
(2012) 12 MP CK 0049

In the Madhya Pradesh High Court

Case No : Miscellaneous Cri. C. No. 4351 of 2012

Bachhu Lal Sharma and Others

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 05-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156, 156(1), 156(3), 169, 173

Citation : (2013) CriLJ 1479 : (2013) 1 JLJ 311 : (2013) 1 MPLJ 188

Hon'ble Judges : S.K. Gangele, J;G.D. Saxena, J

Bench : Division Bench

Advocate : Rajeev Upadhyay, for the Appellant; J.D. Suryavanshi for Respondent No.1 and H.K. Shukla, for the Respondent

Final Decision : Allowed

Judgement

G.D. Saxena, J.—By filing this petition u/s 482 of the Code of Criminal Procedure, 1973, the petitioners have challenged the order dated 7th April, 2012 passed on an unregistered Criminal Complaint Case by the Special Judge (Prevention of Corruption Act) Bhind, whereby in exercise of powers u/s 156(3) of Criminal Procedure Code, the learned trial Court directed to register the F.I.R. against the petitioners and pursuant thereto, the respondent No. 1/EOW Wing Gwalior by lodging F.I.R. at Crime No. 27/2012 has proceeded with the investigation against the accused-petitioners. The facts, in brief, just for the decision of this petition are that the petitioners were public servants and posted in Woman and Child Welfare Department in a district Bhind. The complainant-respondent No. 2 being the Secretary of Oshika Manila Kalyan Mandal filed a complaint that the petitioners after connivance with Smt. Rajeshwari Devi and Prahalad Gandharv prepared the forged documents in the name of the Society to receive grant of Rs. 3,90,000/- which was issued by the State Government. On complaint, the trial Judge by an order dated 6th September, 2011 directed the State Economic Wing Gwalior to make an inquiry into the complaint of the respondent No. 2. In compliance with the direction of the Court, the State Economic Wing Gwalior

submitted a detailed report. Thereafter, the trial Judge by an order dated 7th April, 2012 again directed that since the offences as alleged were cognizable, therefore, on the basis of the complaint filed before the Court, it directed the respondent No. 1 to lodge the F.I.R. and register the crime against the named accused and after investigation the report be sent to the Court.

2. The contention put forth on behalf of the learned counsel appearing for the petitioners is that the trial Judge, once after making detailed inquiry into the alleged crime by the EOW Wing Gwalior and submission of the report in compliance with the directions of the Court dated 6th September, 2011, the direction given by the trial Judge again while passing the order u/s 156(3) of Criminal Procedure Code for lodging the F.I.R. and thereafter initiate the investigation against the named accused is misuse of the process of law. It is submitted that as per requirement of law, in the event of not accepting the report filed by the investigating agency, the trial Court is under an obligation to proceed with the complaint under sections 200 and 202 of Criminal Procedure Code and while proceeding so either he can pass the order u/s 203 of Criminal Procedure Code for dismissal of the complaint or u/s 204 of Criminal Procedure Code for issuing the process against the accused. In that view of the matter, the order under consideration is against the principles of law and same is liable to be set aside. In support of his contention, learned counsel placed reliance on the decision in the case of Maksud Saiyed Vs. State of Gujarat and Others, and Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others,

3. Per contra, the submission of the learned counsel appearing on behalf of respondent No. 1/EOW Wing Gwalior is that the respondent No. 1 is obliged to comply with the directions passed u/s 156(3) of Criminal Procedure Code and consequently, the F.I.R. was lodged and the crime was registered in which the investigation is under progress. It is submitted that after investigation, the respondent No. 1 shall submit either the charge-sheet against the accused or final report, as the case may be, before the competent Court.

4. The question for consideration before us is whether the Special Judge (Prevention of Corruption Act) once after passing an order either u/s 156(3) or section 202(1) of Criminal Procedure Code and inquiry and submission of the report by the Investigating Agency before him in compliance of his earlier directions, again in the light of section 156(3) of Criminal Procedure Code can further issue order for lodging the F.I.R. and registration of the crime to investigate the matter to the same agency?

5. Keeping the above in mind, let us now consider whether the impugned order is liable to be quashed.

6. Before adverting to the rival submissions of the learned counsel for the parties, it would be profitable to reproduce relevant provisions of the Code which are extracted hereinbelow:--

156. Police officer's power to investigate cognizable case. -- (1) Any officer in-

charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered u/s 190 may order such an investigation as above mentioned.

202. Postponement of issue of process. -- (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him u/s 192, may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made.-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath u/s 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in-charge of a police station except the power to arrest without warrant.

7. In *Smt. Mona Panwar Vs. The Hon"ble High Court of Judicature at Allahabad and Others*, , at page 504: the Hon. Apex Court had observed as follows:--

18. When the complaint was presented before the appellant, the appellant had mainly two options available to her. One was to pass an order as contemplated by section 156(3) of the Code and the second one was to direct examination of the complainant upon oath and the witnesses present, if any, as mentioned in section 200 and proceed further with the matter as provided by section 202 of the Code. An order made under sub-section (3) of section 156 of the Code is in

the nature of a peremptory reminder or intimation to the police to exercise its plenary power of investigation u/s 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence u/s 156 and ends with the final report either u/s 169 or submission of charge-sheet u/s 173 of the Code. A Magistrate can u/s 190 of the Code before taking cognizance ask for investigation by the police u/s 156(3) of the Code. The Magistrate can also issue warrant for production, before taking cognizance. If after cognizance has been taken and the Magistrate wants any investigation, it will be u/s 202 of the Code.

