
(2008) 09 P&H CK 0174
In the Punjab And Haryana At Chandigarh

Neelam and Others

APPELLANT

Vs

State of Haryana and Another

RESPONDENT

Date of Decision : 02-09-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 306

Citation : (2009) CriLJ 1180 : (2009) 1 ILR (P&H) 694 : (2009) 2 RCR(Criminal) 360

Hon'ble Judges : Augustine George Masih, J

Bench : Single Bench

Judgement

Augustine George Masih, J.—This petition u/s 482 of the Code of Criminal Procedure has been filed by the petitioners for quashing of the order dated 31-1-2006 and order dated 29-4-2006 passed by the Sub-Divisional Judicial Magistrate, Safidon and for quashing of FIR No. 203 dated 4-5-2006 registered under Sections 306, 34, I.P.C. at Police Station Safidon, District Jind, in compliance with order dated 29-4-2006 passed by the Sub-Divisional Judicial Magistrate, Safidon.

2. It has been stated by the petitioners that petitioner No. 1 was married with one Sunil Kumar s/o. Kitab Singh on 10-11-2002. Two children out of their wedlock were born. Petitioner No. 1 left the matrimonial house of her husband, Sunil Kumar on 26-11 -2005 along with her children with the consent of her husband. On the night of 29-11-2005, petitioner No. 1 was informed by her-in-laws that her husband is no more. On reaching Safidon, Kitab Singh-respondent No. 2, who is father of her husband, informed the petitioner No. 1 that Sunil Kumar, husband of petitioner No. 1 had committed suicide. But later on she came to know that her husband was killed by Kitab Singh and other family members. She filed a complaint dated 14-12-2005 to S.P. Jind but before that she was thrown out of her matrimonial house on 11-12-2005. The application of petitioner No. 1 was marked to the S.H.O., Police Station, Safidon for inquiry. On 8-1-2006, Sh. Manbir Singh, S.H.O., Police Station Safidon called both the

parties and recorded statement of Kitab Singh-respondent No. 2. After recording of the statement, no further action has been taken thereon.

3. In the meantime, in order to save his skin, Kitab Singh-respondent No. 2 filed a complaint against the petitioners by fabricating a false suicide note in the Court of Sub-Divisional Judicial Magistrate, Safidon dated 30-1-2006. The Court took cognizance of this complaint and after recording the statement of Kitab Singh-complainant sent the complaint u/s 202 of the Code of Criminal Procedure for enquiry to the D.S.P., Safidon vide order dated 31-1-2006. On receipt of enquiry report of the D.S.P., Safidon, the Court sent the complaint to the S.H.O., Police Station Safidon u/s 156(3) of the Code of Criminal Procedure for registration of the case vide order dated 29-4-2006, in compliance whereof FIR No. 203 dated 4-5-2006, under Sections 306, 34, I.P.C. was registered at Police Station Safidon.

4. It is these two orders passed by the Sub-Divisional Judicial Magistrate, Safidon i.e. 31-1-2006 and 29-4-2006 along with the FIR, which have been challenged.

5. The contention of the petitioners is that once the Sub-Divisional Judicial Magistrate, Safidon, has taken cognizance of the alleged offences in the complaint and ordered for investigating the matter u/s 202 of the Code of Criminal Procedure, the Magistrate is not competent to send the complaint for registration of the FIR u/s 156(3) of the Code of Criminal Procedure to the police. The powers u/s 156(3) can only be exercised by the Judicial Magistrate at the pre-cognizance stage. Once cognizance has been taken, the Magistrate does not have the authority to send the complaint for registration of the case u/s 156(3) of the Code of Criminal Procedure. It has further been stated that the Magistrate is not competent to send a complaint for enquiry u/s 202 of the Code of Criminal Procedure, if (he offence complained of is exclusively triable by the Sessions Court. The offence in the present complaint being u/s 306/34, I.P.C, which is exclusively triable by the Sessions Court, the Magistrate could not have proceeded to order the investigation in the case and in no condition could he order the registration of an FIR u/s 156(3) of the Code of Criminal Procedure.

