

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CRIMINA PROCEDURE

CRL.REV.P. 523/2009 & CrI. M.A. No. 10941/2009(Stay)

Reserved on: 17th February, 2012

Decided on: 1st March, 2012

YASHPAL KUMAR

..... Petitioner

Through: Mr. B.K. Sharma, Advocate

versus

BHOLA NATH KHANNA & ANR.

..... Respondent

Through: Mr. Dinesh Garg, Advocate.

Mr. Manoj Ohri, APP for the State with SI Rajender Parsad.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition, the Petitioner seeks quashing of the order dated 18th July, 2009 passed by the learned Additional Sessions Judge setting aside the order of the learned Metropolitan Magistrate dated 28th March, 2009 whereby he had dismissed the complaint of Respondent No. 1 and refused to issue summons to the Petitioner herein for offence under Section 3 of the Dowry Prohibition Act.

2. Learned counsel for the Petitioner contends that the impugned order was passed by the learned Additional Sessions Judge in revision without issuing notice to the Petitioner and thus the same is liable to be set aside on account of the fact that the same is in violation of Section 401(2) Cr.P.C. and principles of natural justice. The order of the learned Additional Sessions Judge has gravely prejudiced the Petitioner. In this regard reliance is placed on Mohd. Afzal and others vs. Noor Nisha Begum and another, 1997 (2) Crimes 493. It is further contended that the daughter of the Petitioner filed a complaint against Respondent No. 2 and his family members for offence under Sections 498A/406/34 IPC wherein it was stated that the Petitioner being the father of the girl had spent Rs. 8 lakhs in the marriage function etc.

Respondent No. 1 on the basis of the said complaint of Petitioner's daughter filed a complaint case before the learned Metropolitan Magistrate for summoning the Petitioner under Section 3 of the Dowry Prohibition Act, 1961 (in short the 'DP Act'). The learned Metropolitan Magistrate dismissed the said complaint, however, on a revision being filed by the Respondent, the learned Additional Sessions Judge set aside the order of the learned Metropolitan Magistrate and directed issuance of process against the Petitioner herein for offence punishable under Section 3, DP Act in view of the decision of this Court in *Neera Singh vs. State (Govt. of NCT of Delhi)*, 138 (2007) DLT 152. Learned counsel for the Petitioner contends that the judgment of this Court in *Neera Singh (Supra)* is per incuriam as the same does not consider the provision of Section 7 of the DP Act. Reliance in this regard is placed on *Pooja Saxena vs. State and another*, 2010 (4) LRC 82 Delhi.

3. Learned counsel for Respondent No. 1 on the other hand contends that the complaint of Respondent No. 1 was dismissed at the stage of Section 203 Cr.P.C. and no summons had been issued to the Petitioner. Since the Petitioner had not been summoned, no notice was required to be issued to the Petitioner in the Revision Petition. Reliance in this regard is placed on *Gurdeep Singh vs. State of Haryana*, 2001 (2) RCR Criminal 178 and *Rajesh Garg vs. Tata Tea Ltd. and another*, Cri. Rev. P. 688/2003 decided by this Court on 18th February, 2011. Reliance is also placed on *Shivjee Singh vs. Nagendra Tiwary and others*, 2010 (3) RCR Criminal 466 (SC) wherein their Lordships held that if violation of the procedural provision does not result in denial of fair hearing or causes prejudice to the parties, the same has to be treated as directory notwithstanding the use of word "shall". It is further contended that the learned Additional Sessions Judge was justified in placing reliance on *Neera Singh's* case because if *Pooja Saxena's* decision is to be relied upon then Section 3 of the DP Act will become nugatory. Further in the present case the complaint has been filed not against the girl, who was the victim, but against the father who was an accomplice and gave dowry.

4. I have heard learned counsel for the parties.

5. The facts in nutshell giving rise to the filing of the present petition are that the daughter of the Petitioner Ruchika was married to the son of Respondent No. 1. However, in view of the fact that there was harassment on account of demand of dowry, she filed a complaint before CAW Cell on

the basis of which FIR No. 393/2007 under Sections 498A/406/34 IPC was registered at PS Krishna Nagar against the Petitioner, his wife, son and daughter. Since in the complaint it was stated that the Petitioner being the father of Ruchika spent Rs. 8 lakhs in the marriage and the Petitioner in addition thereto gave Rs. 50,000/- to the son of Respondent No.1 to fulfill his dowry demand, a complaint under Section 3 of DP Act was filed by the Respondent against the Petitioner. After recording the pre-summoning evidence of Respondent No. 1 and calling for judicial file in case FIR 393/2007, the learned Metropolitan Magistrate dismissed the complaint vide order dated 28th March, 2009 in view of the contradictory pleas of the Complainant/Respondent herein and also the fact that if the Court would permit such a complaint than in each case where a case under Section 498A/406 IPC is registered against the in-laws by a girl, to create pressure the in-laws would also file a complaint under Section 3 DP Act against parents of the girl. Against the said order of the learned Metropolitan Magistrate, Respondent No. 1 filed revision petition wherein this order was set aside and vide the impugned order dated 18th July, 2009, the learned Additional Sessions Judge directed summoning the Petitioner for offence under Section 3, DP Act in view of decision in the case of Neera Singh (supra).

