

(2016) 08 SHI CK 0076

In the High Court Of Himachal Pradesh

Case No : Criminal M.M.O. No. 269 of 2015.

**Amar Singh and another - Petitioners @HASH State of Himachal Pradesh
and another**

Date of Decision : 02-08-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), Section 482
Penal Code, 1860 (IPC) — Section 323, Section 352, Section 504

Citation : (2016) 3 SimLC 1585

Hon'ble Judges : Rajiv Sharma, J.

Bench : Single Bench

Advocate : Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate, for the Petitioner; Mr. Parmod Thakur, Additional Advocate General with Mr. Neeraj K. Sharma, Deputy Advocate General, for the Respondent No. 1; None, for the Respondent No. 2

Final Decision : Disposed Off

Judgement

Rajiv Sharma, J.(Oral) - This petition under Section 482 of Code of Criminal Procedure has been filed for quashing FIR No. 23/14 and criminal proceedings pending before Judicial Magistrate 1st Class, Arki, District Solan, in Case No. 134/14.

2. "Key facts" necessary for the adjudication of the present petition are that respondent No.2 has filed a complaint to the SHO, Arki on 23.3.2014 against the petitioners.

Thereafter, respondent No. 2 filed a complaint before the Judicial Magistrate 1st Class, Arki under Section 156(3) CrPC for registration of FIR against the petitioners under Sections 323, 352, 504, 506 and 34 IPC. Judicial Magistrate 1st Class, directed the SHO to register FIR and conduct investigation, vide order dated 26.3.2014. Thereafter, the Investigating Officer carried out investigation. Challan was put up in the Court of learned Judicial Magistrate 1st Class, Arki on 2.6.2014. Charges were framed against the petitioners on 19.5.2015. Case was fixed for recording statements of PW's on 13/14 August, 2015. Reply has been

filed by respondent No. 1. Respondent No. 2, though impleaded as respondent No.2, has chosen not to file the reply.

3. Mr. Sanjeev Bhushan, learned Senior Advocate has vehemently argued that the Judicial Magistrate 1st Class has ordered registration of FIR, without application of mind on 26.3.2014.

4. Mr. Parmod Thakur, Additional Advocate General has supported Order dated 26.3.2014.

5. Respondent No.2 has filed the complaint before the SHO on 23.3.2014. FIR was not registered. He filed an application to the Judicial Magistrate 1st Class, Arki. He ordered registration of FIR on 26.3.2014. Matter was investigated. Challan was put up. Charges were framed on 19.5.2015 against the petitioners. Order dated 26.3.2014 is very cryptic. There is non-application of mind by the learned Judicial Magistrate 1st Class. He has not even mentioned in the Order dated 26.3.2014 that he has gone through the complaint, Annexure P-2 dated 25.3.2014. He has passed a routine and mechanical order. Complaint, annexure P-2 under Section 156(3) CrPC is also not accompanied by an affidavit. Filing of affidavit along with complaint is now mandatory. The Magistrate has not even verified the veracity of the complaint.

6. Their lordships of the Hon''ble Supreme Court in Pepsi Foods Ltd. v. Special Judicial Magistrate reported in (1998) 5 SCC 749 have held that the order of a Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and law applicable thereto. He has also to examine the nature of allegations made in the complaint and evidence, both, oral and documentary, in support thereof.

Their Lordships have held as under:

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion.

The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.."

7. Their lordships of the Hon''ble Supreme Court in Priyanka Srivastava v. State

of U.P. reported in (2015) 6 SCC 287 have held that an application under Section 156(3) CrPC seeking registration of FIR must be supported by an affidavit. Purpose of filing an affidavit is to prevent abuse of the process which has become more common. Their lordships have further held that remedy available under Section 156(3) CrPC is not of routine nature. Exercise of power thereunder requires application of mind. He must verify the truth and veracity of the complaint and the nature thereof. Their Lordships have held as under:

29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the code. A litigant at his own whim cannot invoke the authority of the Magistrate. 2 Page 30 CRL.A.781/12 A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellows citizens, efforts are to be made to scuttle and curb the same.

30. In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take 3 Page 31 CRL.A.781/12 undue advantage in a criminal court as if somebody is determined to settle the scores.

31. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed.

The warrant for giving a direction that an the application under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where 3 Page 32 CRL.A.781/12 there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That

apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.

8. The Full Bench of Allahabad High Court in *Ram Babu Gupta v. State of U.P.* reported in 2001 CriLJ 3363 has held that on receiving complaint Magistrate has to apply his mind to allegations therein. He may at once proceed to take cognizance or order it to go to police station for being registered and investigated. Order of the Magistrate necessarily has to indicate application of mind. The Full Bench has held as under:

(17) In view of the aforesaid discussion on the legal provisions and decisions of the Supreme Court as on date, it is hereby held that on receiving a complaint, the Magistrate has to apply his mind to the allegations in the complaint upon which he may not at once proceed to take cognizance and may order it to go to the police station for being registered and investigated.

The Magistrate's order must indicate application of mind. If the Magistrate takes cognizance, he proceeds to follow the procedure provided in Chapter XV of Cr P.C. The first question stands answered thus.

48. It is clear from the scheme of Chapter XII of the Code that it is obligatory upon the police to investigate cognisable offence and book the offender, if any.

