

(2018) 03 PAT CK 0140

In the Patna High Court

Case No : Criminal Miscellaneous No. 31414 Of 2015

Dr. Nehal Akhtar @ Dr. Md. Nehal Akhtar

APPELLANT

Vs

State Of Bihar Through The Inspector And Anr

RESPONDENT

Date of Decision : 29-03-2018

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 482

Indian Penal Code, 1860 — Section 120(B), 156(1), 156(3), 190, 190(1)(b), 200, 201, 202, 202(1), 420, 465, 467, 468, 471

Prevention Of Corruption Act, 1988 — Section 5(4), 13(1)(d), 13(2), 19

Citation : (2018) 3 PLJR 263

Hon'ble Judges : Ashwani Kumar Singh, J

Bench : Single Bench

Advocate : Amit Narayan, Sanjeev Kumar Mishra, Jharkhandi Upadhyay, R.K. P. Singh, Bal Bhushan Chaudhary, Ramakant Sharma, Santosh Kumar Pandey

Final Decision : Allowed

Judgement

1. Heard learned counsel for the petitioner, learned counsel for the State, learned counsel for the Vigilance Investigation Bureau and learned counsel

for the opposite party no.2.

2. In the present application preferred under Section 482 of the Code of Criminal Procedure (for short "Cr.P.C."), the petitioner has made two

prayers. His first prayer is for quashing the order dated 18.05.2015 passed by the learned Special Judge, Vigilance-II, Patna in Special Case No. 08 of

2014 arising out of Complaint Case No. 8951(C) of 2013 by which after perusing the case record and enquiry report sent by the Superintendent of

Police, Vigilance and after recording that a prima facie case is made out against the petitioner and two others named in the complaint, namely, Lal

Dhari Chaudhary, the then Revenue Karamchari, Baliya, Begusarai, Dr. S.S.

Asfaque and Nehal Akhtar (petitioner), the Superintendent of Police, Vigilance Investigation Bureau has been directed to register an FIR and investigate the same on the basis of the complaint. The second prayer of the petitioner is to quash the First Information Report of Vigilance P.S.Case No. 103 of 2015 dated 09.12.2015 arising out of Special Case No. 08 of 2014/ 22 of 2015 registered under Sections 465, 467, 468, 471, 420, 201, 120-B of the Indian Penal Code and Section 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988.

3. The facts giving rise to this case, in brief, are that one Abdul Alim son of Kaji Salim filed a complaint case in the court of Special Judge, Vigilance-

II, Patna on 16.01.2014, vide Special Case No. 08 of 2014, alleging therein that his grand father, namely, Kaji Md. Muslim was the owner of the land

measuring 19 bighas, 13 kathas and 4 dhurs vide Tauzi no.665, Thana no. 627. His name stood recorded in the revenue register, rent receipt was

granted in his favour and he was coming in peaceful possession. The accused nos.4 and 5, namely, Dr. S.S. Asfaque and Nehal Akhtar with an

intention to grab the aforesaid land of the complainant created a forged and fabricated sale deed no. 5620 dated 02.12.1957 vide page no.113 to 118,

book no.1 and volume no. 36, which was produced before the authority concerned with intention to use as genuine knowing very well that the same

was forged one. When the complainant came to know about the forgery of the aforesaid accused persons, he applied for certified copy of the same

and when the same was supplied, he became aware of the fact that the vendor and the vendee were different persons. He further alleged that the

aforestated accused persons in conspiracy with accused nos. 1, 2 and 3, namely, Fateh Faiyaj, the then Circle Officer, Balia, Begusarai, Shailendra

Kumar Singh, the then Circle Inspector of Balia, Begusarai and Lal Dhari Chaudhary, the then Revenue Clerk of Circle Office, Balia, Begusarai

forged and fabricated the sale deed dated 02.12.1957 and in place of name of his ancestor they got the name of father of accused nos.4 and 5

registered by making interpolation in the revenue record. He alleged that the accused nos. 1 to 3 being public servants issued rent receipt in favour of

accused nos. 4 and 5 after taking illegal gratification.

