
(2014) 03 J&K CK 0030

In the Jammu And Kashmir High Court

Case No : Pet. No. 29/2023 and C.M.A. No. 34 Of 2013

Avtar Krishan Dewani

APPELLANT

Vs

Anil Dhar

RESPONDENT

Date of Decision : 28-03-2014

Acts Referred:

Citation : (2014) 2 JKJ 351

Hon'ble Judges : Mohammad Yaqoob Mir, J

Bench : Single Bench

Advocate : P.N. Goja, Advocate for the Appellant; Sunil Sethi, Sr. Advocate and Mohsn Bhatt, Advocate for the Respondent

Final Decision : Allowed

Judgement

Mohammad Yaqoob Mir, J.—At request of learned counsel for the petitioner, petition-in-hand is treated as petition u/s 561A Cr.P.C.,

necessary note as such be recorded in the title of the petition. Petitioner is aggrieved of order passed by the learned Sessions Judge, Jammu dated

23.02.2013 in terms whereof order of trial Court (C.J.M.), Jammu has been reversed.

2. Hindu Educational Society, Kashmir is registered Society registered under the Societies Registration Act of Smvt. 1998 vide Registration No.

18394/9 dated 25.01.1945. It has its registered office at Raipur Bantalab, Jammu. Said Society is a minority community Institution and has been in

existence since 1943. It imparts education and major institutions owned by the Society at present are Gandhi Memorial College, Srinagar and

Gandhi Memorial College of Education, Jammu.

3. Basically petitioner along with respondents 5 and 6 has filed a complaint

against respondents 1 to 3 alleging therein that said respondents have committed criminal breach of trust in respect of the property of the Society as they have withdrawn and mis-appropriated an amount of Rs.45.00

lac lying in the Central Bank of India, Talab Tillo Branch, Extension Counter, Gandhi Memorial College, Bantalab, Jammu.

4. Complaint was presented before learned Chief Judicial Magistrate, Jammu, who after hearing learned counsel for the complainants has passed

order dated 17.10.2012, same is reproduced herein below:-

Sh. P.N. Goja, Advocate for the complainant. Ld. counsel submitted that the case as projected in the complaint is of public importance and needs

thorough investigation through Crime Branch. I have also gone through the contents of the case wherein serious allegations of dishonest

misappropriation of Rs.45 lac on the part of potential accused persons have been made. The complaint as such, is sent to the Crime Branch,

Jammu with the direction to the I/C to verify the allegations and in case cognizable offence appears to have been committed then FIR shall be

registered and investigation conducted under law. A copy of this order along with complaint in original shall be forwarded to the I/C, Crime

Branch, Jammu through CPO for compliance. An index of the file shall be prepared and consigned to records.

5. As against the above order, respondents Nos. 1 and 2 filed Revision Petition. Learned Sessions Judge, Jammu after referring to Sections 200,

202, 204 and 156(3) Cr.P.C has OPENED that the proper course open to the Magistrate was first to take cognizance then to have got the

preliminary inquiry conducted u/s 202 Cr.P.C. and thirdly should have sent it for investigation u/s 156(3) Cr.P.C. He further observed that unless

the complainant is examined, the Magistrate is not competent to issue the process and when the Magistrate is satisfied that there is a sufficient

material and ground for proceedings then he will issue the process only thereafter Magistrate can proceed u/s 156(3) Cr.P.C. The Magistrate has

committed illegality. He has not examined the complainant. He has simply sent the case to the Crime Branch which he ought not to have done. The

order drawn by the trial Court is without application of mind, no material existed which would satisfy the Magistrate for passing such order. Order

is set aside and complainant is free to seek redressal of his grievance by

approaching the appropriate forum.

6. Learned Revisional Court has mis-directed itself in making observations and in framing opinion on wrong assumptions. Furthermore has

entertained the revision against an interlocutory order which is barred in view of clear mandate of Section 435(4a) Cr.P.C.

