



LAW in-depth



Judicial Inquiry vis a vis police investigation: Legal perspective

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THE term "judicial inquiry" seems to be tinged with a kind of sacredness and trust. Popular confidence in judicial inquiry is created understandably out of disappointing results in police investigations in many sensational cases. 'Judicial inquiry' which is popularly known as '*bichar bibhagio tadanto*' sounds involvement of judges or magistrates in the inquiry suggesting that there would be fair and more credible investigation. Whenever we confront any sensational offence threatening to the even tempo of the society or to the security or safety of our lives we immediately and almost instinctively demand judicial inquiry. Once declaration of judicial inquiry, i.e., '*bichar bibhagio tadanto*' is made, the movement gradually settles down as if everything is solved and appropriate mechanism is set on motion to bring the criminals to justice. It is just a matter of wait for some days or months only.

True it is that police actions and investigations suffer from many a infirmity more often yielding poor or no results. This aspect of things apart, and supposing that judicial inquiry enjoys better position on credibility count can we meaningfully demand judicial inquiry in every case regardless of the nature of crime? After all 'inquiry' is not 'investigation'. It has its statutory connotations, expressed in a different way, limitations. So before demanding or making orders for judicial inquiry it remains to be seen whether such inquiry is capable of serving the purpose it is called for. Let us see what the two oft-quoted legal phraseologies are all about and what legal connotations they carry with.

Statutory position

The expressions 'judicial inquiry' finds frequent use in the orders of the magistrates particularly when the court is not satisfied with the police report or when the case is sent to another magistrate for inquiry upon a narajji (dissent) petition filed by the informant. It is also used in a different language, namely, '*bichar bibhagio tadanto*' by the Govt. either suo motu or when pressed for by any social or political quarter. The terms 'judicial inquiry' and 'police investigation' as such are not to be found anywhere in the Code of Criminal Procedure, shortly, 'the Code', the parent law providing the concepts. The Code uses the terms 'inquiry' and 'investigation' not 'judicial inquiry' or 'police investigation'.

Relevant provisions of the Code

Section 4 of the Code describes "inquiry" as including every inquiry other than trial conducted by a court and "investigation" as including all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person other than a Magistrate. The two words occur in many different places in the Code. A close reading of the provisions of the Code in which the words occur clearly suggests that they are not used as synonyms or alternatives open to be adopted in similar circumstances. They are like different drugs preserved for fighting different diseases.

In the present context the most relevant provisions in the Code of Criminal Procedure are sections 192, 196B, 202, 203 and 205D.

Section 192 reads as follows.- (1) The Chief Metropolitan Magistrate, District Magistrate, or the Sub-divisional Magistrate may transfer any case of which he has taken cognizance, for inquiry or trial to any Magistrate subordinate to him.

Section 196B says- In the case of any offence in respect of which the provisions of section 196 (prosecution for offence against state) or section 196A (prosecution for certain classes of criminal conspiracy) apply the Chief Metropolitan Magistrate, or a District Magistrate may, notwithstanding anything contained in those sections or in any other part of this Code, order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the power referred to in section 155, sub-section (3).

Section 202(1) says inter alia- any Magistrate, on receipt of a complaint of an offence or which has been transferred to him under section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against and either inquire into the case himself or, direct an inquiry or investiga-

tion to be made by any Magistrate or by any police officer or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint. The second proviso of the subsection says in the similar way that-if the offence complained of is triable exclusively by the court of sessions, the Magistrate may postpone the issue of process for compelling attendance of the persons complained against and may make or cause to be made an inquiry or investigation for the purpose of ascertaining the truth or falsehood of the complaint. Sub-section 2 of section 202 provides that - if any inquiry or investigation under this section is made by a person not being a Magistrate or a police officer, such person shall have all the powers conferred by this Code on an officer in charge of a police station, except the power to arrest without warrant. Sub section (2A) says - any Magistrate inquiring into a case under this section, may, if he thinks fit, take evidence of witnesses on oath. And if the case is triable exclusively by the court of sessions, he shall call upon the complainant to produce all his witnesses and examine them on oath.

Section 205D of the Code provides as follows.- (1) When a case is instituted otherwise than on a police report it is made to appear to the Magistrate, during the course of inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police-officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code.

