

(2022) 01 GUJ CK 0073

In the Gujarat High Court

Case No : R/Special Criminal Application No. 523 Of 2022

Hitesh Bhagwanjibhai Soni

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 20-01-2022

Acts Referred:

Constitution Of India, 1950 — Article 226

Code Of Criminal Procedure, 1973 — Section 154, 154(3), 156(1), 156(3), 173(8), 190

Citation : (2022) 01 GUJ CK 0073

Hon'ble Judges : Vipul M. Pancholi, J

Bench : Single Bench

Advocate : PV Patadiya, Maithili Mehta

Final Decision : ?Dismissed

Judgement

Vipul M. Pancholi, J

1. This petition is filed under Article 226 of the Constitution of India in which the petitioner has prayed that the respondents be directed to register the

FIR on the basis of the written complaint dated 11.10.2019 given by the petitioner.

2. Heard learned advocate for the petitioner and learned APP for the respondent-state.

3. At the outset, it is pertinent to note that this petition is filed on 11.12.2019 and a for a period of more than two years, the petitioner has not removed

the office objections and therefore, prima facie, it is clear that the petitioner is not interested to pursue this particular matter. However, today, when

the matter is listed on board, learned advocate for the petitioner has contended that the respondent-police authority has not registered the FIR on the

basis of the written compliant dated 11.10.2019 given by the petitioner and

therefore appropriate direction be issued to the respondent-police authorities.

4. On the other hand, learned APP has opposed this petition and contended that this petition may not be entertained when the petitioner has not taken care to remove the office objections for a period of two years. It is also submitted that the petitioner is having alternative remedy of filing private complaint before the appropriate forum for the grievance raised in the written complaint given by him to the concerned respondent-police authorities.

Learned APP has also placed reliance upon the order dated 17.12.2020 passed in Special Criminal Application No.6760 of 2020 by the coordinate Bench of this Court. It is submitted that this Court, after considering various decisions rendered by the Honâ??ble Supreme Court, has dismissed similar type of petition. Learned APP has therefore urged that this petition be dismissed.

5. I have considered the submissions canvassed by learned advocates for the parties. I have also perused the material placed on record. It is not in dispute that the present petition has been filed by the petitioner in December, 2019 and learned advocate has also admitted the fact that he has not removed the office objections for a period of two years. In the aforesaid background, the submissions of learned advocate for the petitioner are required to be examined. The grievance of the petitioner is that the written complaint given by him to the concerned respondent-police authority has not been registered as FIR and therefore appropriate direction be issued. However, this Court has, in similar type of case, after considering the decisions rendered by the Honâ??ble Supreme Court, observed in paragraphs 3 to 7 as under:

â??3. At this stage, it would be apposite to incorporate the observations made by the Apex Court in the case of M. Subramaniam v. S. Janki dated 20.03.2020 passed in Criminal Appeal No.102 of 2011. The Apex Court has observed thus;-

â?? 5.While it is not possible to accept the contention of the appellants on the question of locus standi, we are inclined to accept the contention that the High Court could not have directed the registration of an FIR with a direction to the police to investigate and file the final report in view of the judgment of this Court in Sakiri Vasu v. State Of Uttar Pradesh And Others in

which it has been inter alia held as under:

11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 of

CrPC, then he can approach the Superintendent of Police under Section 154(3) CrPC by an application in writing. Even if that does not yield any

satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the

aggrieved person to file an application (2008) 2 SCC 409 under Section 156(3) CrPC before the learned Magistrate concerned. If such an application

under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be

made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision

monitor the investigation to ensure a proper investigation.

12. Thus in Mohd. Yousuf v. Afaq Jahan this Court observed: (SCC p. 631, para 11)

11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section

156(3) of the Code. 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 the Code. Even if a Magistrate does not say in so

many words while directing investigation under Section 156(3) of the Code 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 complainant because that police officer could take further steps

contemplated in Chapter XII of the Code only thereafter.

13. The same view was taken by this Court in Dilawar Singh v. State of Delhi (JT vide para 17). We would further clarify that even if an FIR has

been registered and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not

proper, such a person can approach the Magistrate under Section 156(3) CrPC, and if the Magistrate is satisfied he can order a proper investigation

and take other suitable steps and pass such order(s) as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys

under Section 156(3) CrPC.

14. Section 156(3) states:â??156. (3) Any Magistrate empowered under Section 190 may order such an investigation as abovementioned.â? The

words â??as abovementionedâ?? obviously refer to Section 156(1), which contemplates investigation by the officer in charge of the police station.

15. Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII CrPC. In cases where the Magistrate

finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the

investigation properly, and can monitor the same.