6. On notice having been issued, reply on behalf of State as well as Kitab Singh-respondent No. 2 (complainant) has been filed. The reply of the State as well as the respondent No. 2 are on identical grounds, wherein it has been contended that the Sub-Divisional Judicial Magistrate, Safidon had, at no stage before passing order dated 29-4-2006, taken cognizance of the alleged offences in the complaint. It is only vide order dated 29-4-2006 that cognizance was taken and, therefore, the Magistrate was competent to direct registration of the FIR u/s 156(3) of the Code of Criminal Procedure. It has been further contended that the complaint before the Sub-Divisional Judicial Magistrate has filed for issuance of a direction to the police to register FIR u/s 156(3) of the Code of Criminal Procedure and the Magistrate has acted in granting the prayer as made in the complaint vide order dated 29-4-2006.

7. On the basis of the pleadings, the questions which arise for consideration and

decision are:

Question I Whether on receipt of the complaint, the Magistrate could, on taking cognizance of an offence complained of, direct registration of FIR u/s 156(3) of the Code of Criminal Procedure?

Question II Whether in a case where it appears to the Magistrate that the offence complained of is exclusively triable by the Court of Session, the Magistrate could have directed registration of FIR u/s 156(3) of the Code of Criminal Procedure?

8. To resolve these issues, three orders passed by the Sub-Divisional Judicial Magistrate, Safidon during the proceedings in the case are important. But before moving on to the said orders, background facts and the proceedings in the Court is essential to understand the controversy leading to the necessity of adjudication in this case.

9. Complaint dated 30-1-2006 was filed in the Court of Sub-Divisional Judicial Magistrate, Safidon with a prayer to send the same to the S.H.O. Police Station, Safidon u/s 156(3) of the Code of Criminal Procedure for the registration of the criminal case. On 31-1-2006, the complainant made a statement before the Sub-Divisional Judicial Magistrate, Safidon and stated before the Magistrate that his complaint be sent to the Deputy Superintendent of Police, Safidon u/s 202 of the Code of Criminal Procedure for investigation of the matter. On the basis of the said statement, the Magistrate sent the original complaint to the Deputy Superintendent of Police, Safidon u/s 202 of the Code of Criminal Procedure for investigating the matter and ordered a report to be submitted on 14-2-2006. The report of the Deputy Superintendent of Police Safidon was received on 14-2-2006 and the case was simply adjourned to 25-2-2006 and thereafter to 4-3-2006, 11-3-2006, 29-3-2006 and 5 4-2006.

10. On 5-4-2006, the complainant tendered a copy of the opinion of Handwriting, Finger Prints and Document Expert and also made a statement that suicide note be got compared from F.S.L. Madhuban. The Sub-Divisional Judicial Magistrate, Safidon directed the S.H.O. Police Station, Safidon to get the documents compared from F.S.L. Madhuban within 20 days and submit his report along with F.S.L. report. It would not be out of way to mention here that in this order, the Magistrate has stated that the allegations levelled in the complaint are under Sections 306/506/120-B/34, I.P.C. and that Section 306, I.P.C. is exclusively triable by the Court of Sessions.

11. The matter, thereafter, came up for hearing on 29-4-2006, when the Sub-Divisional Judicial Magistrate, Safidon directed the S.H.O. Police Station, Safidon to register a case under Sections 306/34, I.P.C. against the accused persons.

12. The three orders dated 31-1-2006, 5-4-2006 and 29-4-2006 which need consideration of this Court, are reproduced hereinunder:

ORDER-I

Present: Complainant in person with Sh. J.S. Malik, Adv.

....

Complainant presented today.

Statement of complainant is recorded separately in which he has stated that the present complaint may kindly be sent u/s 202, Cr.P.C. In view of statement made by complainant, the present complaint be sent to D.S.P. Safidon u/s 202, Cr.P.C. for investigating the matter and report be submitted on 14-2-2006. Original complaint be sent and photo copy of same be retained in the Court.