Comments

A plain reading of the provisions of law referred to above clearly suggests that the legal implications of words 'inquiry' and 'investigation' are different and the court is given discretion to use them according as they are applicable in view of the peculiarity of circumstances. Law does not contemplate their interchangeable use. Inquiry in its technical sense is circumscribed by formalities and not meant for circumstances claiming all out and in-depth investigation for ascertaining the truth or falsehood of



an allegation. In the whole criminal justice system the word, as I understand, is nowhere used in the sense that it carries higher credibility over police investigation or for that matter it can be resorted to upon failures in police investigation. It is to be noticed that law has taken care in using the two terms side by side as and when necessary so as to give the court a discretion as to which particular mechanism will fit into a particular case. The machinery of investigation is much heavier than the machinery of inquiry and in fact technically the most effective mechanism for detection of crime and the criminals. It provides a higher and more effective mechanism for discovering the truth or falsehood shrouded with mystery which is clearly impossible in an inquiry as contemplated in the Code. Investigation connotes all out efforts by specially trained police personnel for the collection of evidence and detection of criminals for the purpose of bringing them to justice. Investigation is a legal machinery set on motion for achieving a certain goal and goes on unabated unless and until it is achieved. It is just a mission having hardly anything to do with formality, transparency, time-frame or openness. It may be open, secret, painstaking, risky, challenging and admitting of no time-limit. On the other hand inquiry is more or less a formal search within a time limit, as I understand, meant for incidents involving no mystery or claiming no in-depth probe into things. The point may be illustrated by few examples.

Let us take for example, the sensational cinema-hall-bomb-blast case of Mymensingh. On the 7th day of December last year four bombs were let off in four cinema halls at Mymensingh almost at the same time in the evening killing 19 persons leaving many others injured. The tragic incident shocked the conscience of the whole nation. There was an uproar amid fear and confusion for proper detection of the root cause of the crime and detection of the persons responsible for the shocking tragedy. Govt. immediately responded by forming a '*bichar bibhagio tadanto Commission*' comprising Mr. Justice Sultan Hossain Khan, a retired judge of the Supreme Court. People seemingly felt relieved. The Commission made inquiry over a couple of months and submitted a report in March last showing reportedly no positive result. Quite natural, precisely because the incident by its nature claims an all-out investigation by a specialised investigating agency and the private detectives simultaneously and not a judicial inquiry. On the other hand the Dhaka-University-Shamsunnahar-Hall-incident of the last year yielded a positive result through a judicial inquiry. A moments reflection will indicate the difference between the two incidents calling for two kinds of moves directed to uncovering the inside stories.

Practice in the Magistrates' court

The practice of the cognizing Magistrate to send any and every case to another Magistrate subordinate to him for inquiry and report specially when confronted with narajji petition filed by the informant is so common and regular that it has become customary for the lawyers also to pray for judicial inquiry in the circumstances. What is generally done in a judicial inquiry is that a Magistrate examines usually in camera some four or five witnesses brought by the informant who more often than not are partisan and highly interested persons and heavily tutored. The tutored and interested witnesses must say something implicating the persons left out from charge-sheet. And there would naturally be no serious contradictions in their statements. The inquiring Magistrate upon perusal of the statements of the witnesses so examined finds it difficult to go against the same as there is no scope for cross-examination nor has he any right at the stage to sift and weigh the evidence. It is only the face value of the evidence that matters in the inquiry stage. The Magistrate, in the circumstances, has hardly any option but to submit a report showing his satisfaction as to the existence of prima facie case against the persons found innocent in police investigation. Judicial inquiry, therefore, in view of its inherent limitations is not meant for all cases. The practice of sending cases for judicial inquiry regardless of the nature of offence involved, it is submitted, is legally and factually wrong inasmuch as such indiscriminate reference more often defeats than serves the cause of justice. If the result of an investigation is not accepted it must be followed by another investigation by a different and more credible investigating agency and in no circumstances by a judicial inquiry. Let us take a murder case for example. Supposing that a report is submitted by police sending up some persons for trial and recommending release for some others. The informant goes dissatisfied with the report and files narajji petition for taking cognizance against the persons left out from charge-sheet. An order for judicial inquiry is as usually made. Let us suppose that three innocent persons are targeted by the informant out of enmity. What is the degree of probability for those innocent persons to avert the malicious attempt of the informant by inducing belief in the mind of the Magistrate that they are innocent. I am afraid, none. Because, they have no role to play or any say whatsoever in the process of judicial inquiry.

Concluding remarks

Indiscriminate demand for '*bichar bibhagio tadanto*', therefore, cannot be the right step towards the remedy for all wrongs and the routine orders made by the Magistrates directing judicial inquiry, it is submitted, is not legally and factually sound as the device more often than not turn counterproductive. It is the Legal awareness that can substantially diminish the undue trust reposed in '*bichar bibhagio tadanto*' and for the judicial practices it is a wait for an appropriate case to come up before the Supreme Court for interpretation and guidelines.

