COMPILATION OF PUBLICATIONS

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As of 19.01.2021

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TITLE: UNDERSTANDING THE LEGAL POSITION OF FLAT BUYERS UNDER THE INSOLVENCY AND BANKRUPTCY CODE: WHETHER FINANCIAL CREDITORS, OPERATIONAL CREDITORS, OR A THIRD/SEPARATE CLASS OF CREDITORS?

AUTHOR: ANIRBAN BHATTACHARYA AND BHARAT CHUGH

DATE: 24.08.2017

SOURCE: MONDAQ

The Jaypee Infratech Insolvency has once again brought to the fore the issue of legal position of flat buyers and remedies available to them under the Insolvency and Banking Code ("IBC"). This article is an attempt to briefly discuss as to whether such flat buyers qualify as 'Operational' or 'Financial' Creditors; or they constitute a separate class of creditors, and if yes, the extent of their rights under IBC.

The recent NCLAT decision in **Nikhil Mehta v. AMR Infrastructure**[1] is a good starting point. In this case the NCLAT ruled that a purchaser of real estate, under an 'Assured-return' plan, would qualify as a 'Financial Creditor' for the purposes of the Insolvency and Banking Code ("IBC") and therefore, entitled to initiate insolvency process against the builder, in case of non-payment of such 'Assured/Committed return'.

The facts in Nikhil Mehta (supra) were pretty straightforward: The Appellant had booked a residential unit, office space and a shop in a project being developed by AMR. The unit remained a 'paper project' and was never delivered to the Appellant. Fortunately, the Appellant had a MoU with AMR, whereby, in view of a substantial down-payment made by the Appellant, AMR had assured 'Assured/Committed returns' to them, from the date of execution of the MoU till the handing over of the physical possession of the unit(s).

All was good as long as AMR kept paying the 'Assured returns'; however, the payments dwindled and then stopped altogether. The cheques issued in discharge of liability also bounced. Despite various demands, no further payments were made. This, the Appellant argued, was in contravention of the MoU and amounted to non-payment of admitted 'debt' and on this premise Insolvency Process was initiated by the Appellant in the capacity of 'Financial Creditor(s)'.

The NCLT dismissed the Application ruling that the agreement in question was a *'pure and simple agreement of sale and purchase of a piece of property and has not acquired the status of a financial debt as the transaction does not have consideration for the time value of money.* The NCLT held that the monies were not disbursed by the Appellant *'against the consideration for the time value of money'*, and the clause relating to 'assured return' is associated with the delivery of possession and is not a 'Financial Debt', whichever way one looks at it.

Arguments-

Aggrieved by the decision, the Appellant appealed to the NCLAT, where it was argued that through this mechanism of 'Assured returns', a huge amount of money was mobilized by AMR to

aid the development of the project, without any semblance of a collateral or security. In absence of this scheme, AMR would have been constrained to procure this amount from financial institutions. This amount was secured from unsuspecting buyers on the guarantee of 'Assured/Committed returns'. It was argued that this made the Appellant more akin to an 'Investor' or 'Creditor' to whom money is owed, rather than a mere purchaser of property. Reliance was further placed on the admitted and documented payment of 'Commitment Charges' by AMR to the Appellant under the head of 'Financial Costs'. This, according to the Appellant, manifested that AMR itself treated the liability towards the Appellant as a 'Financial Debt' owed to a 'Financial Creditor' and not merely consideration received towards allotment of unit.

Flat Buyers as 'Financial Creditors'

The NCLAT ruled in favour of the Appellant and held it to be a 'Financial Creditor'. The decision read: *"It is clear that Appellants are 'investors' and has chosen 'committed return plan. The Respondent in their turn agreed upon to pay monthly committed return to investors."*

It is palpable that what weighed heavily with the NCLAT was the fact that the amount deposited by 'investors', including the appellant *"was shown as committed return while giving the 'financial cost'/at par with interest on loans"*. Further, AMR had deducted Tax at source ("TDS") on the 'Assured return' payments made to the Appellant under the head of *'Interest, other than Interest on securities'*, thereby making the entire arrangement more identifiable as a loan than anything else, on which periodical interest was due and payable.