Sd/- Gopal Krishan SDJM, Safidon 31-1-2006

ORDER-II

Present: Complainant in person.

Tendered copy of opinion of Sh. Yashpal Chand Jain, Handwriting, Finger Prints and Document Expert Mark-A and also made statement that suicide note be get compared from F.S.L. Madhuban and prayed for necessary direction to SHO, P.S. Safidon.

Heard. In view of the statement made by complainant and report Mark-A and in the light of report submitted by the office of DSP, Safidon, since the allegation levelled in the complaint are u/s 306/506/ 120-B/34, I.P.C. and Section 306, I.P.C. is exclusively triable by the Court of Sessions. In the interest of justice, S.H.O., P.S. Safidon, is directed to get the necessary document from complainant and compared from FSL, Madhuban, within 20 days and submit his report along with FSL report positively on or before 29-4-2006.. Intimation be sent to SHO, P.S. Safidon.

Sd/- SDJM, Safidon 5-4-2006

ORDER-III

Present: Complainant in person with Sh. J.S. Malik, Advocate.

ASI Ved Parkash in person.

Sh. Ved Parkash, ASI, appeared and submitted report of F.S.L., Haryana, Madhuban. Sealed report is opened in the Court. Keeping in view the report received from F.S.L. Madhuban and in view of the report earlier submitted by D.S.P. Safidon, a prima facie case u/s 306/34, I.P.C. is made out against the accused persons. S.H.O., P.S. Safidon is directed to register a case accordingly.

Sd/- Gopal Krishan SDJM, Safidon 29-4-2006.

13. Counsel for the petitioners, on the basis of the above three orders, contends that once the Sub-Divisional Judicial Magistrate, Safidon has, in his order dated 31-1-2006, decided to proceed on the complaint of respondent No. 2 u/s 202 of the Code of Criminal Procedure, as is evident from the order dated 31-1-2006,

he could not have reverted back and taken resort to Section 156(3) of the Code of Criminal Procedure for directing the S.H.O., Police Station, Safidon to register the FIR. He further contends that a perusal of the order dated 5-4-2006 would clearly show that the Sub-Divisional Judicial Magistrate, Safidon was fully aware that the offence alleged to have been committed, as per the complaint, was exclusively triable by the Court of Sessions. Therefore, the Magistrate did not have the option to direct the registration of the FIR but the only option left with the Magistrate was to proceed u/s 202(2), wherein he was bound to call upon the complainant to produce all his witnesses and examine them on oath. The said procedure having not been followed the order dated 5-4-2006 and the subsequent order dated 29-4-2006 cannot be sustained and deserves to be quashed. For these submissions, he relies upon judgment of the Hon''ble Supreme Court in the case of Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others, and Tula Ram and Others Vs. Kishore Singh, .

14. Counsel for the State and the counsel for the complainant contend that since the Sub-Divisional Judicial Magistrate, Safidon has not taken cognizance of the complaint, the assertion of the counsel for the petitioners cannot be accepted. The cognizance was taken by the Magistrate only while passing order dated 29-4-2006 and, therefore, the order passed by the Sub-Divisional Judicial Magistrate, Safidon as well as the registration of FIR in question, in compliance with the order passed by the Court, is in accordance with law.

15. I have heard the counsel for the parties and have gone through the records of the case as well as the judgments cited at the bar. As the questions involved in this case are purely legal in nature, the allegations in the complaint and the counter allegations by the other side are not being commented upon.

16. I now proceed to find answers to the two questions arising in the present case as formulated above.

17. The Hon''ble Supreme Court in Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others, held as follows:

17. Section 156(3) occurs in Chapter XII, under the caption:

Information to the Police and their powers to investigate", while Section 202 is in Chapter XV which bears the heading "Of complaints to Magistrate". The power to order police investigation u/s 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance, stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power u/s 156(3) can be invoked by the Magistrate before he takes cognizance of the offence u/s 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). It may be noted, further that an order made under Sub-section (3) of Section 156, is in

the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence u/s 156 and ends with a report or charge-sheet u/s 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings, under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered u/s 202 to direct, within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding". Thus the object of an investigation u/s 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him.