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LAW opinion



Some problems for rehabilitation of sex workers

SYED TAPOSH

Bangladesh is one of the poorest countries of the world. Poverty drives people in this country in many professions which are not recognised by society. Sex work is considered as one of these professions. A large number of sex workers live in our country. Most of the people have chosen this profession as there is no alternative of livelihood for them. Once someone get involv in this profession, it becomes very difficult for her to turn back to normal life. Sometimes, they never turn back and stick to this profession for generations.

There are many NGOs working for the welfare of the sex workers and their children. They have different activities on health, HIV/AIDS, human rights, education etc. with the objective to empower the sex workers. The word 'Rehabilitation' has widely been used by the development workers in our country. There is a debate among NGOs community on whether the sex workers should be rehabilitated or not. The NGO's working for the welfare of sex workers are mainly divided into two groups based on their stand on the issue of rehabilitation. One group works for rehabilitation of sex workers and their children while the other group



does not want rehabilitation. The later group consist the majority of the NGOs working in the field while only a few work for the rehabilitation. Even the donor's are also more interested to support the NGOs in the later group.

Rehabilitation of sex worker is in fact a difficult task. It should be through motivation, not by force. In the past our government made several attempts to rehabilitate the sex workers which failed to achieve the success due to many reasons. One of the reasons behind this was lack of interest from the sex workers for rehabilitation. Interests grow through motivation which results in behavioural change in different ways. There are many techniques for motivation. Appropriate motivation technique is needed for rehabilitation of sex workers. If motivation techniques are not appropriate, the behaviour may not be changed even if tried for long time.

Besides the absence of appropriate techniques for motivation, there were also problems of management and co-ordination in the efforts made by the governments in the past. There was also lack of co-ordination between the activities of NGOs and the Government. After the eviction of Sex Workers from the brothels at Narayanganj the government tried to rehabili-

tate them in the government's vagrant homes. The government's initiative for rehabilitation of sex workers was very good indeed but the effort went in vein because of lack of co-ordination and management problems. Government's failure to rehabilitate those sex workers created problems for others interested in rehabilitation.

Recently the government has initiated another step for rehabilitation of sex workers through centres for socially disabled women situated at different places of Bangladesh. While talking to some of the officials of these centres, it was found that the people involved in this process do not have adequate knowledge or expertise on the motivation techniques. They don't have knowledge on the current status and nature of sex workers and their children at brothel areas. The Sex Work business is related with different psycho-social aspects. Without knowing much about the psycho-social aspects of sex workers, their attitude, behavioural pattern, problems, financial aspects etc., it is impossible for anyone to succeed in the process of motivation for rehabilitation of sex workers.

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LAW news



Indian SC's rule Father can gift ancestral property to daughters

In a major judgement, the Indian Supreme Court has ruled that a father can gift a reasonable portion of his ancestral immovable property to daughters at the time of their marriage or even long after their marriage.

This ruling was given by a bench comprising Justice RC Lahoti and Justice Ashok Bhan while settling a 15-year-old dispute between a father and his daughters in Salem district of Tamil Nadu in favour of the latter by setting aside a trial court order which was upheld by the Madras High Court.

Considering several rulings of the apex court, the bench said "it can safely be held that a father can make a gift of ancestral immovable property within reasonable limits, keeping in view the total extent of the property held by the family in favour of his daughter at the time of marriage or even long after her marriage".

The father, Raja Gounder, had gifted some portion of his ancestral land to his daughters in 1985 but five years later alleged that the daughters, taking advantage of his addiction to alcohol, had fraudulently taken away the ancestral property which he could not have gifted.

The trial court and the high court had ruled in favour of the father saying he had no right to gift away ancestral property except for pious purposes.

The bench said the question as to whether a particular gift was within reasonable limits or not has to be judged according to the status of the family at the time of making a gift, the

extent of immovable property owned by the family and the extent of property gifts.

"No hard and fast rule prescribing quantitative limits of such a gift can be laid down. The answer to such a question would vary from family to family," Justice Bhan said.

Taking the case in hand, the bench said the father had failed to plead the total extent of the ancestral immovable property of the family and prove that the gift was unreasonable taking the total extent of property into account.

Apart from this, the question of reasonableness or otherwise of the gift made has to be assessed vis-à-vis the total value of the property held by the family.

"Simply because the gifted property is a house, it cannot be held that the gift made was not within the reasonable limits," the apex court said.

The court said, "It would depend on number of factors such as the status of the family, total value of the property held by the family and the value of the gifted property and so on".

However, on facts, it was found that the gift was not within reasonable limits, such a gift would not be upheld, the Supreme Court said and added it was for those challenging the gift to prove that the gift made by the father was excessive or unreasonable, keeping in view, the total holding of the family.

Source: PTI, New Delhi.