But we do not think this can be regarded as a valid objection against the view we are taking, because in any case the action taken by the police on the First Information Report has to be communicated to the informant and a copy of the report has to be supplied to him under sub-section (2)(i) of Section 173 and if that be so, we do not see any reason why it should be difficult to serve notice of the consideration of the report on the informant. Moreover, in

any event, the difficulty of service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of being heard at the time when the report is considered by the Magistrate."

The Supreme Court in the case of **Minu Kumari & Anr. v. State of Bihar & Ors., (2006) 4 SCC 359**, has held as under:

"12. The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceeding or takes the view that there is material for proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the first information report lodged becomes wholly or partially ineffective. This Court in Bhagwant Singh v. Commr. of Police (1985) 2 SCC 537 held that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. As indicated above, there is no provision in the Code for issue of a notice in that regard.

13. We may add here that the expressions "charge-sheet" or "final report" are not used in the Code, but it is understood in Police Manuals of several States containing the rules and the regulations to be a report by the police filed under Section 170 of the Code, described as a "charge-sheet". In case of reports sent under Section 169 i.e. where there is no sufficiency of evidence to

justify forwarding of a case to a Magistrate, it is termed variously i.e. referred charge, final report or summary. Section 173 in terms does not refer to any notice to be given to raise any protest to the report submitted by the police. Though the notice issued under some of the Police Manuals states it to be a notice under Section 173 of the Code, there is nothing in Section 173 specifically providing for such a notice.

14. As decided by this Court in Bhagwant Singh case the Magistrate has to give the notice to the informant and provide an opportunity to be heard at the time of consideration of the report. It was noted as follows: (SCC p. 542, para 4)

> "The Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report."

15. Therefore, the stress is on the issue of notice by the Magistrate at the time of consideration of the report. If the informant is not aware as to when the matter is to be considered, obviously, he cannot be faulted, even if protest petition in reply to the notice issued by the police has been filed belatedly. But as indicated in Bhagwant Singh case the right is conferred on the informant and none else.

16. When the information is laid with the police, but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to

> investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in All India Institute of Medical Sciences Employees' Union (Reg.) v. Union of India (1996) 11 SCC 582. It was specifically observed that a writ petition in such cases is not to be entertained.
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> 17. The above position was highlighted in Gangadhar Janardan Mhatre v. State of Maharashtra. (2004) 7 SCC 768."

The Supreme Court in the case of **Mosiruddin Munshi v. Mohd. Siraj & Ors.,** reported in **(2008) 8 SCC 434** has held as under:-

> "4. We have heard the learned counsel for the parties and gone through the record. The broad facts stated above have not been denied. It, therefore, stands uncontroverted that the proceedings against the respondent-accused had been quashed without notice to the appellant, who was the original complainant. We are, therefore, of the opinion that the order of the learned Single Judge impugned before us must be set aside and we order accordingly. We also remit the case to the High Court for a fresh decision in accordance with law. The appeal is accordingly allowed."

Section 399 of Cr.P.C. reads as under :

> "**399. Sessions Judge's powers of revision -** (1) In the case of any proceeding

the record of which has been called for by himself, the Sessions judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of section 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the provisions of sub-sections (2), (3), (4) and (5) of section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of an person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court."

Section 401 of Cr.P.C. reads as under :

"**401. High Court's powers of revision.**—(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a court of appeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

> (4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.
> (5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

Therefore, it is clear that the Sessions Court may exercise all or any of powers which may be exercised by the High Court under sub-section (1) of Section 401 of CrPC and the provisions of sub-sections (2), (3), (4) & (5) of Section 401 of CrPC would apply to such proceedings.

This Court in the case of **Gyan Singh Vs. State of M.P. (Cr.R. 1215 of 2015, order dated 28-2-2017)** has held as under:

> "In view of the specific provision of Section 401(2) of Cr.P.C ., it is clear that no order prejudicial to the interest of any other person shall be passed unless he had an opportunity of being heard either personally or through his Counsel. Thus, When a criminal revision is filed by an accused against the order taking cognizance or against the order framing charges, the complainant is required to be heard. Whenever, any order which is in favor of the complainant is challenged by the accused, then the complainant is required to be heard."