NCLAT further ruled that the 'debt' in this case was disbursed against the consideration for the *'time value of money'* which is the key ingredient to be satisfied in order for an arrangement to qualify as 'Financial Debt' and for the lender to qualify as a 'Financial Creditor', under the scheme of IBC.

In this regard, it was observed *"For every calendar month the Corporate Debtor (AMR) was liable to pay committed return w.e.f January, 2009 till the date of handing over of the possession to the appellants. Therefore, it is clear that the amount disbursed by the appellants was "against the consideration of the time value of money and the Respondent-Corporate Debtor raised the amount by way of sale-purchase agreement, having a commercial effect of borrowing".*

With these observations, Appellant was held to be a 'Financial Creditor'.

L & L Comment-

Though the judgment does not incisively examine the nuances of the concept of *'time value of money'* and the various types of arrangements included within the definition of 'Financial Debt' u/s 5(8) of IBC, however, what cannot be taken away from it is the fact that it is extremely intuitive and logically sound. It demonstrates eminent common sense and appears to be a correct application of the concept of 'time value of money'. It recognizes that a purchaser of a real estate unit is under no obligation to pay a substantial amount of money as down-payment if the possession of the unit is not likely to be handed over to him in the near future. In that scenario, the builder would have to arrange finance from independent sources for the development of the

project. This would not only require collateral/security but involve imposition of extremely onerous conditions, including but not limited to a relatively exorbitant rate of 'interest'. Simply put, a bank lending money to the builder, needless to state, would qualify as a 'Financial Creditor' and entitled to all the rights emanating from such an arrangement under IBC, including the right to initiate insolvency process under IBC, in case of a default in repayment of debt.

From that viewpoint, if the builder succeeds in inviting funds from an individual purchaser, as opposed to a Bank, on much more favorable terms, in that case - it does not stand to reason as to why that individual purchaser should not be entitled to similar protection as a Bank, when it is essentially serving the same purpose. Any other view discriminates between an individual purchaser of a real estate unit and the Bank, and to the former's detriment.

It also needs to remembered that the purchaser of a real estate unit under such an arrangement is parting with a huge amount of money upfront, but getting the possession of the subject real estate unit much later; therefore, he deserves to be recouped for the period during which he is deprived of the use and enjoyment of 'money' and is also not in possession of the unit. If that is not the case, then why would a rational buyer defer receipt of benefit/consideration to the future, if he could have the same consideration now. For instance, a purchaser willing to make payment of a huge amount at one shot may very well go in for house that is ready to move-in, rather than hold up his investment for a future benefit.

Alternatively, if he does not want to make a huge payment upfront, he may not pay the builder a substantial down-payment and invest the same money in something else and earn interest instead. Now, since he does not take that option and pays that money to the builder instead (without corresponding delivery of possession of property), he deserves to be rewarded for the delayed possession, which in this case is through the 'Assured/Committed Return' Scheme.

The opportunity cost of foregoing the use of a substantial amount of money, while waiting for the possession of the unit, has to be kept in mind. Since a buyer stays out of enjoyment of money as well as the property, for a long period of time, the consideration for him to still make the payment and wait for the real estate unit is nothing but the periodic 'Assured Return' that he is guaranteed, which has the affect of offsetting, at least to some extent, the risk factor and uncertainty inherent in delayed possession.

Money today is more valuable than same amount of money tomorrow. Possession of a sum of money today is certain but expectation of the same amount of money in future involves uncertainty. There is a possibility that the future money never gets repaid and possession of the property never delivered. This is where 'Assured-return' scheme kicks in and tries to neutralize that risk. This is the concept of **'time value of money'**, and forms the cornerstone of all banking and financial systems.

The payment of 'interest' on the amount paid by purchaser is nothing but recognition of 'time value of money'. The judgment correctly brings within the fold of 'Financial Debt' such an arrangement and allows the purchaser to invoke insolvency as a 'Financial Creditor'. Protection of 'time value of money' was one of the driving forces behind IBC.