4. After instituting the complaint, the Special Judge made an enquiry from the complainant and heard the submissions of the advocate representing him

and vide order dated 16.01.2014, the date on which the complaint was filed, the learned Special Judge sent a copy of the same to the Superintendent of Police, Vigilance Investigation Bureau for investigation and report and adjourned the case to 15.02.2014. Since then, the case was adjourned to different dates awaiting the investigation report, which was submitted in the court on 12.02.2015, the date on which the learned Special Judge perused the investigation report and directed for keeping the same on record. Thereafter, on 25.02.2015, he fixed 12.03.2015 as the date for hearing the counsel for the complainant on the investigation report. On 12.03.2015, again the case was adjourned to 02.04.2015 and thereafter to 04.04.2015, 20.04.2015, 07.05.2015, 12.05.2015 and 18.05.2015. On 18.05.2015, after hearing the counsel for the complainant and perusing the investigation report submitted by the Vigilance Investigation Bureau, the impugned order was passed whereby the Superintendent of Police was directed to institute an FIR against three out of five accused persons named in the complaint, namely, Lal Dhari Chaudhary, the then Revenue Clerk, Baliya, Begusarai, Dr. S.S. Asfaque and Nehal Akhtar (petitioner). Thereafter, Vigilance P.S. Case No. 103 of 2015 was registered on 09.12.2015 and investigation was taken up.

5. Assailing the aforesaid impugned order dated 18.05.2015 and the First Information Report vide Vigilance P.S. Case No. 103 of 2015, learned counsel for the petitioner submitted that the learned Special Judge, Vigilance committed grave illegality in proceeding with the complaint first and then in directing for institution of an FIR on the basis of the complaint. He submitted that firstly the order is bad as it is in complete contravention to the ratio laid down by the Supreme Court in Anil Kumar & Ors. Vs. M.K. Ayappa [(2013) 10 SCC 705] and, secondly, because once the learned Special Judge had taken cognizance of the offence under Section 190 of the Cr.P.C. and proceeded with the enquiry under Section 202 of the Cr.P.C. after entertaining the complaint filed under Section 200 of the Cr.P.C., he ought not to have referred the complaint in exercise of powers under Section 156(3) of the Cr.P.C. for investigation by the police under Section 156(1) of the Cr.P.C. He submitted that the procedure adopted by the learned Special Judge, Vigilance in dealing with the case is wholly illegal and unsustainable in the eyes of law.

6. Per contra, learned counsel appearing for the Vigilance Investigation Bureau submitted that the Vigilance Investigation Bureau proceeded with the preliminary investigation as per the order by the learned Special Judge. The Vigilance Investigation Bureau did not commit any illegality either in proceeding with the preliminary investigation or in instituting the FIR pursuant to the direction given by the court. He, however, admitted that in view of the ratio laid down by the Supreme Court in *Anil Kumar & Ors. Vs. M.K. Ayappa (Supra)*, the learned Special Judge was not right either in directing the Vigilance to conduct preliminary investigation or to institute FIR.

7. Learned counsel appearing for the complainant-opposite party no.2 submitted that grave allegations have been made against the petitioner in the complaint, which was found true in preliminary investigation. He submitted that initially the complainant had filed a complaint in terms of Section 200 of the Cr.P.C. before the court of Special Judge, Vigilance in which the learned Special Judge called for a report from the Superintendent of Police, Vigilance Investigation Bureau, Patna and on receipt of the preliminary report when the allegations were found true, the court directed for institution of an FIR and investigation of the same, which cannot be held to be bad in law. He submitted that the learned Special Judge, Vigilance had not proceeded with the enquiry into the matter rather he had simply called for a report from the Superintendent of Police, Vigilance, which cannot be termed to be an enquiry in terms of Section 202 of the Cr.P.C. He submitted that so far as the petitioner is concerned, he is not a public servant and, hence, no sanction was required for prosecuting him and, therefore, no illegality can be found with the investigation of the criminal case lodged against him.

8. I have heard learned counsel for the parties and perused the record.

9. The facts, which are not in dispute, are as under :-

(a) Initially a complaint was filed by the complainant-opposite party no.2 against altogether five persons including the Circle Officer and the Circle

Inspector of Balia, Begusarai.

(b) The advocate appearing for the complainant was heard and the learned Special Judge, Vigilance also made enquiry from the complainant.

(c) The learned Special Judge, Vigilance directed the complaint petition to be sent to the Superintendent of Police, Vigilance Investigation Bureau for

preliminary investigation and report.

(d) The preliminary investigation report was received and thereafter the case was adjourned on several dates for hearing the complainant on the report.

(e) After hearing the complainant and perusing the investigation report, the learned Special Judge, Vigilance came to a finding that there was sufficient material to proceed against the petitioner and two others and there was no material to proceed against the Circle Officer and the Circle Inspector.