Therefore, where the police fails in its duty to register and investigate a cognisable offence, the aggrieved person may complain to the concerned Magistrate.

Where the Magistrate receives a complaint or an application which otherwise fulfils the requirements of a complaint envisaged by Section 2(d) of Cr. P.C. and the facts alleged therein disclose commission of an offence, he is not always bound to take cognizance.

This is clear from the use of the words "may take cognizance" which in the context in which they occur in Section 190 of the Code cannot be equated with "must take cognizance." The word "may" gives a discretion to the Magistrate in the matter. Two courses are open to him. He may either take cognizance under Section 190 or may forward the complaint to the police under Section 156(3), Cr. P.C. for investigation. Once he takes cognizance he is required to embark upon the procedure embodied in Chapter XV. On the other hand, if on a reading of complaint he finds that the allegations therein clearly disclose commission of a cognisable offence and forwarding of complaint under Section 156(3), Cr. P.C. to the Cr. P.C. to the police for investigation will be conducive to justice and valuable time of Magistrate will be saved in inquiring into the matter which was the primary duty of police to investigate, he will be justified in adopting that course as an alternative to take cognizance of the offence himself. An order under Section 156(3), Cr. P.C. is in the nature of a reminder or intimation to the police to exercise their full powers of investigation under Section 156(1), Cr. P.C. Such an investigation begins with the collection of evidence and ends with a

report or charge-sheet under Section 173. It is obvious that power to order investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The power under Section 156(3) is exercisable at a pre-cognizance stage while the other at post-cognizance stage. Once the Magistrate has taken cognizance of the offence, it is not within his competence to revert back to pre-cognizance stage and invoke Section 156(3), Cr. P.C. A great care is, therefore, to be taken by the Magistrate while deciding the course to be adopted. That discretion has to be exercised cautiously with application of judicial mind and not in a routine and mechanical manner.

9. A Learned Single Judge of Gujarat High Court in *Anil K. Khandelwal v. Maksud Saiyed* reported in 2006 CriLJ 3180 has held that the Magistrate has not even gone through the complaint. He has straightway issued directions under Section 156(3) CrPC to investigate the matter which was not just and proper. The Learned Single Judge has held as under:

27. It appears to the Court that the learned Chief Judicial Magistrate has not applied his mind while passing the order under Section 156(3) of the Criminal Procedure Code directing the police to investigate in the matter. The impugned order, on the face of it, reveals that he has not gone through the complaint. He has stated in the order that the accused Nos. 1 to 10 are Manager and Branch Manager of Dena Bank. As a matter of fact, the accused No. 1 was the Ex-Chairman and Managing Director of Dena Bank, and the accused No. 2 was the Executive Director. The accused Nos. 3 to 10 are Directors of Dena Bank. None of these persons are Managers or Branch Manager. Despite this, the learned Chief Judicial Magistrate has mentioned in his order that they are Managers or Branch Manager. With regard to the prospectus he has simply stated that the Bank has issued prospectus for its public issue and at page No. 87 false informations were given so as to cause damage to the Company and to jeopardise the reputation of the Company. Despite the fact that the litigations are pending before the Civil Court he has mentioned about non-returning of export bills etc. On these facts he has passed order under Section 156(3) of the Criminal Procedure Code, directing the PSI, Sayajiganj Police Station to make inquiry in the matter.

31. The Court is of the view that without undergoing this process in the present case the learned Chief Judicial Magistrate has straightway issued the direction under Section 156(3) of the Code to investigate in the matter which is not just and proper looking to the facts of the present case.

10. In the instant case also, even the Magistrate has not stated in the Order that he has gone through the documents.

11. A learned Single Judge of Andhra Pradesh High Court in *D.K. Pattanaik and Anr v. Station House Officer* reported in 2008 CriLJ 2287 has held that before a Magistrate orders investigation by the Police under Section 156(3), he has to apply his mind to know whether allegations in complaint, prima facie, make out a

case. The learned Single Judge has held as under:

29. On a careful consideration of the Scheme of the Code and the above mentioned judgments, I am of the view that even for ordering investigation by Police under Section 156(3) Cr.P.C., the Magistrate cannot act merely as a post office and he is bound to apply his mind before so doing.

30. The endorsement of the Magistrate, by which he directed the Police to investigate the complaint, does not show that there was any application of mind whatsoever. There is nothing to suggest therein whether he felt that the allegations, prima facie, made out an offence alleged and a further investigation is required or not. For this purpose, in my considered view, the Magistrate is bound to disclose his mind by a brief indication of the reason for ordering such an investigation. Otherwise, it is not possible to know whether the Magistrate has mechanically forwarded the complaint to the Police or he had done so after application of mind.

31. For the above mentioned reasons, I hold that before a Magistrate orders for investigation by Police under Section 156(3) Cr.P.C., he has to apply his mind to know whether the allegations in the complaint, prima facie, make out a case. I further hold that the learned Judicial Magistrate of I Class, Narasampet, failed to apply his mind before referring the complaint to Police for investigation.

12. Accordingly, the present petition is allowed. FIR No. 23/14 under Sections 323, 352, 504, 506 and 34 IPC and further criminal proceedings pending before Judicial Magistrate 1st Class, Arki, District Solan, in Case No. 134/14, are quashed and set aside.

13. Pending applications are also disposed of.