This judgment is all the more important for one more reason: Earlier this year, the NCLT in **Col. Vinod Awasthy v. AMR Infrastructure Ltd. (Principal Bench-Delhi)**[2] had ruled that, notwithstanding the presence of an assured return clause, a purchaser of a flat cannot be treated as a provider of 'goods' or 'services' to the builder and therefore, does not qualify as an 'Operational Creditor' and cannot initiate Insolvency Process in that capacity.

The present judgment will go on to ensure that purchasers of real estate will have an effective remedy under the IBC regime, and provide much needed succor to purchasers of 'paper houses' in 'paper towns', and ensure that what they are left with are not mere 'paper promises' and 'paper returns'.

However, with respect to flat buyers whose contracts do not incorporate such/similar clauses, it appears that they might not qualify as 'Financial' or 'Operational' creditors, and are therefore, disentitled from invoking insolvency process under IBC. However, much would depend on the nature of their agreement with the builder. Having said that, even those flat buyers, who do not qualify as either 'Financial' or 'Operational' creditors, may still file their claims with the Insolvency Resolution Professional ("IRP") in terms of form F[3], provided of course, the insolvency process otherwise stands initiated at the behest of an 'Operation' or 'Financial' creditor. For those flat buyers who are interested in taking possession of their units on payment of balance amounts, once the Insolvency process is in motion, the collective wisdom of the IRP and the Creditors Committee governs whether the Company goes towards a revival (which may mean continuance of projects and delivery) or liquidation, in which case the assets are liquidated, and in all probability, flat buyers end up being entitled only to refund of their money, either as Financial or other creditors, depending on the nature of their agreement with the builder. In either case, the flat owners would be well advised to file their claims, distinctively specifying their preference for unit, rather than refund of their monies, by way of abundant caution, within their claim (Form F or C, as the case may be). Needless to state, all this raises a number of challenges, including the practicability of the maximum time limit of 270 days for evolving and presenting a revival plan failing which the Company goes into liquidation, earmarked within which is a period of 14 days for filing of claims by creditors and mere seven days for the IPR to verify those claims. All this also raises certain pressing issues as to the impact of the insolvency process on flat owners' loan agreements with their respective Banks/Financial Institutions and what happens should they continue to pay/stop paying their EMIs. In view of the prevailing uncertainty and vacuum, it is expected that judiciary would fill these gaps and clarify and streamline the process of insolvency for flat owners, without compromising/diluting the value of underlying assets.

Footnotes

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1. Company Appeal (AT) (Insolvency) No. 7 of 2017; Judgment delivered on 21st July, 2017. *The judgment has been followed by the NCLAT recently in Anil Mahindroo & And v. Earth Iconic Infrastructure (P) Ltd (Date of Decision 02.08.2017) to the same effect.*

2. NCLT, Principal Bench, Delhi in CP No. (IB)-10(PB)/2017; Date of Decision 20.02.2017.

3. The Insolvency and Bankruptcy Board of India ("IBBI") recently on 16 August, 2017 amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, and the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 and introduced a form (Form F) for submission of claims by creditors other than financial and operational creditors to the interim resolution professional ("IRP") by virtue of the newly inserted regulation 9A under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 carves out a detailed provision for filing and proving claims by other creditors.

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TITLE: ALL YOU NEED TO KNOW ABOUT THE LAW RELATING TO MONEY LAUNDERING IN INDIA

AUTHOR: ANIRBAN BHATTACHARYA

DATE: MAY 2017

SOURCE: MONDAQ

CURRENTLY UNAVAILABLE ON WEBSITE

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TITLE: TO DISCHARGE OR NOT TO DISCHARGE: THAT IS THE QUESTION

AUTHOR: ANIRBAN BHATTACHARYA & BHARAT CHUGH

DATE: 22.03.2017

SOURCE: MONDAQ

The recent order by the Hon'ble Supreme Court in **Amit Sibal v. Arvind Kejriwal**[1], has again brought to the forefront, the short but extremely important question as to : ***Whether the magistrate, in a 'summons case based on a complaint' has the power to drop proceedings and discharge an accused, or not ?***

The question assumes great practical significance insofar as many criminal cases such as defamation, dishonour of cheques, amongst other cases of relatively private character are triable as summons cases (based on private complaints, as opposed to investigation and charge-sheet by the police[2]).