16. The power in the Magistrate to order further investigation under Section 156(3) is an independent power and does not affect the power of the

investigating officer to further investigate the case even after submission of his report vide Section 173(8). Hence the Magistrate can order reopening

of the investigation even after the police submits the final report, vide State of Bihar v. J.A.C. Saldanha (SCC : AIR para 19).

17. In our opinion Section 156(3) CrPC is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper

investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper

investigation has not been done, or is not being done by the police. Section 156(3) CrPC, though briefly worded, in our opinion, is very wide and it will

include all such incidental powers as are necessary for ensuring a proper investigation.

18. It is well settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the

proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without

special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it

impliedly also grants the power of doing all such acts or employ such means as

are essentially necessary for its execution.â??

6. The said ratio has been followed in *Sudhir Bhaskarrao Tambe v. Hemant Yashwant Dhage and Others*², in which it is observed.

â??2. This Court has held in *Sakiri Vasu v. State of U.P.*, that if a person has a grievance that his FIR has not been registered by the police, or having

been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go to the High Court under Article 226 of the

Constitution of India, but to approach the Magistrate concerned under Section 156(3) CrPC. If such an application under Section 156(3) CrPC is made

and the Magistrate is, *prima facie*, satisfied, he can direct the FIR to be registered, or if it has already been registered, he can direct proper

investigation to be done which includes in his discretion, if he deems it necessary, recommending change of the investigating officer, so that a proper

investigation is done in the matter. We have said this in *Sakiri Vasu* case because what we have found in this country is that the High Courts have

been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.

3. We are of the opinion that if the High Courts entertain such writ petitions, then they will be flooded with such writ petitions and will not be able to

do any other work except dealing with such writ petitions. Hence, we have held that the complainant must avail of his alternate remedy to approach

the Magistrate concerned under Section 156(3) CrPC and if he does so, the Magistrate will ensure, if *prima facie* he is satisfied, registration of the

first information report and also ensure a proper investigation in the matter, and he can also monitor the investigation.

4. In view of the settled position in *Sakiri Vasu* case, the impugned judgment of the High Court cannot be sustained and is hereby set aside. The

Magistrate concerned is directed to ensure proper investigation into the alleged offence under Section 156(3) CrPC and if he deems it necessary, he

can also recommend to the SSP/SP concerned a change of the investigating (2016) 6 SCC 277 officer, so that a proper investigation is done. The

Magistrate can also monitor the investigation, though he cannot himself investigate (as investigation is the job of the police). Parties may produce any

material they wish before the Magistrate concerned. The learned Magistrate shall be uninfluenced by any observation in the impugned order of the

High Court.

8. In these circumstances, we would allow the present appeal and set aside the direction of the High Court for registration of the FIR and investigation

into the matter by the police. At the same time, our order would not be an impediment in the way of the first respondent filing documents and papers

with the police pursuant to the complaint dated 18.09.2008 and the police on being satisfied that a criminal offence is made out would have liberty to

register an FIR. It is also open to the first respondent to approach the court of the metropolitan magistrate if deemed appropriate and necessary.

Equally, it will be open to the appellants and others to take steps to protect their interest. â??

4. While referring to the judgment of Sudhir Bhaskarrao Tambe (supra), it is observed that if the High Courts entertain such writ petitions seeking

registration of FIR, then they will be flooded with such writ petitions and will not be able to do any other work, except dealing with them. It is

specifically held that the complainant must avail of his alternate remedy to approach the Magistrate concerned under section 156(3) of Cr.P.C and if

he does so, the Magistrate will ensure, if prima facie he is satisfied, registration of the FIR and also ensure a proper investigation in the matter. While

approving the aforesaid view, the Supreme Court has set aside the direction of the High Court for registration of the FIR and has directed the

respondent thereto to approach the court of Magistrate if deemed appropriate and necessary. Thus, the law on the registration of FIR is well settled and

has been reiterated in the recent judgment of the Supreme Court as noted hereinabove.

5. In the present case, the petitioner has not approached the concerned Magistrate and has directly approached this Court for the aforesaid prayer.

6. Under the circumstances and in light of the observations made by the Apex Court, the writ petition is rejected since the petitioner has the remedy to

approach the approach the concerned Magistrate under section 156(3) of the Cr.PC.

7. It is noticed by this Court that various applications seeking registration of FIR are being filed before this Court directly without approaching the

concerned Magistrate under Section 156(3) of the Code. Such applications which are directly filed are in direct conflict with the observations of the

Apex Court. The Apex Court has expressed its concern with regard to filing of such applications/petitions directly before the High Court since filing of such petitions/applications are an unnecessary burden.â??

6. Keeping in view the aforesaid order passed by this Court, if the facts of the present case as observed hereinabove are examined, this Court is of the view that when the petitioner has remedy of approaching the concerned Magistrate Court for passing the order under Section 156(3) of the Code, the present petition deserves to be dismissed. Accordingly, this petition is dismissed.