
(2017) 05 CAL CK 0008
In the Calcutta High Court
Case No : 46 of 2009

Mahendra Kumar Jalan & Ors.

APPELLANT

Vs

The State of West Bengal & Anr.

RESPONDENT

Date of Decision : 05-05-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 482](#), [Section 154](#), [Section 157](#), [Section 156\(3\)](#), [Section 154\(1\)](#), [Section](#)

Citation : (2017) 05 CAL CK 0008

Hon'ble Judges : Sankar Acharyya

Bench : SINGLE BENCH

Advocate : Somopriyo Chowdhury, Swati Agarwal, Natasha Roy, Deep Chaim Kabir, Kunal Ganguly, J. Saha

Judgement

1. This revisional application has been filed by six accused petitioners under Section 482 of the Code of Criminal Procedure (in short Cr.P.C.) challenging the order dated 18th December, 2008 passed by learned Additional Chief Metropolitan Magistrate, Calcutta in case no. C-1545/2008 on an application filed by the opposite party no. 2 as complainant under Section 156 (3), Cr.P.C. In the impugned order direction was given to O.C. Burrabazar P.S. for investigation treating the complaint as F.I.R. At the very outset, it is pointed out that the impugned order has been passed filling up the blanks in a printed form.

2. In the revisional application, inter alia, petitioners have contended that the opposite party no. 2 lodged the complaint before the learned Additional Chief Judicial Magistrate, Calcutta on 18th December, 2008 under Section 156 (3) Cr. P.C. and said complaint was forwarded by learned Metropolitan Magistrate to the O.C., Burrabazar P.S. for investigation treating the complaint as F.I.R. Petitioners have claimed that the allegations made in the complaint do not constitute any cognizable offence. Said allegations relate to civil dispute between the opposite party no. 2 and the petitioners. There is inordinate delay in lodging the

complaint. No document was produced along with the complaint. There is no element of cheating or criminal breach of trust or criminal conspiracy against the accused petitioners in the complaint but First Information Report has been registered against them for the offences punishable under Section 406/420/120B of the Indian Penal Code (in short I.P.C). The petitioners have prayed for quashing the impugned order and the proceeding initiated on the complaint of the opposite party no. 2.

3. At the time of hearing the opposite party no. 1 the State of West Bengal did not participate but the opposite party no. 2 who is defacto complainant in the Court below contested the revisional application. The opposite party no. 2 filed affidavit-in-opposition challenging the contention of the revisional application. Then petitioners have filed one affidavit-in-reply.

4. In course of hearing, learned Senior Counsel for the petitioners submitted that from the face value of the complaint which was treated as F.I.R. no cognizable offence is prima facie made out. According to him, before invoking power of learned Magistrate under Section 156 (3) Cr. P. C. there must be compliance of Section 154 (1) and Section 154 (3) of the Cr. P. C. but there is no specific averment to that effect in the complaint and no document to substantiate such compliance was filed along with the complaint. He advanced his argument that the complaint should have been supported by affidavit. In support of his argument he has relied on the judgment of the Hon''ble Supreme Court in Priyanka Srivastava vs. State of Uttar Pradesh reported in (2015) 6 SCC 285. He submitted that said judgment law has retrospective effect under Article 141 of the Constitution of India. In support of his argument relating to retrospective effect he relied on the judgments of the Hon''ble Supreme Court in the cases of B. A. Linga Reddy and Others vs. Karnataka State Transport Authorities and Others reported in (2005) 4 SCC 515 and Yakub Abdul Razal Memon vs. State of Maharashtra reported in (2015) 3 SCC (cri) 673. He also cited one unreported judgment of the Hon''ble Madhya Pradesh High Court at Jabalpur in the case of Shankar Lal Khambra vs. Malti Verma and Others. He also relied on a decision of this bench in the case of Ramesh Kr. Agarwal vs. State of West Bengal reported in (2016) vol. 3, Calcutta Criminal Law Reporter 662 in which the decisions of the Hon''ble Supreme Court in the cases of Lalita Kumari Vs. Government of Uttar Pradesh and Others and M/s. Thermax Ltd. and Others Vs. K.M. Johny and Others have been followed regarding the allegations on facts made in the complaint of that case. Mr. Sekhar Basu, learned Senior Advocate submitted that the allegations made in the complaint under consideration here are vague. Although there are allegations of making payment by opposite party no. 2 to the petitioners but there is no specific allegation who amongst the petitioners received money from him and on which date. He also pointed out that there are allegations against several companies in the complaint but said companies have not been made accused in the case. He drew my attention to the allegation that the negotiations for the alleged transaction between the parties started in June, 1995 and the complaint was filed after more than thirteen years in December,