To set the context right for the discussion, it would be apposite to recapitulate that, earlier in 2014, in **Arvind Kejriwal and others versus Amit Sibal& Anr**[3] (in a case alleging defamation

by Delhi Chief Minister Mr. Arvind Kejriwal) a Single Judge of the Hon'ble High Court of Delhi had ruled that the '**Magistrate has the power to hear the accused at the time of explanation of substance of the accusation, and if no offence is made out, to drop proceedings against him at that stage itself, and the court need not, in all cases, take the matter to a full blown trial**'.

Aggrieved by this decision, the matter was carried by the complainant (Mr.AmitSibal) to the Supreme Court. The main ground of attack was that '**The Magistrate, in a Summons Case, has no power to drop proceedings, in absence of a specific provision in the CrPC to that effect**' Pending hearing on the matter, the Supreme Court had stayed the operation of the High Court decision. The Respondents (representing the accused) did not dispute this legal position (as to CrPC not stipulating a 'discharge scenario' in summons cases) and the Supreme Court apparently agreed with this proposition and matter was remanded to the High Court for fresh consideration from the viewpoint of Section 482 of the CrPC, effectively implying that Trial Court would have no such power.

Since the order of the Supreme Court is basically in the nature of a 'consent order', an independent discussion of the legal position in this regard becomes extremely important and this is what the authors seek to do, by way of this article.

An overview of the Statutory Realm

Speaking purely in terms of statutory provisions, an examination and juxtaposition of the provisions relating to trial of 'Warrants Cases' and 'Summons Cases' would quickly reveal that as far as Trials of Sessions and Warrants cases (for offences punishable with imprisonment of 2 years or more) are concerned, there are specific provisions in the form of Section 227 and 239 CrPC, respectively, which stipulate affording an opportunity to the accused to make submissions on the point of charge and seek discharge at the very threshold. This is similar to a *'no case to answer'* motion, wherein accused argues that even if the prosecution case is accepted at face value and taken to be correct, no case is made out against the accused. This opportunity is specifically provided vis-à-vis Warrants Cases. However, there is no analogous provision as far as Summons Cases are concerned.

Chapter XX specifically deals with the procedure relating to trial of Summons cases by Magistrates.

Section 251 of the CrPC reads as follows:

251. Substance of accusation to be stated. *— When in a summons case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge.*

Even on a bare reading, it becomes apparent that there is no specific power of discharge or dropping of proceedings available with the Magistrate in a Summons Trial. However, the judicial opinion on this aspect is far from consistent and the position of law has meandered a great deal. A short chronology of decisions dealing with this aspect would be apposite.

Judicial Interpretation of Section 251 of the CrPC

The issue was first dealt-with at length by the Supreme Court in **K.M.Matthew v. State of Kerala**[4] where the accused had sought recalling of the summoning order in a Summons Case.

The facts of the case lie in very narrow conspectus; the accused (who was a Chief Editor of a daily newspaper) was summoned for an offence u/s 500 of the Indian Penal Code, 1860 ("IPC") (defamation). The Chief Editor, on appearance, moved an application seeking 'dropping of proceedings' on the premise that there was no specific allegation against him and offence against him was not made out. The Magistrate had accepted this plea and held that complaint, insofar as it concerned the Chief Editor, could not be proceeded with.

On the matter finally reaching the Supreme Court, it was held that:

"If there is no allegation in the complaint involving the accused in the commission of the crime, it is implied that the Magistrate has no jurisdiction to proceed against the accused. It is open to the accused to plead before the Magistrate that the process against him ought not to have been issued. The Magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. It is his judicial discretion. No specific provision is required for the Magistrate to drop the proceedings or rescind the process. The order issuing the process is an interim order and not a judgment. It can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused"

With these observations, the proceedings against the accused were dropped. This judgment gave rise to many questions such as, would not such a decision amount to the court reviewing its own order.