10. The Special Judge, Vigilance is deemed to be a Magistrate under Section 5(4) of the Prevention of Corruption Act, 1988 being clothed with all magisterial power provided under the Cr.P.C.

11. When a private complaint is filed before a Magistrate, he has two options; (i) he may take cognizance of the offence under Section 190(1)(b) of the Cr.P.C. and proceed further for enquiry and trial; and (ii) he may direct for investigation under Section 156(1) of the Cr.P.C. by the police in exercise of his power conferred under Section 156(3) of the Cr.P.C.

12. Section 156(3) of the Cr.P.C. falling under Chapter XII under the caption 'Information to the Police and their Powers to Investigate' and Section 202 of the Cr.P.C. falling under Chapter XV bearing the heading 'Complaints To Magistrates' operate in distinct spheres and at different stages. There is a clear distinction between the two.

13. Any Judicial Magistrate before taking cognizance of the offence can order investigation under Section 156(1) of the Cr.P.C. in exercise of power conferred under Section 156(3) of the Cr.P.C. If he does so, then he is not to examine the complainant or to call for an investigation report. Hence, the power under Section 156(3) of the Cr.P.C. is exercisable at pre-cognizance stage. On the other hand, powers under Section 202(1) of the Cr.P.C. can be invoked at the post-cognizance stage when the Magistrate/Special Judge (deemed to be a Magistrate) is in seisin of the case.

14. Sub-section (1) of Section 202 makes it obligatory upon the Magistrate before summoning the accused that he shall 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 against the accused.

15. In the present case, it would be manifest that the learned Special Judge, Vigilance had taken cognizance of the offence under Section 190 of the Cr.P.C. and had proceeded with enquiry as contemplated under Section 202 of the Cr.P.C. He had called for an investigation report from the police in exercise of his powers conferred under Section 202(1) of the Cr.P.C. Once he had chosen to proceed with the enquiry after taking cognizance of the offence, he could not have opted to exercise the powers conferred under Section 156(3) of the Cr.P.C. and directed the Superintendent of Police, Vigilance Investigation Bureau to institute an FIR on the basis of the complaint and investigate the same.

16. In *Rameshbhai Pandurao Hedau Vs. State Of Gujarat* [(2010)4 SCC 185], while dealing with the difference between an investigation ordered by the Magistrate under Chapter XII containing "Section 156(3) Cr.P.C." and under Chapter XV containing "Section 202 Cr.P.C.", the Supreme Court held as under:-

"23. Reference was also made to the decision of this Court in *Mohd. Yousuf vs. Afaq Jahan* [(2006) 1 SCC 627], where it has been held that when a Magistrate orders investigation under Chapter XII of the Code, he does so before he takes cognizance of the offence. Once he takes cognizance of the offence, he has to follow the procedure envisaged in Chapter XV of the Code. The inquiry contemplated under Section 202(1) or investigation by a police officer or by any other person is only to help the Magistrate to decide whether or not there is sufficient ground for him to proceed further on account of the fact that cognizance had already been taken by him of the offence disclosed in the complaint but issuance of process had been postponed.

24. The law is well-settled that an investigation ordered by the Magistrate under Chapter XII is at the pre-cognizance stage and the inquiry and/or investigation ordered under Section 202 is at the post- cognizance stage. What we have to consider is whether the Magistrate committed any error in refusing the appellant's prayer for an investigation by the police under Section 156(3) of the Code and resorting to Section 202 of the Code instead, since both the two courses were available to him.

25. The power to direct an investigation to the police authorities is available to the Magistrate both under Section 156(3) Cr.P.C. and under Section

202 Cr.P.C. The only difference is the stage at which the said powers may be invoked. As indicated hereinbefore, the power under Section 156(3)

Cr.P.C. to direct an investigation by the police authorities is at the pre-cognizance stage while the power to direct a similar investigation under Section 202 is at the post- cognizance stage.â??

17. In Dharmeshbhai Vasudevbbhai & Ors Vs. State Of Gujarat & Ors. [(2009) 6 SCC 576,]while considering the power of the Magistrate to recall

an order passed by him under section 156(3) Cr.P.C., the Supreme Court observed that before taking cognizance the Magistrate can invoke his

powers under section 156(3) but once he takes cognizance, he has to proceed in accordance with the procedure involved in Chapter XV thereof

including the power to take enquiry or investigation under section 202 Cr.P.C.