18. Similarly, in the case of Tula Ram and Others Vs. Kishore Singh, , the Hon"ble Supreme Court has held as under:

10. Analysing the scheme of the Code on the subject in question it would appear that Section 156(3) which runs thus:

Any Magistrate empowered u/s 190 may order such an investigation as above mentioned.

Appears in Chapter 12 which deals with information to the police and the powers of the police to investigate a crime. This section is therefore placed in a Chapter different from Chapter 14 which deals with initiation of proceedings against an accused person. It is, therefore, clear that Sections 190 and 156(3) are mutually exclusive and work in totally different spheres. In other words, the position is that even if a Magistrate receives a complaint u/s 190 he can act u/s 156(3) provided that he does not take cognizance. The position, therefore, is that while Chapter 14 deals with post cognizance stage Chapter 12 so far as the Magistrate is concerned deals with pre-cognizance stage, that is to say once a Magistrate starts acting u/s 190 and the provisions following, he cannot resort to Section 156(3). Mr. Mukherjee vehemently contended before us that in view of this essential-distinction once the Magistrate chooses to act u/s 156(3) of the Code it was not open to him to revive the complaint, take cognizance and issue process against the accused. Counsel argued that the Magistrate in such a case has two alternatives and two alternatives only - either he could direct re-investigation if he was not satisfied with the final report of the police or he could straightway issue process to the accused, u/s 204. In the instant case the Magistrate has done neither but has chosen to proceed u/s 190(1)(a) and Section 200 of the Code and thereafter issued process against the accused u/s 204. Attractive though the argument appears to be we are however unable to accept the same. In the first place, the; argument is based on a fallacy that when a Magistrate orders investigation u/s 156(3) the complaint disappears and goes out of existence. The provisions of Section 202 of the present Code debar a Magistrate from directing investigation on a complaint where the offence charged is triable

exclusively by the Court of Session. On the allegations of the complainant the offence complained of was clearly triable exclusively by the Court of Sessions and therefore it is obvious that the Magistrate was completely debarred from directing the complaint filed before him to be investigated by the police u/s 202 of the Code. But the Magistrate's powers u/s 156(3) of the Code to order investigation by the police have not been touched or affected by Section 202 because these powers are exercised even before cognizance is taken. In other words, Section 202 would apply only to cases where the Magistrate has taken cognizance and chooses to enquire into the complaint either himself or through any other agency. But there may be circumstances as in the present case where the Magistrate before taking cognizance of the case himself chooses to order a pure and simple investigation u/s 156(3) of the Code. The question is, having done so, is he debarred from proceeding with the complaint according to the provisions of Sections 190, 200 and 204 of the Code after receipt of the final report by the police? We see absolutely no bar to such a course being adopted by the Magistrate. In the instant case, there is nothing to show that the Magistrate had taken cognizance of the complaint. Even though the complaint was filed by (sic before) the Magistrate, he did not pass any order indicating that he had applied his judicial mind to the facts of the case for the purpose of proceeding with the complaint. What he had done was to keep the complaint aside and order investigation even before deciding to take cognizance on the basis of the complaint. After the final report was received the Magistrate decided to take cognizance of the case on the basis of the complaint and accordingly issued notice to the complainant. Thus, it was on April 2, 1975 that the Magistrate decided for the first time to take cognizance of the complaint and directed the complainant to appear. Once cognizance was taken by the Magistrate u/s 190 of the Code it was open to him to choose any of the following alternatives:

- (1) Postpone the issue of process and enquire into the case himself; or
- (2) direct an investigation to be made by the police officer; or
- (3) any other person.