The correctness of the legal proposition set out above in K.M.Mathew (supra) came up for consideration before the Supreme Court in in **Adalat Prasad v. Rooplal Jindal & Ors**[5] wherein a three judge bench was specially constituted since the validity of K.M.Mathew (supra) was open to question. The Court held that "*If the Magistrate issues process without any basis, the remedy lies in petition u/s 482 of the CrPC, there is no power with the Magistrate to review that order and recall the summons issued to the accused*"[6]

The decision in Adalat Prasad was reaffirmed by the Supreme Court in **SubramaniumSethuraman v. State of Maharashtra & Anr**[7] (which was a Summons Case relating dishonour of cheque u/s 138 of the Negotiable Instruments Act, 1881 - "NI Act"), wherein it was held that : Discharge, Review, Re-Consideration, Recall of order of issue of process u/s 204 of the CrPC is not contemplated under the CrPC in a Summons Case. Once the accused has been summoned, the trial court has to record the plea of the accused (as per Section 251 of the CrPC) and **the matter has to be taken to trial to its logical conclusion and there is no provision which permits a dropping of proceedings, along the way.**[8]

An aberration

This position held sway for a long time, till the Supreme Court in **Bhushan Kumar v. State (NCT of Delhi)**[9] ruled that the Magistrate has the power to discharge an accused in a Summons Case. The relevant observations of the Court are as under:

"It is inherent in Section 251 CrPC that when an accused appears before the trial court pursuant to summons issued under Section 204 in a Summons Trial case, it is the bounden duty of the trial court to carefully go through the allegations made in the charge-sheet or complaint and consider the evidence to come to a conclusion, whether or not, commission of any offence is disclosed and if the answer is in the affirmative, the Magistrate shall explain the substance of the accusation to the accused and ask him whether he pleads guilty otherwise, he is bound to discharge the accused as per Section 239 of the CrPC"

The above observation raises more questions than it answers:

i. Firstly, if one delves into the facts of **Bhushan Kumar** (supra) it is revealed that the case concerned an FIR u/s 420 of the IPC, which is punishable with upto 7 years of imprisonment, and was therefore, a Warrants Case and not a Summons Case; in such a factual background, the discussion of Section 251 of the CrPC seems inapposite as Section 251 of the CrPC applies only *qua* a Summons Case;
ii. Secondly, in the context of a Summons Case, the applicability of words 'discharge' and Section 239 of the CrPC is questionable; Section 239 of the CrPC figures in a separate and dedicated chapter (Chapter XIX) and applies only with respect to a Warrants case and not a Summons case (Chapter XX). The case before the court was a warrants case. In a matter triable as Warrants Case the possibility of discharge was never in question.
iii. Therefore, the question as to whether the Magistrate is empowered to discharge an accused in a Summons Case never really arose before the court in this case. In fact, the caseinvolved only the following two questions:

    a. Whether taking cognizance of an offence by the Magistrate is same as summoning an accused to appear?
    b. Whether the Magistrate, while examining the question of summoning an accused, is required to assign reasons for the same?

    Therefore, in absence of this question arising before the court, and the case in question being a Warrants Case which specifically provides for 'discharge', **Bhushan Kumar** (supra) may not have precedential value for the following reasons:

c. Observations qua Summons Case cannot be considered to be the *'ratio decidendi'* as the immediate case before the court was one triable as a Warrants Case.
d. The court's attention not having been drawn to previous decisions in Adalat Prasad, SubramaniumSethuramanetc, and for that reason, the decision may be *per incuriam.*
e. being incongruent with the clear scheme of CrPC and procedure to be adopted in a Summons Case (expressly set out in Chapter XX of the CrPC)

The decision of the court in Bhushan Kumar (supra) was followed in a catena of decisions including **UrrshilaKerkar v. Make My Trip (India) Private Ltd**[10] with the following observations:

"9. It is no doubt true that Apex Court in Adalat Prasad Vs. Rooplal Jindal and Ors. (2004) 7 SCC 338 has ruled that there cannot be recalling of summoning order, but seen in the backdrop of decisions of Apex Court in Bhushan Kumar and Krishan Kumar (supra), aforesaid decision cannot be misconstrued to mean that once summoning order has been issued, then trial must follow. If it was to be so, then what is the purpose of hearing accused at the stage of framing Notice under Section 251 of Cr.P.C. In the considered opinion of this Court, Apex Court's decision in Adalat Prasad (supra) cannot possibly be misread to mean that proceedings in a summons complaint case cannot be dropped against an accused at the stage of framing of Notice under Section 251 of Cr.P.C. even if a prima facie case is not made out."

