
(1996) 08 OHC CK 0001

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 1102 of 1996

Kanhu Charan Sethy and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 13-08-1996

Acts Referred:

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

Citation : (1996) CriLJ 4236 : (1996) 2 OLR 362

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : B. Mishra, S. Jena. M. Ch. Jena and R.K. Sethy, for the Appellant;
Standing Counsel, for the Respondent

Judgement

P.K. Misra, J.—The accused persons have filed this application u/s 482 of the Code of Criminal Procedure (hereinafter referred to as the "Code") for quashing G. R. Case No. 101 of 1996 arising out of ICC Case No. 30 of 1996 now pending in the file of the Sub-Divisional Judicial Magistrate. Anandapur.

2. Briefly stated, the facts giving rise to the present application are as follows :

Complainant. Rabindra Sethi filed ICC Case No. 30 of 1996 in the Court of the Sub-Divisional Judicial Magistrate, Anandapur, against the present petitioners alleging commission of offences Under Sections 294/ 341/395/323/34, Indian Penal Code (hereinafter referred to as the "IPC"). On 20-3-1996. the date on which the complaint was filed, the SDJM passed the following order:

"One Rabindra Sethy files a complaint petition - Under Sections 294/341/395/323/34, IPC against the accused K. C. Sethy and four others. Register the case. Advocate N. R. Panda, A. Pattanaik and R. Barik filed power in favour of the complainant. Send the original complaint petition to the OIC, Ghasipura P. S., to treat this as FIR and take up investigation u/s 156(3) of Cr PC and to submit his report by 26-4-1996. Complainant to file extra copy of complaint petition in course of day."

After receiving the aforesaid order, Ghasipura P. S. Case dated 26-3-1996 corresponding to G. R. Case No. 101 of 1996 has been registered. The accused persons have approached this Court invoking the jurisdiction u/s 482 of the Code challenging registration of a case by the police.

3. Mr. B. Misra, learned counsel appearing for the petitioners, has raised the sole contention that though the Magistrate has power to direct investigation u/s 156(3) of the Code, he has no jurisdiction to direct the police to treat the complaint as an FIR. In support of the aforesaid contention, he has placed reliance on the Division Bench decision of the Punjab and Haryana High Court reported in Ganesh Dass and Others Vs. State of Kerala and Another, (obviously "State of Kerala" is a mis-print.)

The learned Standing Counsel appearing for the State has submitted that no illegality has been committed in directing the police to treat the complaint as an FIR and to investigate into the same, in view of the provision contained in Section 156(3) of the Code.

4. The provisions of Section 156 (1) and (3) of the Code which are relevant for the purpose of this case are extracted hereunder:

"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) xx xx xxx (3) Any Magistrate empowered u/s 150 may order "such an investigation as above-mentioned."

A bare reading of the aforesaid provisions makes it clear that under Sub-section (1) the power to investigate any cognizable case without the order- of a Magistrate has been vested with the Police Officer. Under Sub-section (3) any Magistrate authorised to take cognizance, of offence u/s 190, Cr PC may order police to. investigate a case. The question is whether such a Magistrate acting u/ s 156(3) of the Code can direct the police to register an FIR and thereafter proceed with the investigation of the case, as has been done in the present case ?

5. The question was raised in a decision reported in AIR 1961 SC 986 (Gopal Das Sindhi and Ors. v. State of Assam and Anr.). In the said case, a complaint was filed before The Additional District Magistrate alleging commission of offences Under Sections 147, 323, 342 and 448. IPC which was placed before a Magistrate First Class for disposal. The concerned Magistrate First Class, after receiving the complaint directed the O. I. C., Gauhati Police Station "To register a case, investigate and if warranted submit charge-sheet by 23rd August, 1957". The police, after investigation submitted charge-sheet u/s 448 IPC, only. After receipt of the charge-sheet, the Additional District Magistrate placed the matter before another Magistrate for disposal. Subsequently, the latter Magistrate framed the

charge purporting to act u/s 251A of the Code of Criminal Procedure, 1898 (hereinafter referred to as the "old Code"). The accused filed revision Under Sections 439/561-A of the old Code which was dismissed. Thereafter, the accused persons filed appeal before the Supreme Court. Before the Supreme Court, inter alia, it was contended that the Magistrate acted without jurisdiction in directing the police to register a case, to investigate it and thereafter to submit charge-sheet, if warranted. While answering the aforesaid contention, it was observed by the Supreme Court that while sending the matter to the police u/s 156(3) of the Code, the Magistrate had not taken cognizance and he had power to send the matter to the police for investigation.

6. The scope of Section 156(3) of the Code came up for consideration by the Supreme Court in the decision reported in Tula Ram and Others Vs. Kishore Singh, . In the said decision while distinguishing between the scope of power of Magistrate to direct investigation by police u/s 156(3) and u/s 202 of the Code, it has been held that the former relates to a stage before taking cognizance, whereas the latter relates to a stage after taking cognizance. In Paragraph-14 of the said decision, the principle of law was summarized as follows :

"1. That a Magistrate can order investigation u/s 156(3) only at the pre-cognizance stage, that is to say, before taking cognizance Under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter-14 he is not entitled in law to order any investigation u/s 156(3) though in case not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Section 202 of the Code.

2. Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives :

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

3. In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

4. Where a Magistrate orders investigation by the police before taking cognizance u/s 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightway issue process against the

accused or apply his mind to the complaint filed before him and take action u/s 190 as described above."

7. -The question again, came up before the Supreme Court in the case of H.S. Bains, Director, Small Saving-Cum-Deputy Secretary Finance, Punjab, Chandigarh Vs. State (Union Territory of Chandigarh), . In the said case, a complaint was filed before the Magistrate who ordered an investigation by the police u/s 156(3) of the Code. The police after completing the investigation submitted a report to the Magistrate u/s 173 of the Code opining that the case against the accused was not true and might be dropped. The Magistrate, however, after perusing the report submitted by the police disagreed with the conclusion of the police and took cognizance of the case and directed issue of process to the accused. The said order of the Magistrate was challenged unsuccessfully before the High Court and ultimately the matter came to the Supreme Court. The Supreme Court after referring to the various provisions observed as follows :

"3. Chapter XII of the Code of Criminal Procedure, 1973 deals with information to the police, and their powers to investigate. Section 156(1) vests in an Officer in-charge of a police station the power to investigate any cognizable case, without the order of a Magistrate. Section 156(3) authorises a Magistrate, empowered u/s 190, to order an investigation as mentioned in Section 156(1). The provisions from Section 157 onwards are concerned with the power and procedure for investigation. Section 169 prescribes that if upon an investigation it appears to the Officer in-charge of the police station that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall if such person is in custody, release him on his executing a bond (with or without sureties) to appear if and when required, before a Magistrate empowered to take cognizance of an offence on a police report and to try the accused or commit him for trial. Section 170 prescribes that if upon investigation it appears to the Officer in-charge of the police station that there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of an offence on a police report and to try the accused or commit him for trial. If the offence is bailable the officer shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed. Section 173(1) casts a duty upon the Police Officer to complete the investigation without unnecessary delay. Section 173(2) prescribes that as soon as the investigation is completed the Officer in-charge of the police station shall forward to a Magistrate empowered to take cognizance of an offence on a police report, a report in the prescribed form stating the various particulars mentioned in that sub-section."

It was further observed in paragraph-6 :

"...on receipt of a complaint a Magistrate has several courses open to him. He

may take cognizance of the offence and proceed to record the statements of the complainant and the witnesses present u/s 200. Thereafter, if in his opinion there is no sufficient ground for proceeding he may dismiss the complaint u/s 203. if in his opinion there is sufficient ground for proceeding he may issue process u/s 204. However, if he thinks fit, he may postpone the issue of process and either enquire into the case himself or direct an investigation to be made by a Police Officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. On the other hand, in the first instance, on receipt of a complaint, the Magistrate may, instead of taking cognizance of the offence, order an investigation u/s 156(3). The police will then investigate and submit a report u/s 173(1). On receiving the police report the Magistrate may take cognizance of the offence u/s 190(1)(b) and straightway issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The police report u/s 173 will contain the facts discovered or unearthed by the police and the conclusions drawn by the police therefrom. The Magistrate is not bound by the conclusions drawn by the police and he may decide to issue process even if the police recommend that there is no sufficient ground for proceeding further. The Magistrate after receiving the police report, may, without issuing process or dropping the proceeding decide to take cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statements upon oath of the complainant and the witnesses present u/s 200. Criminal Procedure Code and thereafter decide whether to dismiss the complaint or issue process. The mere fact that he had earlier ordered an investigation u/s 156(3) and received a report u/s 173 will not have the effect of total effacement of the complaint and therefore the Magistrate will not be barred from proceeding u/s 200, 203 and 204. Thus, a Magistrate who on receipt of a complaint, orders an investigation u/s 156(3) and receives a police report u/s 173(1), may, thereafter, do one of three things :

- (1) he may decide that there is no sufficient ground for proceeding further and drop action;
- (2) he may take cognizance of the offence u/s 190(1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report;
- (3) he may take cognizance of the offence u/s 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the "complainant and his witnesses u/s 200.

if he adopts the third alternative, he may hold or direct an inquiry u/s 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be."