18. In Suresh Chand Jain Vs. State of M.P. & Anr. [(2001)2 SCC 628] ,while considering the powers of a Magistrate under section 156(3), the

Supreme Court held that such power is vested in the Magistrate before taking cognizance of the offence and not thereafter.

19. As noted above, in the present case, the learned Special Judge had chosen to adopt the procedure prescribed under Chapter XV of the Cr.P.C.

while dealing with the complaint. He, thereafter, proceeded under section 202(1) of the Cr.P.C. and directed the Vigilance Investigation Bureau to

conduct a preliminary investigation and submit report and kept the matter with himself postponing the issue of process against the accused. The

Vigilance Investigation Bureau submitted its report. The learned Special Judge, Vigilance considered the same and gave an opportunity of hearing to

the Advocate for the complainant and thereafter directed for deletion of names of two accused persons against whom the Vigilance Investigation

Bureau had found no material in preliminary investigation and directed for institution of FIR against the remaining three accused persons.

20. It is reiterated that in the present case the learned Special Judge, Vigilance was exercising his powers at the post-cognizance stage under Chapter

XV of the Cr.P.C. when the matter was taken up by him on 18.05.2015. Under such circumstances, he was not competent to switch back to pre-

cognizance stage and issue a direction under Section 156(3) of the Cr.P.C. for investigation.

21. Coming to the next point argued by the learned counsel for the petitioner in

respect of the locus to file a complaint by a private individual, I am of the view that there is nothing in the Cr.P.C. which prohibits filing of a complaint by a private individual alleging corruption charges against public servants but there are essential prerequisites in such special cases under the Prevention of Corruption Act, which need to be satisfied before the Special Judge trying special cases may proceed with the same.

22. An identical issue had come up for consideration before the Supreme Court in *Anil Kumar & Ors. Vs. M.K.Aiyappa & Anr.* (Supra), wherein the issue framed was “whether the Special Judge/Magistrate is justified in referring a private complaint made under Section 200 Cr.P.C. for investigation by the Deputy Superintendent of Police, Karnataka Lokayukta, in exercise of powers conferred under Section 156(3) Cr.P.C. without the production of a valid sanction order under Section 19 of the Prevention of Corruption Act, 1988”. The Supreme Court, taking note of the judicial pronouncements rendered on the issue in *Subramanian Swamy Vs. Manmohan Singh* [(2012) 3 SCC 64,] *State of U.P. Vs. Paras NathSingh* [(2009) 6 SCC 372], *State of W.B. Vs. Mohd. Khalid* [(1995) 1 SCC 684]and *Additional Director General, Army Headquarter Vs. C.B.I.* [(2012) 6 SCC 228], while upholding the right of an individual to file complaints under the Prevention of Corruption Act had proceeded to clarify that in absence of a previous sanction for prosecution of the public servants charged with acts of corruption, the Magistrate concerned can neither take cognizance and hold enquiry under Section 202 of the Cr.P.C. nor can order for investigation against the public servant, under Section 156(3) of the Cr.P.C. Thus, obtaining a sanction to prosecute public servants charged with acts of corruptions was held an essential pre-condition for filing of a complaint by a private individual.

23. Admittedly, in the present case, apart from the three accused against whom FIR has been ordered to be instituted, two other public servants, namely, Fateh Faiyaj, the then Circle Officer, Balia, Begusarai and Shailendra Kumar Singh, the then Circle Inspector of Balia, Begusarai were named in the complaint. The complaint was not accompanied with any sanction order. Hence, in view of the law laid down by the Supreme Court in *Anil Kumar & Ors. Vs. M.K. Ayappa* (Supra), the learned Special Judge, Vigilance- II, Patna should not have entertained the complaint and proceeded

with the same either under Chapter XII or under Chapter XV Cr.P.C. without there being a valid sanction order to prosecute the public servants.

24. In view of the discussions made hereinabove, I am of the considered opinion that the impugned order dated 18.05.2015 passed by the learned

Special Judge, Vigilance-II, Patna in Special Case No. 08 of 2014 is wholly illegal and untenable in the eyes of law.

25. For the reasons aforementioned, the application is allowed. The impugned order dated 18.05.2015 passed by the learned Special Judge, Vigilance-

II, Patna in Special Case No. 08 of 2014 arising out of Complaint Case No. 8951(C) of 2013 and First Information Report of Vigilance P.S.Case No.

103 of 2015 dated 09.12.2015 as also the entire criminal prosecution arising therefrom are hereby set aside.