2008 without explanation of such inordinate delay. He submitted for setting aside the impugned order claiming it not at all an order with application of judicial mind and he also submitted for quashing the proceeding.

5. On the other hand Mr. Kabir, learned Advocate for the opposite party no. 2 argued that the allegation made in the complaint sufficiently fulfil the prima facie ingredients to make out the case under Sections 420/406/120B of the Indian Penal Code and according to him there is no error in treating the complaint as F.I.R. as per impugned order. He further submitted that the case made out in the complaint is not a mere breach of contract rather it is a complicated scheming plan of the accused petitioners behind a corporate veil. According to him police investigation is badly required to unearth the truth as to how the petitioners exploited the opposite party no. 2 by a premeditated conspiracy. He has claimed that practising fraud upon the opposite party no. 2, the petitioners managed to receive Rs. 10,40,000/- alluring him that they would sell one centrally air conditioned office space at 81, Netaji Subhash Road, Calcutta " 700 001. He further argued that the opposite party no. 2 annexed documents to the complaint which was treated as F.I.R. but the petitioners have not brought those documents as annexed to the complaint although certified copy of that complaint excluding the annexure has been filed with the revisional application. According to him the judgments cited by learned Senior Advocate for the petitioners are not applicable in the instant case as precedents. According to him at the relevant time of passing the impugned order the only requirement of law was the judicial satisfaction of learned Magistrate that the case relating to commission of cognizable offence is made out and police did not act relating to such offence. However, he did not dispute on the legal proposition that interpretation of law by the Hon"ble Supreme Court is normally operates retrospectively and exceptionally prospectively. On this point he relied on the principles of law discussed in the judgement of Golak Nath Vs. State of Punjab reported in AIR 1967 SC 1643. Mr. Kabir, learned Advocate for the opposite party no. 2 distinguished the instant case from the decisions cited on behalf of the petitioners on facts and submitted that the revisional application is liable to be dismissed as devoid of merits.

6. At the very outset, I like to mention that a Photostat certified copy of the impugned order has been annexed to the revisional application. It is apparent that the said order has been passed on a printed form filling up some columns by handwriting. It will not be out of place to set out the impugned order showing handwritten portion by italics. "Complainant is present with his lawyer files a petition u/s. 156(3) Against the accused person/s U/S 156(3) Cr.P.C.

Perused the petition.

Petition of complaint forwarded to O/C Burrabazar P.S. P.S. for investigation treating the complaint as F.I.R."

7. On plain reading of the impugned order, it appears that there is no reflection

that before forwarding the complaint to Officer-in- Charge, Burrabazar, Police Station for treating the complaint as FIR, learned Additional Chief Metropolitan Magistrate, Kolkata was at all satisfied that commission of any cognizable offence was complained of in the petition of complaint. In my opinion, passing of such order exercising magisterial power is unwarranted.

8. Having gone through the petition of complaint which was treated as FIR, it appears that in paragraph 9, the complainant respondent no. 2 stated that he had lodged a complaint against the accused person before the Officer-in-Charge, Burrabazar, Police Station on 13.12.2008 but no action had been taken against them. The complaint was lodged in the Court of learned Additional Chief Metropolitan Magistrate on 18.12.2008. There is no refraction in the complaint that before lodging the complaint in Court the complainant complied with the provisions under Sub-Section 3 of Section 154 Cr. P. C.

