

REVISIONAL CRIMINAL.

Before Jwala Prasad, J.

SHUKADEVIA SAHAY

v.

HAMID MIAN.*

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Dec., 22.

Code of Criminal Procedure, 1898 (Act V of 1898), sections 173, 191(b)—Final report by police to Subdivisional Magistrate—refusal to take cognizance—Direction by District Magistrate to police to submit charge sheet—order illegal.

Where a recommendation that no proceedings be taken against the accused person, is submitted to the subdivisional magistrate under section 173, Criminal Procedure Code, and the latter refuses to take cognizance of the alleged offence under section 191(b), the District Magistrate has no power to direct the police to submit a charge sheet in the case, and if he does so, the order is revisable by the High Court.

The facts of the case material to this report are stated in the order of Jwala Prasad, J.

Manuk (with him *H. L. Nandkeolyar* and *D. L. Nandkeolyar*), for the petitioner.

Sultan Ahmad, Government Advocate (with him *Ahmad Raza*, *Gulam Muhammad* and *Syed Muhammad Izhar Hussain*), for the Crown.

JWALA PRASAD, J.—The petitioner is aggrieved by the order of the District Magistrate of Champaran, dated the 26th October, 1927, directing the police to submit a charge sheet against him and two others, Bishunath Upadhya and Baldeo Pasari. The circumstances under which the order of the District Magistrate was passed may be briefly stated as follows :—

On the 2nd August, 1927, some unfortunate communal riots took place at Bettiah in which one Kari Mian was murdered. During the course of investigation, on the 13th August, 1927, one Hamid Mian was examined by the police under section 161 of

* Criminal Revision no. 716 of 1927, from an order of A. P. Middleton, Esq., I.C.S., District Magistrate of Champaran, dated the 26th October, 1927.

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the Code of Criminal Procedure. He charged the petitioner along with other persons as having instigated the murder of his father Kari Mian. On the basis of this statement a first information was drawn up by the sub-inspector of police on the 26th August, 1927, against the petitioner and others. After completion of the investigation a report under section 173, usually called the "final report," was submitted to the Subdivisional Officer of Bettiah. The report disbelieved the version of Hamid Mian that the petitioner instigated the murder in question. It was said that the evidence was tainted and though a certain amount of evidence was found against Bishunath and Baldeo it was considered insufficient for a charge sheet, and hence a final report under section 302 read with section 149 was submitted under orders of the Deputy Inspector-General of Police. This report was submitted through the superior police officer under section 158 of the Code of Criminal Procedure to the Subdivisional Officer on the 13th of September. The Magistrate passed the following order on the 14th September :

"Enter true under section 302. Accused unknown; evidence unreliable."

A day before this order of the Magistrate, a petition was filed before the Magistrate on behalf of Hamid Mian impugning the police investigation and praying that

"In case the police submits final report in the above murder case your honour may in view of the seriousness of the crime be pleased to call for a charge sheet or be pleased to give opportunity to the petitioner to prove his case by witnesses who are present."

The Magistrate disposed of it by reference to his order on petitions in similar cases :

"vide the order on the other petitions."

The order on those petitions has been quoted in the petition of Hamid Mian to the District Magistrate, dated the 29th September, 1927, and runs as follows :

"This verges on the libellous, especially as it is well known that the Superintendent of Police and Deputy Inspector-General, both Christians, have supervised every detail."

Aggrieved by this order of the Subdivisional Magistrate, Hamid Mian filed an application before the District Magistrate praying that

“ your honour may be pleased to send for the police papers and after hearing the petitioner's Counsel order judicial enquiry into the case or direct the police to submit charge sheet in the case.”

The District Magistrate acceded to the prayer and, as observed above, directed the police to submit charge sheet.

Mr. Manuk on behalf of the petitioner contends that the order of the District Magistrate is not only illegal but wholly without jurisdiction. He says that the District Magistrate had no power to direct a charge sheet to be submitted against the petitioner. Sir Sultan Ahmad, on the other hand, contends that the order of the District Magistrate was purely an executive order and is not covered by the Code of Criminal Procedure and that consequently the order is not capable of being challenged on the revisional jurisdiction of this Court. The question raised is very important, and not free from doubt and difficulty. The report in question was submitted to the Subdivisional Magistrate in the usual and legal way. It was the final report in the case, final in the sense that the investigation had been “ completed,” to use the word of section 173. That section requires that the police officer shall submit his final report to the Magistrate empowered to take cognizance of the offence on a police report. These words refer to clause (b), sub-section (1) of section 190 of the Code, which empowers the District Magistrate, Subdivisional Magistrate and any other Magistrate specially empowered in that behalf to take cognizance of an offence upon a police report. The District Magistrate is the head of a district and is a superior officer so far as the Subdivisional Magistrate is concerned. The Subdivisional Magistrate was placed in charge of the subdivision under orders of the local Government under section 13 of the Code. Under section 17(1) the District Magistrate is empowered to make rules or give special orders as to