7. Section 190 Cr.P.C provides that Magistrate may,

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a report in writing of such facts made by any police officer; and

(c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been

committed take cognizance of such offences. If Magistrate opts to take cognizance then he has to follow the procedure prescribed under Chapter

XVI of the Cr.P.C., i.e., u/s 200 Cr.P.C., he has at once to examine the complainant and the witnesses present, if any, upon oath and the

substance of the examination has to be reduced to writing which is to be signed by the complainant and the witnesses and as also by the Magistrate

subject to the condition as incorporated in the proviso. Thereafter he may either postpone the issuance of process and direct inquiry or

investigation in terms of Section 202 Cr.P.C. In case he does not opt. to postpone issuance of process then he has to issue process and proceed in

accordance with the Chapter XVII Cr.P.C. If such course is adopted, then upon such complaint, investigation u/s 156(3) Cr.P.C. is not required.

8. In case Magistrate receiving the complaint does not take the cognizance and opts for ordering investigation u/s 156(3) Cr.P.C. then in that

eventuality neither the statement of the complainant or of the witnesses is required to be recorded. Only, the Magistrate has to apply his mind and

order investigation.

9. Learned Sessions judge misconstruing the provisions, has opined that it is only after the proceedings under Sections 190/200/202 or 204

Cr.P.C, Magistrate could order investigation u/s 156(3) Cr.P.C.

10. Section 190 Cr.P.C. provides that the Magistrate may take cognizance. The word 'may' assumes significance. It empowers the Magistrate

either to take cognizance and to proceed in accordance with Chapter XVI Cr.P.C. or to send the complaint for investigation.

11. Learned Magistrate in his order dated 17.10.2012 has strictly adhered to the provisions of Section 190 Cr.P.C. He has applied his mind and

has noticed that serious allegations of mis-appropriation of Rs. 45 lac has been levelled, therefore had opted to send the complaint to the Crime

Branch, Jammu with direction to verify the allegations and in case cognizable offence appears to have been committed then FIR shall be registered

and investigation conducted under law. The course adopted by the learned Magistrate is totally in keeping with the mandate of Sections 190

Cr.P.C. and 156(3) Cr.P.C.

12. Learned Sessions judge has observed that learned Magistrate could not have ordered investigation by the Crime Branch as in terms of Section

156(3) Cr.P.C., Magistrate has the power to direct the officer-in-charge of Police Station to investigate. Such opinion framed by the learned

Sessions Judge is totally misplaced. Section 156(1) Cr.P.C. provides that any officer-in-charge of Police Station may without the order of a

Magistrate, investigate any cognizable case. Section 156(3) Cr.P.C. provides that the Magistrate u/s 190 CrPC may order such an investigation.

13. From the judgment rendered by the Apex Court in Dilawar Singh Vs. State of Delhi, . Paragraph No. 17 is relevant to be quoted:-

17. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation u/s 156(3) of

Cr.P.C. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose

of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so.

After all, registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable

offence in a book kept by the officer in charge of the police station as indicated in Section 154 of Cr.P.C. Even if a Magistrate does not say in so

many words while directing investigation u/s 156(3) of the Cr.P.C. that an FIR should be registered, it is the duty of the officer in charge of the

police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps

contemplated in Chapter XII of the Cr.P.C. only thereafter.

14. In the instant case, the Magistrate before taking cognizance has ordered

investigation u/s 156(3) Cr.P.C, therefore, was not obliged to examine the complainant and the witnesses at the time of filing of the complaint. Magistrate has applied the mind for taking action, i.e., for ordering investigation u/s 156(3) Cr.P.C. In case he would have taken cognizance then he had to proceed in accordance with Chapter XVI Cr.P.C.

15. When complaint is filed before the Magistrate as envisaged by Section 190 Cr.P.C., if the only course is to take cognizance then there will be no scope for ordering investigation u/s 156(3) Cr.P.C. Then purpose of 156(3) Cr.P.C. will be rendered illogical and illusory.