9. As per allegation of the complaint the complainant made payment of Rs. 10,40,000/- out of which 6,90,000 in cash and 3,50,000 by cheque to the accused persons for purchasing one office space in centrally air conditioned complex at 81, Netaji Subhash Road, Calcutta-700 001. As the accused person offered him the price at the rate of Rs. 5300/- per square feet. Said offer was made on 11.06.1995 but the complainant did not state as to on which date he paid which amount to whom among the accused persons. He made allegation of transfers of land in question from Binani Metals Ltd. (not a party herein) to Dempo Merchantiles Ltd. (not a party) and subsequently said Benani Metals Ltd. sold its sister concern Dempo Merchantiles Ltd. to accused no. 1, 4 & 6. So far as it can be understood from the complaint, there is allegation of series of transfers of said immovable property evading stamp duty. Collusion and conspiracy among the accused petitioners has been alleged for such series of transfer. The accused petitioners erected illegal construction for which they faced demolition order from Kolkata Municipal Corporation. On demand of the complainant the petitioners falsely represented that the building matter was regularised by K.M.C. The complainant was not given the office space despite his demand. At his instance the accused no. 3 and 4 assured him to execute an indemnity bond sending a letter dated 14.03.2002 but no such indemnity bond was executed. Complainant sent letter dated 19.12.2005 which was replied by accused no. 5 in a letter dated 28.02.2006 mentioning that all interests in respect of the premises of 81, Netaji Subhash Road has been transferred to accused no. 1 long back in the year 2001. In January 2008 accused persons denied complainant's payment of Rs.10,40,000/- to them and they also denied the entire transaction. The petition of complaint does not speak any action of the complainant after such denial in January 2008 and before his lodging complaint before Officer-in-Charge, Burrabazar, Police Station on 13.12.2008.

10. Having gone through the materials-on-record I cannot brass aside the argument advanced on behalf of the petitioners of this revisional application that the dispute between the parties is a civil dispute. I like to reiterate that alleged

transaction of 1995 has been complained in 2008. It does not appear to me that such an inordinate delay was properly explained in the petition of complaint. The allegation made in the complaint do not constitute the offences fulfilling the ingredients of the penal Sections 420/406/120B of the Indian Penal Code. Rather, it may be said that in substance the allegations made in the complaint speak about a simple civil dispute that on assurance of accused petitioners given in 1995 the complainant/opposite party no. 2 paid Rs.10,40,000/- to them for purchasing a centrally air conditioned office space at the rate of Rs.5300/- per square foot at 81, Netaji Subhash Road, Kolkata 700001 but even after construction of building there they neither provided him the office space nor refunded the money to him and they denied in January, 2008 about any such transaction. Such a simple matter has been made complex in the complaint introducing stories of series of transfer of the property in question, execution of power of attorney, voluntary liquidation of company, evading stamp duty of Govt., unauthorised construction of building, notice by Kolkata Municipal Corporation to the petitioners imposing fine etc. Interestingly complainant did not mention specifically on which date he paid money to whom and why even after outright denial of the total transaction in January, 2008 he was waiting till December, 2008 for taking action against petitioners, whom he paid money in 1995 as alleged.

11. In my opinion, the face value of the complaint does not sufficiently speak of criminal intention of all the petitioners of whom except petitioner no. 3 none else was known to complainant (para 6 of complaint) for entering into a criminal conspiracy against the complainant/opposite party no. 2 before June, 1995 in order to deceit him dishonestly inducing him to pay Rs.10,40,000/- and to commit any offence of fraud or criminal breach of trust. As per allegations made in paragraph 6 (c) of the complaint the accused petitioner no. 3 introduced the other petitioners with the complaint and all of them allured him to book one office space and on 11.06.1995 he made part payment out of consideration money for booking an office space for purchasing at the rate of Rs.5300/- per square foot. In considered opinion of this Court the complaint as it is may at best be considered as a breach of civil contract of the year 1995 brought in the garb of a criminal complaint in the year 2008.