Course Correction

The recent order of the Supreme Court in **Amit Sibal (supra)**, appears to be the much needed course correction and seems to suggest that the trial court has no power to drop proceedings/discharge in a Summons Trial. This also appears to be in sync with the settled judicial view and also the scheme of CrPC, wherein separate and distinct procedures have been laid down for Warrants, as opposed to Summons Cases (or those cases triable summarily for that matter).

The Delhi High Court recently in **R.K. Aggarwal v. Brig Madan Lal Nassa& Anr**[11] expressly recognised the absence of power of discharge in a summons case by holding:

"There is no basis in the contention of the petitioners for discharge for the reasons that firstly, there is no stage of discharge in a summons case. Under Chapter XX of Cr.P.C, after filing a private complaint, in a summons case, the accused is either convicted or acquitted. There is no stage of discharge of an accused at any stage under Chapter XX of Cr.P.C"

Analysis.

The very fact that in a Summons Case there is no specific provision of a discharge, as opposed to a Warrants Case (S.227/239/245 of the CrPC) speaks volumes as to the legislative intent of not having an elaborate hearing at the time of framing of notice. What also deserves to be borne in

mind is the fact that Summons Cases were not envisaged to be as long-drawn out as Warrants Case and the need for a specific discharge hearing was ousted.

It was expected that, since Summons Cases relate to offences of relatively lesser gravity and capable of being completed expeditiously, having a dedicated charge hearing would only delay matters unnecessarily, without any corresponding benefit. The legislative intent to have a relatively abridged form of trial in Summons Cases is writ large on the face of the provisions.[12]

The latest decision in **Amit Sibal (supra)** is in perfect harmony with the statutory scheme. However, since the decision is more in the nature of a consent order, the authors feel that an authoritative judicial decision that examines the nuances of the issue is required. The decision should also take into account the fact that Summons Cases, for which a separate and abridged form of trial has been envisaged, now for all practical purposes take as long as Warrants Cases, and there is no ostensible reason as to why the accused should not be able to argue for a discharge in such cases and has to mandatorily face a protracted trial.

Conclusion

A decision which reads into Section 251 itself 'the power of discharge' may be required. One way in which the same can be done is by holding that the power to frame notice in a case, has implicit within itself the power not to frame a notice when no case is made out against the accused. Such a judicial pronouncement is required to clear the air on this issue. Amendment of the law is, of course, the more appropriate way of bringing about a change, wherein the desirable results may be achieved without having to stretch the language of the section unnecessarily.

Till then, reliance on SubramaniumSethuraman (*supra*) (supported broadly by Amit Sibal v. Arvind Kejriwal - *supra*) and the bare provisions of CrPC constrain us to conclude that there is no such provision in CrPC that permits a 'discharge' or 'dropping of proceedings' in a Summons Case. Having said that, the remedy of filing a revision u/s 397 of the CrPC and/or a petition seeking quashing of proceedings u/s 482 of the CrPC before the Hon'ble High Court is always available with the accused, who can argue, in appropriate cases, that the continuance of proceedings against him amounts to abuse of process of law, and ends of justice demand that proceedings are quashed.

Footnotes

1. 2016 SCC OnLine SC 1516

2. In contrast to Summons Cases based on private complaint, in cases based on FIR (culminating into a Police Report u/s 173 of the CrPC), Section 258 of the CrPC specifically provides for dropping of proceedings. However, a similar provision is conspicuously absent in Summons Cases based on a private complaint.

3. (2014) 1 High Court Cases (Del) 719

4. (1992) 1 SCC 217

5. (2004) 7 SCC 338.

