

(2022) 07 PAT CK 0081

In the Patna High Court

Case No : Criminal Miscellaneous No. 11360 Of 2021

Kalpana Kumari

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 28-07-2022

Acts Referred:

Constitution Of India, 1950 — Article 226

Code Of Criminal Procedure, 1973 — Section 154, 154(1), 154(3), 156(3), 239

Indian Penal Code, 1860 — Section 34, 406, 420

Citation : (2022) 07 PAT CK 0081

Hon'ble Judges : Prabhat Kumar Singh, J

Bench : Single Bench

Advocate : Sanjeev Kumar, Preeti, Ansul, Kanhaiya Kishore

Final Decision : Allowed

Judgement

1. The present application has been filed for quashing the order dated 24.02.2020 passed in Rajiv Nagar PS Case No. 222 of 2015 by the learned court of Additional Chief Judicial Magistrate XI, Civil Court, Patna whereby and whereunder learned court below has been pleased to reject the discharge petition filed by the petitioners under Section 239 of the Code of Criminal Procedure.

2. The prosecution case in brief is that informant/complainant Smt. Alka Verma had filed a complaint petition bearing No. 2881(C) of 2015 with a prayer to refer the matter under Section 156(3) of the Code of Criminal Procedure to the Rajiv Nagar Police Station for institution of FIR and accordingly, FIR was lodged against the petitioners. The complainant in her complaint petition alleged that accused persons are the Director and Managing Director of the company M/s Neelkantha Solution Pvt. Ltd. and Others which had entered into a development agreement on 05.10.2012 with the landlord namely, Nirmala Devi for construction of a multi-storied apartment.

3. It is further alleged that all the accused persons had assured the complainant

that he would construct the flat within three years. It is further alleged that upon the assurance of the accused persons the complainant had entered into an agreement for sale dated 03.12.2013 for Flat No. 106 consisting of an area of 1110 sq. ft. including one car parking space bearing Parking space no. 5 for the price of Rs. 24,59,000/- and also made an advance payment of Rs. 3,50,000/- at the time of execution of the said agreement for sale dated 03.12.2013.

4. It is further alleged that as per the terms and conditions of the agreement, the husband of the complainant made payment of Rs. 5,50,000/- to the accused (petitioners), but in spite of huge payment apartment was not constructed within the time and thus, accused persons had cheated the complainant.

5. That on the basis of aforesaid complaint case , Rajiv Nagar PS case No. 222 of 2015 dated 24.08.2015 under Sections 406 and 420 was instituted against the petitioners and others and after investigation charge-sheet was submitted vide Charge Sheet No. 231 of 2016 dated 31.10.2016 under Sections 406, 420 and 34 of the Indian Penal Code and accordingly summons were issued against all the accused persons including these petitioners. After coming to know about the issuance of summons, all the accused persons including petitioners appeared before the court below and filed a discharge petition under Section 239 of Cr.P.C dated 13.03.2019 which has been dismissed by the impugned order mechanically without application of mind.

6. Petitioners have challenged the impugned order on the ground that complaint petition does not disclose that complainant approached the police station for registration of the case or complained to the higher police officials against non-registration of the case and abruptly made prayer in the complaint petition to get the same registered under Section 156(3), in other words it is submitted that the complaint was not filed after compliance of the statutory provision of 154(1) of the Code of Criminal Procedure and 154(3) of the Code of Criminal Procedure and the learned court below without taking note of the fact that complainant has not complied with the mandatory provisions, mechanically sent the aforesaid complaint petition for lodging the FIR and issued summons against the petitioners. In support of the same, petitioners have relied upon a case decided by the Apex Court in Priyanka Srivastava & Anr. vs. The State of UP & Ors. reported in 2015(6) SCC 287.

7. In this case, Opposite Parties have already appeared. No counter affidavit has been filed on behalf of State/Opposite Party No. 2 in spite of several indulgence. However, submission of the learned counsel for the opposite parties is that since in this case charge-sheet has already been submitted against the petitioners for offence under Sections 406, 420 and 34 of the Indian Penal Code, therefore, at this stage the trial need not be interfered with by this Hon'ble Court.

8. Heard rival submissions of the parties and perused the materials available on record, this court finds substance and force in the submission made on behalf of petitioners. From bare perusal of complaint petition, it is apparent that

complainant has nowhere stated or disclosed that the complainant had approached the police for institution of police case or had complained to the higher police officials regarding non-institution of the FIR in pursuance of provision under Section 154(1) and 154(3) Code of Criminal Procedure nor has sworn affidavit in the complaint petition. In the case of Priyanka Srivastava & Anr. vs. The State of UP & Ors. (Supra), the Apex Court considered the similar question of law and observed and held as follows:-.

"27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the Bank. We are absolutely conscious that the position does not matter, for nobody is above the law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction under Section 156(3) Cr.P.C and also there is a separate procedure under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to.

28. Issuing a direction stating "as per the application" to lodge an FIR creates a very unhealthy situation in society and also reflects the erroneous approach of the learned Magistrate. It also encourages unscrupulous and unprincipled litigants, like Respondent 3 namely, Prakash Kumar Bajaj, to take adventurous steps with courts to bring the financial institutions on their knees. As the factual exposition would reveal, Respondent 3 had prosecuted the earlier authorities and after the matter is dealt with by the High Court in a writ petition recording a settlement, he does not withdraw the criminal case and waits for some kind of situation where he can take vengeance as if he is the emperor of all he surveys. It is interesting to note that during the tenure of Appellant 1 who is presently occupying the position of Vice-President, neither was the loan taken, nor was the default made, nor was any action under the SARFAESI Act taken. However, the action under the SARFAESI Act was taken on the second time at the instance of the present Appellant 1. We are only stating about the devilish design of Respondent 3 to harass the appellants with the sole intent to avoid the payment of loan. When a citizen avails a loan from a financial institution, it is his obligation to pay back and not play truant or for that matter play possum. As we have noticed, he has been able to do such adventurous acts as he has the embedded conviction that he will not be taken to task because an application under Section 156(3) Cr.P.C is a simple application to the court for issue of a direction to the investigating agency. We have been apprised that a carbon copy of a document is filed to show the compliance with Section 154(3), indicating it has been sent to the Superintendent of Police concerned.

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. 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 fellow 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 the said Act or under Article 226 of the Constitution of India. But it cannot be done to take 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 Sections 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 application under Section 156(3) be supported by an affidavit is 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 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."

9. In view of the discussions made above, the impugned order dated 24.02.2020 passed by learned Additional Chief Judicial Magistrate XI, Patna in connection with Rajiv Nagar PS Case No. 222 of 2015 and subsequent criminal proceeding are hereby quashed.

10. Accordingly, this application stands allowed.