12. In paragraph 16 of the judgment of the Hon''ble Supreme Court of India in M/s Thermax Ltd. & Ors. Versus K.M. Johny & Ors. referring to two other decisions of the Hon''ble Supreme Court in S.K. Alagh versus State of Uttar Pradesh & Ors. reported in (2008) 5 SCC 662 and Maharashtra State Electricity Distribution Company Limited & Anr. Versus Datar Switchgear Limited & Ors. reported in (2010) 10 SCC 479 held:- "The principles enunciated from the above-quoted decisions clearly show that for proceedings under section 156 (3) of the Code, the complaint must disclose relevant material ingredients of Sections 405, 406, 420 read with Section 34, I.P.C. If there is a flavour of civil nature, the same cannot be agitated in the form of criminal proceeding. If there is huge delay and in order to avoid the period of limitation, it cannot be resorted to a criminal

proceeding."

13. Said principle is squarely applicable here according to the allegations made in the complaint. Therefore, it is established that the allegations made in the complaint do not make out a prima facie case of any cognizable offence for treating the complaint as FIR at Burrabazar P.S. as per prayer of the complainant who is respondent no. 2 herein.

14. Section 154 of the Code of Criminal Procedure, 1973 provides mandate on officer-in-charge of a police station for recording information of cognizable offence (popularly known as FIR) giving copy of such recording forthwith to the informant. There is also provision for sending substance of such information by informant to the Superintendent of Police in case of refusal to record the information of cognizable offence at police station. If the Superintendent of Police is satisfied that such information discloses commission of a cognizable offence he shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him. Under Section 154, Cr.P.C. the officer-in-charge is bound to record information of commission of cognizable offence but there is no mandate on him to hold investigation. His power to investigate is vested in Section 156, Cr.P.C. If from the information recorded under Section 154 (1), Cr.P.C. the officer-in-charge has reason to suspect the commission of any cognizable offence he shall proceed for investigation in view of the provision under Section 157, Cr.P.C.

15. In the instant case, as per complaint, information was given to officer-in-charge of Burrabazar police station on 12.12.2008 but no action was taken against accused persons before lodging the complaint in Court on 18.12.2008. It is not the case of the complaint that before lodging complaint with prayer for investigation under Section 156 (3), Cr.P.C. the information was given to the higher police authority under Sub-Section (3) of Section 154, Cr.P.C. In the impugned order there is no reflection that before passing of that order there was compliance of Section 154 (1) and 154 (3) of the Cr.P.C. Plenary power of investigation is vested with police authorities. Receiving information of cognizable offence in police station recording the same as FIR is duty of police officer. Court is not window of the police stations for receiving informations of commission of cognizable offences for forwarding the same to concerned police station for recording it as FIR. Section 156 (3), Cr.P.C. does not speak for receiving complaint in Court and its forwarding to police station for recording FIR. Yet, it is not illegal. But, passing of order under Section 156 (3), Cr.P.C. for recording FIR at police station and for investigation is not a mere formality or an act like post office. The impugned order does not exhibit that the learned Metropolitan Magistrate considered the above legal aspects at all. That apart, passing of judicial order in a printed form filling up blanks is not approved as proper.

16. In paragraph 111 in the Constitution Bench judgment in Lalita Kumari Vs. Govt. of U.P. & Ors. reported in AIR 2014 SC 187 the Hon"ble Supreme Court has been pleased to hold:- "(i) Registration of FIR is mandatory under Section 154 of

the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

(ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

(iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, copy of the entry of such closure must be supplied to the first information forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

(iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

(v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

(vi) As to what type and in which case preliminary inquiry is to be conducted will depend on the facts and circumstances of each case.

The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/ family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reason for delay. The aforesaid are only illustrations and exhaustive of all conditions which may warrant preliminary inquiry.

(vii) While ensuring and protecting the rights of the accused and the complainant, preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

(viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above".

17. Said Constitution Bench decision has been relied in the judgment in Priyanka Srivastava and Another Vs. State of Uttar Pradesh and Others reported in (2015) 6 SCC 287. In paragraphs 29, 30 and 31 of the said judgment in Priyanka Srivastava the Hon"ble Supreme Court held:- "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) CrPC 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 persons 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."