16. Legislature in its wisdom has used the word 'may' in Section 190 Cr.P.C., same has to be used and interpreted in a manner so as to advance

the object. The only way of using the word 'may' is to hold that Magistrate has power to take action either by taking cognizance and proceed in the

manner as prescribed under Chapter XVI Cr.P.C. that is he has to record the statement of complainant and the witnesses. But if the Magistrate

applies his mind and feels that allegations in the complaint are such which require investigation then appropriate course for the Magistrate is to

order with Section 156(3) Cr.P.C. In such eventuality the statement of complainant or the witnesses is not required to be recorded. When such

course is adopted then Police on receipt of such complaint from the Magistrate has to proceed in accordance with chapter XIV Cr.P.C. that is to

proceed in accordance with Section 157 Cr.P.C. and other provisions of Chapter XIV Cr.P.C.

17. Offices of the Crime Branch Kashmir and Jammu have been declared to be Police Station for the purpose of registration and investigation of

the offences as listed in Annexure attached to SRO 202 notified on 03.06.1999. Observation of learned Sessions judge that Magistrate could not

have ordered investigation to the Crime Branch on the ground that it is only officer-in-charge police station who could be asked to investigate is

misplaced because direction to the Crime Branch means direction to the Incharge Police Station (Crime Branch).

18. Learned Counsel for respondents 1 to 3 again submitted that offences allegedly committed do not fall within the ambit of Annexure to SRO 22.

Learned Counsel further submitted that offence allegedly is committed in district Jammu, therefore, it does not fall even within the scope of S. Nos.

7 and 8 of annexure to SRO 202 dated 03.06.1999, which reads as under:-

7. Cases of fraud, theft or cheating of a peculiar nature which effect more than one District.

8. Important theft of currency notes or important defalcation of public money.

19. It is alleged that an amount of Rs. 45 lac has been withdrawn from the account of the Society lying in the Central Bank of India Talab Tillo

Branch Extension Counter Gandhi Memorial College, Raipur, Bantalab, Jammu, but the same effects the funds of the society which is a joint fund

operated for both districts of Srinagar and Jammu.

20. In the complaint, it is alleged that the society has crores of rupees in various banks accounts with Nationalized Bank including Central Bank of

India, Talab Tillo branch, Extension Counter, Gandhi Memorial College of Education, Raipur, Bantalab, Jammu. Accused with other members of

the Executive Committee being office bearers of the society stood entrusted with the property of the Society. There have been disturbing reports

about mis-appropriation and mis-management by the accused and wrongful loss has been caused to the Society. Accused have committed criminal

breach of trust in respect of the property of the society. Therefore, offence of mis-appropriation effects more than one district, therefore, allegedly

criminal act committed by the accused is of magnitude. Even otherwise also public money is allegedly swindled; therefore, order to the Crime

Branch to investigate the case was well within the competence of Magistrate.

21. Revisional Court has totally ignored the bar for entertaining revision as contained in section 435(4a) Cr.P.C. which reads as under:-

435(4-a) The powers of revision conferred by this Section shall not be exercised in relation to any interlocutory order passed in any appeal,

inquiry, trial or other proceedings.

22. Order of learned Magistrate on the face of it was interlocutory so revision should not have been entertained, this aspect has been ignored by

the learned Sessions judge.

23. Learned Revisional Court appears to have laboured under misconception-of law and in the process has reversed a legally sound order passed

by the learned Magistrate.

24. Order impugned passed by the learned revisional court is totally inconsistent

and misdirected and a sheer abuse of the process of the court so
is unsustainable, as such is set aside. Petition accordingly allowed along with
connected Cr.M.A. Crime Branch shall proceed in pursuance to
order dated 17.10.2012 passed by the learned Chief Judicial Magistrate. Revision
Petition succeeds and is disposed of as above along with
connected CMA.