6. The first contention of the learned counsel for the Petitioner is that no notice was issued in the revision petition. Learned counsel for the Respondent No. 1 states that there was no need for issuing notice to the Petitioner as he had not been summoned in the complaint case by the learned Metropolitan Magistrate and the complaint was dismissed at the stage of Section 203 Cr.P.C. It may be noted that the revision petition was filed by Respondent No. 1 under Section 397 Cr.P.C., which permits the High Court or any Sessions Judge to call for or examine the records of any proceedings before any inferior criminal court situated within its local jurisdiction to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order. Section 399 Cr.P.C. provides for the Sessions Judge's power of revision. Section 399 (2) provides that "where any proceedings 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 apply to such proceedings and reference in the said sub-sections to the High Court shall be construed as references to the Sessions Judge". Section 401 (2) Cr.P.C. states that no order under this Section shall be made to the prejudice of the accused or the other person unless he has had an opportunity of being heard either personally or by pleader in his own defence. It cannot

be said that the order impugned in the present petition has not been passed to the prejudice of the Petitioner whereby he has been directed to be summoned as an accused. Since the order is to the prejudice of the petitioner, the same should not be passed without an opportunity of being heard given to the Petitioner personally or through pleader as provided under Section 401 (2) Cr.P.C.

7. There is yet another way to look at it. With the dismissal of the complaint, an indefeasible right had accrued in favour of the Petitioner for not being tried in the complaint case instituted by the Respondent No. 1 and the dismissal being on merits would have enured to his benefit. This right of the Petitioner has been taken away by the impugned order without providing an opportunity of being heard to the Petitioner. Further Section 401 (2) Cr.P.C. starts with a negative covenant “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, the sub-Section makes it abundantly clear that no order to the prejudice of an accused or any other person can be made unless the said accused or the said person had been given an opportunity of being heard. In the absence of a hearing being afforded to the petitioner, to my mind, the impugned order needs to be set aside. Reliance of Respondent No.1 on the decision in Gurdeep Singh (Supra) is misconceived in view of the decision of the Hon’ble Supreme Court in Pepsi Food Ltd. and another vs. Special Judicial Magistrate and others, 1998 (5) SCC 749 wherein it was held that the order of summoning is a serious matter which affects the valuable right of an individual. Thus, this valuable right cannot be taken away without affording an hearing to the accused.

7. As regards the next proposition, the learned Additional Sessions Judge by the impugned order relying upon the decision of this Court in Neera Singh (supra) directed that the Petitioner be summoned. The decision of Neera Singh came up for consideration before this Court in Pooja Saxena (supra) and this Court distinguished the same. There is no dispute to the proposition that Neera Singh (supra) was passed by this Court without taking into consideration the provision of Section 7 (3) of the DP Act. Section 7 (3) of the DP Act reads as under: -

“3. Notwithstanding anything contained in any law for the time being in force, a statement made by the person aggrieved by the offence shall not subject such person to a prosecution under this Act.

8. It is thus evident that Section 7 (3) is a non obstante clause and will thus prevail on any other law for the time being in force and a statement made by a person aggrieved by the offence under this Act shall not subject him to prosecution under this Act. Thus the decision of this Court in Neera Singh (supra) is an obiter and does not constitute a binding precedent for the reasons that the provisions of DP Act 1961 were not subject matter of the dispute before the Court in the petition under Section 482 Cr.P.C. in Neera Singh's case and thus, this Court did not take into consideration the provisions under Section 7 (3) of the DP Act.

9. Further there is no merit in the contention of learned counsel for the Respondent that the Petitioner being the father of the victim girl was not an "aggrieved person". Section 7(3) of the DP Act bars cognizance of a complaint against the person aggrieved by the offence. It cannot be said that only "aggrieved person" would be the victim girl. Even the father of the victim girl, who was made to give dowry, would be an aggrieved person. Similar view has been taken in Ram Gopal Sah v. State of Jharkhand, II (2009) DMC 844.

10. In view of the aforesaid discussion, the impugned order dated 18th July, 2009 passed by the learned Additional Sessions Judge is set aside. The petition and the application are disposed of accordingly. Trial Court record be sent back.

Sd./-
(MUKTA GUPTA)
JUDGE

MARCH 01, 2012