18. Referring to said paragraph 30 learned Senior counsel for the petitioners drew any attention to the certified copy of the complaint (FIR) in this case and

argued that the complaint is not supported by affidavit and on that count the proceeding is liable to be quashed. He advanced the arguments that said observation of the Hon''ble Supreme Court should be given retrospective effect as in the judgment Hon''ble Court has not held it as effective prospectively. In support of his arguments my attention was drawn to paragraph 59 of the judgment of the Hon''ble Supreme Court in Yakub Razak Memon Vs. State of Maharashtra reported in (2015) 9 SCC 552. In paragraph 59, Hon''ble Court held:- "59. Thus viewed, it would become a declaration of law under Article 141 of the Constitution and unless the Court says it is prospectively applicable, it would always be deemed to be applicable. However, it is also to be seen what is the purpose and purport behind the said principle and whether that would affect the issuance of death warrant in this case. The Court has held that sufficient notice is to be given to the convict before the issuance of death warrant by the Sessions Court so that it would enable him to consult his advocates and to be represented in the proceedings. That being the purpose, it has to be viewed in the present exposition of facts".

19. He also relied on another decision of the Hon''ble Supreme Court in B.A. Linga Reddy Vs. Karnataka State Transport Authority reported in (2015) 4 SCC 515.

20. Mr. Kabir, learned counsel for the complainant/opposite party no. 2 does not oppose the said principle of law regarding applicability of precedents retrospectively unless purpose and purport behind that principle is to give effect prospectively. According to him, the complaint under consideration was lodged in 2008 long before the judgment in Priyanka Srivastava's case (supra). He advanced the arguments that before the said judgment there was no concept of filing affidavit along with a criminal complaint and in such a situation in law in paragraph 30 of that judgment Hon''ble Court expressed the opinion that "..... a stage has come in this country where Section 156 (3) CrPC application are to be supported by affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate". According to Mr. Kabir, such opinion of the Hon''ble Supreme Court sufficiently indicates that such a stage of necessity of filing affidavit has arisen subsequent to legislation of Section 156 (3), Cr.P.C. and thus the concept of filing such affidavit is to be adopted prospectively after passing the judgment in Priyanka Srivastava (supra).

21. The purpose of giving direction that an application under Section 156 (3), Cr.P.C. be supported by an affidavit has been clearly stated in paragraph 31 of the judgment which is future precautionary measure to deter a litigant to casually invoke the authority of the Magistrate under Section 156 (3), Cr.P.C.

22. Having gone through the cited decisions and considering the arguments advanced before me on this matter of retrospective/prospective effect of filing affidavit with application under Section 156 (3), Cr.P.C. the arguments advanced by Mr. Kabir appears to me convincing and reasonably acceptable and therefore, accepted in this judgment. Arguments of Mr. Basu, made to the effect that

lodging information under Section 154 (1), Cr.P.C. and then under Section 154 (3), Cr.P.C. before filing application in Court under Section 156 (3), Cr.P.C. is obligatory for the complainant all along is accepted in this judgment.

23. Further discussion is considered unnecessary and therefore, avoided in this judgment.

24. In summing up the findings made in the foregoing paragraphs I find and hold that the impugned order dated 18th December, 2008 passed by learned Additional Chief Metropolitan Magistrate, Calcutta in C-1545/2008 is liable to be set aside and accordingly set aside. Consequently, the whole proceedings is quashed. The FIR drawn in Burrabazar Police Station on the basis of complaint of C-1545/2008 is declared ineffective and investigation, if any, done on the basis of such FIR is quashed. Seizure, if any, done by investigating police officer in the mean time is disapproved. Seized article, if any, be returned to the person/ authority from whom seized. Accused persons in connection with that case in the Court of learned Additional Chief Metropolitan Magistrate, Calcutta be discharged. A copy of this judgment be sent from criminal section of this Court to the learned Additional Chief Metropolitan Magistrate, Calcutta for information and compliance.

25. Urgent Photostat certified copy of this judgment, if applied for be given expeditiously to the parties following usual formalities.