19. The phrase "taking cognizance of means cognizance of an offence and not of the offender. Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint or on a police report or upon information of a person other than a police officer. Before the Magistrate can be said to have taken cognizance of an offence u/s 190(1)(b) of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding u/s 200 and the provisions following that section. However, when the Magistrate had applied his mind only for ordering an investigation u/s 156(3) of the Code or issued a warrant for the purposes of investigation, he cannot be said to have taken cognizance of an offence.

20. Taking cognizance is a different thing from initiation of the proceedings. One of the objects of examination of the complainant and his witnesses as mentioned in section 200 of the Code is to ascertain whether there is prima facie case against the person accused of the offence in the complaint and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such person. Such examination is provided, therefore, to find out whether there is or not sufficient ground for proceeding further.

21. From the order dated 1-8-2009, passed by the appellant, it is evident that the appellant had called for a report from the police station concerned and considered the said report wherein it was inter alia mentioned that no case was registered on the basis of the application made by Respondent 3. Respondent 3 at the time of filing complaint before the appellant had filed her own affidavit, carbon copy of the application sent by her to the Senior Superintendent of Police, Saharanpur with its postal registration and photocopy of the medical certificate. Under the circumstances the appellant had exercised the judicial discretion available to a Magistrate and directed that the application, which was submitted by Respondent 3 u/s 156(3) of the Code, be registered as complaint and directed the Registry to present the said complaint before her on 28-8-2009 for recording the statement of Respondent 3 u/s 200 of the Code.

23. Normally, an order u/s 200 of the Code for examination of the complainant

and his witnesses would not be passed because it consumes the valuable time of the Magistrate being vested in inquiring into the matter which primarily is the duty of the police to investigate. However, the practice which has developed over the years is that examination of the complainant and his witnesses u/s 200 of the Code would be directed by the Magistrate only when a case is found to be a serious one and not as a matter of routine course. If on a reading of a complaint the Magistrate finds that the allegations therein disclose a cognizable offence and forwarding of the complaint to the police for investigation u/s 156(3) of the Code will not be conducive to justice, he will be justified in adopting the course suggested in section 200 of the Code.

24. Here, in this case Respondent 3 had averred in the application submitted before the appellant that the officer in-charge of Nakur Police Station had refused to register her complaint against her father-in-law regarding alleged rape committed on her and that no action was taken by the Senior Superintendent of Police though necessary facts were brought to his notice. Under the circumstances, the judicial discretion exercised by the appellant, to proceed u/s 200 of the Code.

8. In Rameshbhai Pandurao Hedau Vs. State of Gujarat, , at page 191, the Hon. Apex Court had observed as follows:--

25. Power to direct an investigation to the police authorities is available to the Magistrate both u/s 156(3), Criminal Procedure Code and u/s 202, Criminal Procedure Code. The only difference is the stage at which the said powers may be invoked. As indicated herein before, the power u/s 156(3) Criminal Procedure Code to direct an investigation by the police authorities is at the pre-cognizance stage while the power to direct a similar investigation u/s 202 is at the post-cognizance stage.

26. The learned Magistrate has chosen to adopt the latter course and has treated the protest petition filed by the appellant as a complaint u/s 200 of the Code and has thereafter proceeded u/s 202, Criminal Procedure Code and kept the matter with himself for an inquiry in the facts of the case. There is nothing irregular in the manner in which the learned Magistrate has proceeded and if at the stage of sub-section (2) of section 202 the learned Magistrate deems it fit, he may either dismiss the complaint u/s 203 or proceed in terms of section 193 and commit the case to the Court of Session.

9. On perusal of the above legal positions, it is clear that in ordering an investigation u/s 156(3) of the Code, the trial Magistrate is not empowered to take cognizance of the offence and such cognizance is taken only on the basis of the complaint of the facts received by him which includes a police report of such facts or information received from any person, other than a police officer u/s 190 of the Code. Section 200 of the Code which falls in Chapter XV indicates the manner in which the cognizance has to be taken and that the Magistrate may also inquire into the case himself or direct an investigation to be made by a

police officer before issuing process. In the present case, the trial Judge at preliminary stage u/s 156(3) of the Code by an order dated 6th September 2011 directed that the complaint of the complainant u/s 156(3) of Criminal Procedure Code is sent for inquiry to the Police Superintendent Economic Offences Wing Gwalior. Thereafter, on receipt of the report dated 11th December 2011, the direction by an order dated 7th April 2012 is again issued to the effect that since the matter in complaint is related to the misappropriation of Government money and cognizable by the police, hence, after due consideration, it has forwarded to the State EOW Gwalior the complaint and documents filed for registration of the F.I.R. and then to investigate and submit further report. This direction is against the law because once the power conferred u/s 156(3) of Criminal Procedure Code is exercised, same could not be re-exercised after receiving the report from the Investigating Agency. It is trite in law that the trial Judge ought to have proceeded with the procedure after recording the statements of complainant and witnesses and after considering the documents filed with the complaint and also on due consideration of the report filed by the EOW Gwalior, as laid down in Chapter XV of the Code, he could have passed the order either u/s 203 or section 204, Criminal Procedure Code. Therefore, subsequent order given by him for investigation after lodging the F.I.R. by the same investigating agency, which has already submitted the report in terms of the directions contemplated in law is not inconformity with the provisions as laid down above. Consequently, we allow the petition and set aside the order dated 7th April 2012 with a direction to the trial Court to follow the procedure and proceed with complaint case as per provision of the law.