In the instant case as the allegations made against the accused made out a case exclusively triable by the Court of Session the Magistrate was clearly debarred from ordering any investigation, but he was not debarred from making any enquiry himself into the truth of the complaint. This is what exactly the Magistrate purported to have done in the instant case. The Magistrate issued notice to the complainant to appear before him, recorded the statement of the complainant and his witnesses and after perusing the same he acted u/s 204 of the Code by issuing process to the accused appellants as he was satisfied that there were sufficient grounds for proceedings against the accused.

19. A perusal of the above judgments of the Hon''ble Supreme Court would clearly spell out the law with regard to the powers of the Magistrate, which are different and distinct when exercised under Chapter XII and Chapter XV to the

Code of Criminal Procedure.

In the light of the above, the questions are answered as follows:

QUESTION-I

Whether on receipt of the complaint, the Magistrate could, on taking cognizance of an offence complained of, direct registration of FIR u/s 156(3) of the Code of Criminal Procedure?

20. Whenever a complaint is received by a Magistrate of which he is authorized to take cognizance and if he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding, may either enquire into the case himself or direct an investigation to be made by a police officer or by such other person, as he thinks fit. This is mandated u/s 202 of the Code of Criminal Procedure. However, if on receipt of the complaint, the Magistrate, without examining the complainant, directs the police to investigate, then the order is u/s 156(3) of the Code of Criminal Procedure, meaning thereby, there is no actual application of mind and is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation u/s 156(1) and no cognizance of the offence has been taken. However, if the investigation is directed u/s 202 of the Code of Criminal Procedure, then the same can be done on taking cognizance of the offence alleged. The investigation u/s 156(3) results in submission of a final report u/s 173 of the Code of Criminal Procedure, which forms the subject matter for consideration by the Magistrate u/s 190(1)(b) of the Code of Criminal Procedure. However, submission of a report after investigation u/s 202 of the Code of Criminal Procedure, which can be called for only after taking cognizance of the offence, furnishes material for consideration by the Magistrate either to summon the accused by passing an order u/s 204 or refusing to process by an order of dismissal of the complaint u/s 203. The words used by the legislature in Section 156(3) qualifying the powers of the Magistrate read "...May order such an investigation..." whereas in Section 202 "...or direct an investigation...", brings out the difference in the very nature of the powers exercised by the Magistrate which are distinct and requiring qualitative difference in application of mind while exercising such powers. It is always desirable that the Magistrate taking cognizance of offence on complaint should keep in mind the difference between an order u/s 156(3) and a direction u/s 202 and not make a hybrid composite order under both the Sections.

Answer to Question I:

21. When a complaint is received by or presented before a Magistrate, he should either send the complaint at the outset to the officer incharge of the Police Station directing him to treat it as an First Information Report u/s 154 and proceed under Chapter XII to investigate u/s 156 and submit a final report u/s 202 observing with preemptory requirement of the Section and proceed under Chapter XV of the Code of Criminal Procedure. A Magistrate when decides to proceed under Chapter XV, has no jurisdiction to direct the police to investigate

under Chapter XII and if he does so, he would be acting wholly without jurisdiction.

QUESTION-II

Whether in a case where it appears to the Magistrate that the offence complained of is exclusively triable by the Court of Sessions, the Magistrate could have directed registration of FIR u/s 156(3) of the Code of Criminal Procedure?

In this regard, provisions of Section 202(2), are itself very clear and are thus reproduced hereinbelow:

202(2) In an enquiry under Sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions, he shall call upon the complainant to produce all his witnesses and examine them on oath.

22. A perusal of the above would clearly show that the Magistrate has no option but to call upon the complainant to produce all his witnesses and examine them on oath where it appears to the Magistrate that the offence complained of is exclusively triable by the Court of Sessions. This issue has also been dealt with by the Hon"ble Supreme Court in the case of Tula Ram and Others Vs. Kishore Singh, . It has clearly been held therein that the Magistrate was clearly barred from ordering any investigation but he was not debarred from making any enquiry himself into the truth of the complaint.