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the distribution of business among Magistrates, including the Subdivisional Officer subordinate to him; but police reports under section 173 are to be submitted to the Subdivisional Magistrate who had the power to take cognizance of an offence on a police report. The report was accordingly properly placed before the Subdivisional Officer and legally disposed of by him. He refused to take cognizance of any offence under clause (b) of section 191, accepting the recommendation of the police officer in the report that the case against the petitioner was highly improbable. The report having been once placed before the Subdivisional Officer and disposed of by him could not be again put up before the District Magistrate. It went to him on account of the petition of Hamid Mian in which he complained of the order of the Subdivisional Officer refusing to take cognizance of the offence and also not taking action upon his petition of the 13th of August protesting against the police investigation. The District Magistrate in his order says,

"The main reason given in the final report for not submitting a charge sheet seems to be that there was no special reason why Sukhdeo Sahai, who is a Mukhtear and regarded as one of the local leaders of the Hindus, should instigate a murder of Kari Mian, who was quite an unknown person. The police, however, admit that there was a certain amount of evidence against Bishunath Upadhaya and Baldeo Pasari. This, however, is a case in which as I have remarked one statement was recorded much earlier than in most of the other cases and it is difficult to see how Badar could have begun at that stage to concoct a false case. I think the complainant has good reason for objecting to the final report and for claiming that his case should at least be enquired into by a Magistrate. I, therefore, allow this application and direct that the police submit a charge sheet against Bishunath Upadhaya, Baldeo Pasari and Sukhdeo Sahay."

This order virtually sets aside the order of the Subdivisional Officer passed upon the police report and the petition on behalf of Hamid Mian, dated the 13th September.

It has been frankly admitted by Sir Sultan Ahmad that there is no provision in the Code of Criminal Procedure for putting up the police report to the District Magistrate in a case of this kind, but he, as the executive head of the district and of the police, has

the right to direct a police officer to submit a charge sheet. Calling for a charge sheet in the teeth of the police officers' view that there was no case against the accused amounts to putting the accused to a trial; for in submitting a charge sheet the police officer has to send up an accused or to release him on bail, or to report that he is absconding in which case the Magistrate would take proper action to force his attendance. It seems to me that such an order must be a judicial one as calling upon the accused to take his trial and fettering his liberty, and I do not think that the District Magistrate had the power under the Code to call for a charge sheet after the final report was put up before a Magistrate empowered to take cognizance of the offence under section 173 and disposed of by him. The order of the District Magistrate must, therefore, be set aside.

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The matter, however, does not rest here. The prayers of Hamid Mian before the District Magistrate were (1) to order a judicial enquiry into the case, or (2) to direct the police to submit charge sheet. The District Magistrate did not pass any order with respect to the first prayer, inasmuch as he immediately directed the police to submit charge sheet. That prayer of Hamid Mian must now be considered. It seems to me that the petition of the 13th August filed before the Subdivisional Officer was a protest petition and came under the definition of "complaint" given in section 4(h) of the Code of Criminal Procedure. "Complaint" means the allegation made orally or in writing to a Magistrate with a view to his taking action against the person who has committed an offence. Mr. Manuk contended that the name of the accused was not mentioned in this petition. This, however, is not imperatively required under the definition. Reading the petition it is obvious that it related to the murder case of Kari Mian, which was under the investigation of the police and in which a final report was to be submitted. The police enquiry was impugned and a prayer was made to call for a charge sheet, or to give

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an opportunity to the petitioner to prove his case by witnesses. I hold that this was a complaint under the Code of Criminal Procedure filed under section 200. The Magistrate did not dispose of it in accordance with law. He should have examined the petitioner on oath and disposed of it in accordance with law. The petition, however, purports to be on behalf of Hamid Mian relating to his father Kari Mian's murder during the recent riot. It is initialled at the left-hand corner by Mr. Abdul Wadood, a pleader of Muzaffarpur. To the petition is attached a vakalatnama which is not properly drawn up. Except saying that it is a petition on behalf of Hamid Mian, the name of the actual petitioner is not mentioned. From what has transpired it may be taken to be a petition of Hamid Mian; but it must be properly signed with a proper vakalatnama. The accused is entitled to ask the complainant to take the responsibility of filing a valid complaint under the Code. It is open to Hamid Mian if he wants to go on with the case to file a fresh complaint or in the presence of the Magistrate to rectify the defects pointed out above. If that is done, then the Magistrate will proceed to dispose of the complaint in accordance with law as laid down in Chapter XVI of the Code of Criminal Procedure.

Order set aside.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

MITA DUSADH

v.

ANUP MAHTON.*

Bengal Tenancy Act, 1885 (Act V of 1885), section 181, scope of—service-grant of a police character, incidents of—occupancy right, whether can accrue—incident, preservation of, in favour of grantee as well as grantor.

* Appeal from Appellate Decree no. 1033 of 1925, from a decision of Babu Raj Narayan, Subordinate Judge of Patna, dated the 21st April, 1925, confirming a decision of Babu Ram Chandrak Misra, Munsif of Patna, dated the 12th December 1926.