The High Court of Uttarakhand in the case of **Ravi Chaudhary vs. State of Uttaranchal & Ors.**, reported in **2010 (1) N.C.C. 55** has held as under:-

> "5. It is admitted by learned counsel for both the parties that the revisionist/ complainant- Ravi Chaudhary was not arrayed as a party in the revision filed before the Sessions Judge, Hardwar. It is, therefore, stands uncontroverted that in the revision filed before the Sessions Judge where the order passed by Judicial Magistrate, Hardwar was set aside, the revisionist was not arrayed as a party on the basis of whose protest petition, the respondents were summoned. No order shall be made to the prejudice of any person unless he had an opportunity of being heard either personally or by pleader in this own defence. In the present case, neither the revisionist was arrayed as a party nor he was informed and the revision before the Sessions Judge was heard in his absence, though the order against which the revision was filed by the respondents, was passed on the protest petition moved by the revisionist/ complainant before the Judicial Magistrate. Hence, the order passed by Sessions Judge, Hardwar dated 3.6.2006 is not sustainable in the eyes of law and deserves to be set aside."

The High Court of Uttarakhand in the case of **Isa Khan & Ors. v. State of Rajasthan & Anr.,** reported in **2006 (3) Crimes 155** has held as under:-

> "8. Sub-section (2) of Section 399 of the Code provides that where any proceeding

by way of revision is commenced before a Sessions Judge under Sub-section (1), the provision of Sub-sections (2), (3), (4) and (5) of the Code shall, so far as may be, apply to said proceeding and references in the said sub-sections to the High Court shall be construed as reference to the Sessions Judge. Sub-section (2) of Section 401 of the Code provides that no order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence. Thus, a bare reading of Sub-section (2) of the Section 401 of the Code makes it clear that while exercising revisional jurisdiction, no order should be made to the prejudice of the accused or other person. The expression "other person" in Sub-section (2) of Section 401 of the Code includes a complainant. Learned counsel has placed reliance on a decision of this Court in Hazi Mohd. Shafi v. State of Rajasthan & Anr., wherein this Court held that no order under Section 401 (2) of the Code shall be made to prejudice the accused or other person unless he has had an opportunity of being heard either personally or through Counsel in his own defence. The word "other person" includes the complainant. Thus, without affording an opportunity of hearing to the complainant, the revisional Court committed apparent error in setting aside the order passed by the learned trial Court.

9. In Bodu Ram v. State of Rajasthan, this Court held that the complainant having not been impleaded as a party in revision petition and the revision petition having been disposed of without notice and without affording an opportunity of

> hearing to him, the revision petition deserves to be accepted on this sole ground without going into the merits of the case. In that case, the complainant was the person who lodged the first information report, upon which the case was registered. Thereafter, on submission of the negative final report in the case, the cognizance was taken on his protest petition. The order taking cognizance was challenged before the Revisional Court without impleading the complainant as a party and the Revisional Court allowed the revision by setting aside the order issuing the process. That order came to be challenged before this Court and this Court set aside the order of the Revisional Court solely on the ground that the complainant has not been impleaded as a party and has not been afforded an opportunity of hearing. The facts of the instant case are almost identical to those of the case of Bodu Ram (Supra).”

In the present case, the Magistrate had taken cognizance of offence on the complaint filed by the applicant and the said order was challenged by the respondent no.2 by filing criminal revision before the Sessions Court, however, the applicant was not made a party and without hearing the complainant, the revision was allowed and the order taking cognizance was set aside.

Thus, in the considered opinion of this Court, it was obligatory on the part of the respondent no.2 to arraign the applicant as a respondent in the criminal revision and the Revisional Court should have heard the applicant before the deciding the Criminal

Revision. As the criminal revision was allowed by the Revisional Court, without affording any opportunity of hearing to the applicant, therefore, the order dated 19-8-2014 passed by the 2nd A.S.J., Shivpuri in Criminal Revision No. 78 of 2014 is hereby set aside and the matter is remanded back to the revisional Court to hear the criminal revision filed by the respondent no.2 afresh after giving an opportunity of hearing to the applicant.

With aforesaid observations, the Criminal Revision is **allowed**.

(G.S.Ahluwalia)
Judge