23. However, during the enquiry or at any stage where it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions, direction of investigation by the police officer is not permissible and he is required to hold an enquiry by himself. At this stage, proviso comes into play which mandates that he shall call upon the complainant to produce all his witnesses and examine them on oath. The obvious reason is that in a private complaint, which is required to be committed to the Court of Sessions for trial, the interest of the accused will be, safeguarded as the accused would not be taken by surprise at the time of trial and it would reveal the version of the complainant and the witnesses whose list is required to be filed by the complainant u/s 204(2) before the issuance of the process. This would be necessary as the Magistrate is mandated u/s 208(1) to furnish without delay to the accused, free of cost, copy of the statements recorded u/s 200 or Section 202, of all persons examined by the Magistrate.

Answer to Question II:

24. Once the Magistrate comes to a conclusion that the offence alleged is exclusively triable by the Court of Sessions, he has to proceed in accordance with Section 202(2) of the Code of Criminal Procedure and cannot order for investigation by the police u/s 156(3).

25. Now is the time to revert back to the orders under question passed by the Sub-Divisional Judicial Magistrate, Safidon in the instant case to test their veracity on the touchstone of law.

26. The first order is dated 31-1-2006. It starts with the presentation of the complaint and thereafter, proceeds to say that the statement of the complainant has been recorded and on the statement of the complainant, the original complaint is sent to the D.S.P., Safidon, u/s 202 of the Code of Criminal Procedure for investigating the matter and to report. This shows the application of mind by the Magistrate to the complaint and the statement of the complainant and thereafter, the investigation was directed u/s 202. Having taken cognizance of the offence under Chapter XV, the Magistrate was bound to proceed further in accordance with the provisions contained in this chapter.

27. A perusal of the order dated 5-4-2006 would clearly show that the Sub-Divisional Judicial Magistrate, Safidon, on going through the complaint, the report of the D.S.P., Safidon, and the report/opinion of the handwriting, finger prints and document expert, came to the conclusion that the allegations leveled in the complaint were under Sections 306/506/120-B/34, I.P.C. of which Section 306, I.P.C. is exclusively triable by the Court of Sessions. Having said so, the Magistrate could not have proceeded in any other manner in the matter, except for proceeding u/s 202(2) of the Code of Criminal Procedure, which provides for calling upon the complainant to produce all his witnesses and examine them on oath.

28. The matter, thereafter, came up for hearing before the Sub-Divisional Judicial Magistrate, Safidon on 29-4-2006, when the Magistrate instead of proceeding u/s 202(2) went a step further and issued directions to the SHO, Police Station, Safidon to register a case against the accused under Sections 306/34, I.P.C. u/s 156(3) of the Code of Criminal Procedure. The order is hit by the answers to questions I and II as given above where it has been held that:

A Magistrate when decides to proceed under Chapter XV, has no jurisdiction to direct the police to investigate under Chapter XII and if he does so, he would be acting wholly without jurisdiction.

Once the Magistrate comes to a conclusion that the offence alleged is exclusively triable by the Court of Sessions, he has to proceed in accordance with Section 202(2) of the Code of Criminal Procedure and cannot order for investigation by the Police u/s 156(3).

29. This order fails the test of law as laid down above and is held illegal being not in accordance with law and the provisions of the Code of Criminal Procedure.

This petition is, accordingly, partly allowed. The order dated 29-4-2006 passed by the Sub-Divisional Judicial Magistrate, Safidon, FIR No. 203 dated 4-5-2006, under Sections 306/34, I.P.C. Police Station Safidon, District Jind registered in compliance with the order dated 29-4-2006 and all consequential proceedings

arising therefrom are hereby quashed. A direction is issued to the Sub-divisional Judicial Magistrate, Safidon, to proceed with the complaint in accordant with Section 202(2) of the Code of Criminal Procedure and take further action, in accordance with law.