6. *It should be noted that in Adalat Prasad (supra), the case against the accused was triable as a Warrants Case and not a Summons Case. It is pertinent to flag that in a warrants case the accused gets an opportunity to argue that no case is made out against him and seek a discharge, to protect himself from the rigmarole of a full-fledged trial, which might take years. Whereas, there is no analogous provision as far as Summons Cases are concerned, as demonstrated above.*

7. (2004) 13 SCC 324

8. Though there is no provision for discharge in such cases, but the dual remedy of invoking Section 482 as well as revisional jurisdiction u/s 397 of the CPC was clarified by the Supreme Court in *Dhariwal Tobacco v. State of Maharashtra (2009) 2 SCC 370.*

9. (2012) 5 SCC 424

10. 2013 SCC OnLine Del 4563. To the same effect, also see :Raujeev Taneja v. NCT of Delhi (Crl.M.C. No.4733/2013 decided on 11th November, 2013)

11. 2016 SCC OnLine Del 3720. Also see : R.P.G. Transmission Ltd v. Sakura Seimitsu (I) Ltd. &Ors, 2005 SCC OnLine Del 311, Raj Nath Gupta &Ors v. State and Anr. 1999 SCC OnLine Del 683 and Devendra Kumar Jain v. State, 1989 SCCOnLine Del 121

12. 41st Law Commission Report, p. 178, para 22.1

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TITLE: FIR AND TRANSFER OF INVESTIGATION: THE LEGAL ISSUES IN THE SUSHANT SINGH RAJPUT CASE

AUTHOR: ANIRBAN BHATTACHARYA

DATE: 07.08.2020

SOURCE: BAR & BENCH

Amidst the public outcry over the Mumbai Police's lack of incisiveness and unreasonable dilatoriness, as well as the legitimacy of the Bihar Police's FIR in Sushant Singh Rajput's case, a look at the law as propounded by the Supreme Court of India may help to better appreciate the prevalent scenario.

While the Mumbai Police has examined over 40 witnesses without lodging an FIR, the Bihar Police registered an FIR in Patna and reached Mumbai to investigate. The Mumbai Police, as well as the Home Minister of Maharashtra, has declared it as a case of suicide.

A police officer is empowered to 'investigate' into these classes of cases:

*(a) Where first information under **Section 154** is received relating to the commission of a cognisable offence;*

*(b) Where information is received, under **Section 155** relating to the commission of a non-cognisable offence and an order for investigation in respect thereof has been obtained from the competent Magistrate:*

*(c) Where information is received of a suicide or as to the killing of a person by another or by an animal or by machinery or by accident or having died under circumstances raising a suspicion that an offence has been committed. Such an investigation is primarily directed to ascertain the cause of death, falls under **Section 174**, and is called inquest.*

In Sushant's case, the Mumbai Police investigation was not set into motion through the first two modes. Thus, it squarely fell under Section 174.

Sections 174, 175 and 176 of the *Code of Criminal Procedure, 1973* (CrPC) provide for magisterial inquiries into cases of unnatural death. The system is in place to ensure that unexplained deaths do not remain unexplained and that the perpetrator is tried by a competent court established by law.

The proceedings Under Section 174 have a **very limited scope**. The object of the proceedings is **merely** to ascertain whether a person has died under suspicious circumstances or an unnatural death, and if so what is the apparent cause of the death. Details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted **is foreign to the ambit and scope of the proceedings under Section 174 of the Code.** Neither in practice nor in law was it necessary for the police to mention those details in the inquest report.

The procedure under Section 174 is for the purpose of discovering the cause of death, and **the evidence taken is very short.** In *George and Ors. v. State of Kerala and Anr*, it has been held that the investigating officer is not obliged to investigate, at the stage of inquest, or to ascertain as to who were the assailants. A similar view has been taken in *Suresh Rai and Ors. v. State of Bihar* . Therefore, Sections 174 and 175 of the Code afford a **complete Code in itself and are entirely distinct from the "investigation"** under Section 157 of the Code. Under the latter provision, if an officer in-charge of a police station has reason to suspect the commission of an offence which he is empowered to investigate, he shall proceed in person to the spot to investigate the facts and circumstances of the case.