8. Thus the question as to whether the Magistrate had jurisdiction to direct the police to register a case was not specifically dealt with by the Supreme Court in any of the aforesaid decisions. However, since the question had been raised before the Supreme Court in the decision reported in AIR 1961 SC 986 and the contention had been repelled, it appears that some Judges of Punjab and Haryana High Court took the view in various decisions that Magistrate was empowered to direct the police to register a case. The aforesaid view of some of the learned Singe Judges of Punjab and Haryana High Court was not accepted by the Division Bench decision of Punjab and Haryana High Court reported in Ganesh Dass and Others Vs. State of Kerala and Another, , and relying upon the decision of the Supreme Court reported in AIR 1977 SC 2401, the Division Bench held as follows :

"In view of the propositions laid down by their Lordships of the Supreme Court in the case of Tula Ram (supra) and in view of catena of decisions which took the view contrary to the views expressed in the case of Baru Ram, we are of the considered opinion that the Magistrate while passing order u/s 156(3). Cr PC Is not empowered to direct the police to register the First Information Report. The registration of the FIR pertains to the sphere of powers of investigation by the police, and the registration of the First Information Report is done in exercise of powers by the police u/s 154, CrPC. That function of the police need not. and cannot be usurped by the Magistrate while passing an order u/s 156(3) Cr PC. Even plain reading of Section 156(3) Cr PC indicates that the Magistrate is empowered to direct the investigation by the police, and there is no mention regarding the powers to direct registration of the FIR. Occasion to order investigation may arise in two circumstances, namely, firstly before the Magistrate takes cognizance of the case, and, secondly, when he decides to proceed u/s 202 Cr PC. The former is the stage before taking cognizance and is covered by the provisions of Section 156(3). The latter is after taking cognizance by the Magistrate, but the Magistrate directs investigation u/s 202, Cr PC because he thinks it fit to postpone issue of process until he gets enough material, either by enquiry or investigation, to satisfy himself as to whether he should proceed further and issue summon? to the accused to appear before him: or whether he should dismiss the complaint as being without substance. Those would be the powers Under Sections 203 and 204 of the Code. These two provisions Under Sections 156 and 202, Cr PC function on two different floors. The direction u/s 156(3) may arise in a complaint which pertained to cognizable case or a non- cognizable case. The Magistrate asks the police to undertake the investigation because that helps him to save his time. Investigation by the police in non-cognizable case would otherwise be not possible unless the Magistrate issues such direction. All these provisions in Chapter XII of the Code pertains to "Information to the police and their Power to Investigate.". In some cases where the complaint is filed in the Court, the Magistrate before taking cognizance of the case can direct the police to undertake investigation in the complaint. In that case the Police Officer would be performing all those powers of investigation

which he would be entitled to while investigating a cognizable case as per the provisions given in Chapter X.II of the Code. All these provisions, however, do not contemplate any direction by the Magistrate to the police to register FIR."

With due respect, in the decision reported in Tula Ram and Others Vs. Kishore Singh, , I do not find any direct support for the view taken by the Division Bench of the Punjab and Haryana High Court to the effect that the Magistrate has no jurisdiction to direct the police to register an FIR. On the other hand, the very fact that such a question was raised in the decision reported in AIR 1961 SC 986, but not accepted, militates against the view expressed by the aforesaid Division Bench decision of the Punjab and Haryana High Court, reported in Ganesh Dass and Others Vs. State of Kerala and Another, .

9. Though there appears to be some divergence of opinion in the Punjab and Haryana High Court, no direct decision of the Orissa High Court on the point has been cited. It is true that there is no express provision in Section 156(3) enabling the Magistrate to direct the police to register FIR. According to me, however, the question is of no consequence. As evident from the decisions of the Supreme Court reported in Tula Ram and Others Vs. Kishore Singh, : and even the Division Bench decision of the Punjab and Haryana High Court in Ganesh Dass and Others Vs. State of Kerala and Another, , the Magistrate has ample power to direct the police to take up investigation u/s 156(3) before taking cognizance of the offence. If such a course is adopted, on the basis of the police report, the Magistrate may drop the proceeding or the Magistrate can take cognizance and proceed as such, or even take cognizance of the offence u/s 190(1)(a). The scope and ambit of investigation by the police, be it on the basis of FIR lodged u/s 154, Cr PC or on the basis of direction issued by the Magistrate in a complaint case u/s 156(3), is the same. If the Magistrate on the basis of report of the police decides to take cognizance, evidently, the case will proceed as if it is a case on police report and if the Magistrate even after submission of such police report does not take cognizance and decides to proceed in accordance with Sections 200 and 202 of the Code, then the case would continue as a complaint case. Ultimately, it will depend upon the manner in which the Magistrate decides to proceed in the case. Whether there is formal registration of FIR on the basis of direction of the Magistrate u/s 156(3) or not is of no consequence. It is not necessary for a Magistrate acting u/s 156(3) to direct the police to formally register an FIR. Such a direction in the present case was superfluous and in view of the clear provision of Section 156(3), the police is bound to take up investigation, whether formal FIR is registered or not. By formal registration of FIR, the investigating agency, i.e. the police does not get any additional power, nor is it handicapped in any manner in the matter relating to investigation if formal FIR is not registered. All the powers available to investigating agency can be exercised in the investigation undertaken pursuant to direction of the Magistrate u/s 156(3).

10. In such view of the matter, I, therefore, hold that though the direction of the

Magistrate to treat the complaint as an FIR was superfluous and unnecessary, the investigating agency should investigate into the alleged offences in accordance with the provisions of law under Chapter XII of the Code in view of the direction of the Magistrate u/s 156(3).

The Criminal Misc. Case is disposed of accordingly.