The investigation under Section 174 is not an investigation upon receipt of information relating to the commission of a cognizable offence within the meaning and import of Section 154 of the Code *(Manoj Kumar And Ors v. State Of Chhattisgarh)*. The inquest report is supposed to be prepared on the spot with two or more respectable inhabitants of the neighbourhood and is to be submitted to the District Magistrate or Sub Divisional Magistrate. The inquest report normally would not contain the manner in which the incident took place or the names of eye-witnesses as well as names of accused persons. The basic purpose of holding an inquest is to report regarding the cause of death, namely whether it is suicidal, homicidal, accidental etc. The witnesses are not required to be examined.

In *Ashok Kumar Todi v. Kishwar Jahan and Ors.*, it has been held that the inquiry/investigation under Section 174 read with Section 175 of the Code can continue only till the outcome of the cause of the death. Depending upon the cause of death, the police has to either close the matter or register an FIR. In that case, as per the post mortem report dated 22.09.2007, the cause of death of Rizwanur Rahman was due to the effect of ten injuries on the body and which were *ante mortem* in nature. In such circumstances, the proceedings under Section 174 of the Code **were not permissible beyond** 22.09.2007 and registration of an FIR was the natural outcome to ascertain whether the death was homicidal or suicidal.

Therefore, in Sushant's case, since there was no FIR registered by the Mumbai Police, the question of a second FIR (the FIR registered by the Bihar Police being the only existent FIR) and applicability of *TT Anthony's case* does not arise, as decided in *Manoj Kumar Sharma.*

Secondly, it can be safely concluded that the ongoing investigation by the Mumbai Police is under Section 174 for the purpose of ascertaining whether the death is natural or unnatural.

Therefore, it belies legal logic as well as procedure established by law as to how the Mumbai Police, which was ONLY required to reach the spot where the deceased had been found and write up an inquest report in the presence of two or more respectable persons from the neighbourhood, continued to investigate under Section 174 (after examination of more than 40 persons) for more than a month when the proceedings under Section 174 are not permissible once the post mortem report is out.

Arguendo, if the procedure adopted by the Mumbai Police is indeed correct in cases of suicide, a similar investigation was imperative even in the case of Disha Salian, who also apparently committed suicide a few days prior to Sushant. The Mumbai Police has no answer as to why the procedures adopted are different in two similar cases of alleged suicide.

The other legal tangle is whether the Bihar Police could have reached Mumbai to investigate.

In Satvinder Kaur's case, the Supreme Court stated that the High Court had committed a grave error in accepting that the investigating officer had no jurisdiction to investigate the matters or the alleged ground that no part of the offence was committed within the territorial jurisdiction of the police station at Delhi. It held that at the stage of investigation, the material collected by an investigating officer cannot be judicially scrutinized for arriving at a conclusion that the officer of particular police station would not have territorial jurisdiction.

In Rasiklal's case, it was held that the without conducting an investigation, it was improper on the part of the investigating agency to forward its report with the observation that it did not have jurisdiction and that the investigation should be transferred to the concerned police station in Mumbai.

Both these cases are prior to the introduction of the concept of 'Zero FIR' in 2013. As explained in the case of *Bimla Rawal* by the High Court of Delhi, if at the time of registration of FIR itself, it is apparent on the face of it that crime was committed outside the jurisdiction of the police

station, the police, after registration of a Zero FIR, should transfer the FIR to the relevant police station for investigation.

The issue is now academic, since the Bihar government has submitted before the Supreme Court that it has agreed to transfer the case to the Central Bureau of Investigation (CBI).

As regards Rhea Chakraborty, accused in the Bihar Police FIR seeking investigation by the Mumbai Police, the Supreme Court has long settled the issue in In *Narmada Bai v. State of Gujarat and Ors*. In that case, it was held that the accused persons do not have a say in the matter of appointment of investigating agency and cannot choose as to which agency must investigate the offence committed by them. Recently, a three-Judge Bench in *E Sivakumar v. Union of India and Ors* reiterated the same.

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