

(2018) 11 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Application Criminal No. 69 Of 2018, Criminal Miscellaneous Case No. 671 Of 2018, IA No. 01 Of 2018

Sandeep Gupta @APPELLANT@Hash State And Ors

Date of Decision : 03-11-2018

Acts Referred:

Constitution Of India, 1950 — Article 226
Code Of Criminal Procedure, 1973 — Section 107, 151, 154, 154(1), 156(3), 157, 173, 200, 202, 561A
Jammu And Kashmir Land Revenue Act, 1939 — Section 133
Prevention Of Corruption Act, 1988 — Section 5(4)

Citation : (2018) 11 J&K CK 0002

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Advocate : Sunil Sethi, Vishal Sharma, K.S. Johal, Karman Singh Johal, C.M. Koul

Final Decision : Allowed

Judgement

1. In the instant petition filed under Section 561-A Cr.P.C, petitioner seeks quashment of order dated 15th October, 2018, passed by the learned Chief Judicial Magistrate, Jammu on the Complaint of the respondent No. 3, i.e., Nasreena Bano, directing the respondent No. 1 to register FIR under relevant provisions of law along with Complaint of the respondent No. 3.

2. In petition it has been stated that petitioner is serving in the Indian Police Services (IPS), presently posted as SDPO, Domana and is borne on the cadre of Jammu and Kashmir Police. A request was received in the Police Station, Domana from the revenue officials for providing police help, apprehending law and order problem in the process of removing illegal encroachments on the State land in compliance to the directions of High Court issued in a Public Interest Litigation. The petitioner was also informed about the same by the Incharge Police Post, Chinore and the Police Police, Chinore to co-operate with the revenue officials and provide all necessary support to them and also ensure that no untoward incident happens during the anti-encroachment drive. It is stated on 04th

August, 2018, the anti-encroachment drive for retrieval of the State land from illegal encroachers was started under the jurisdiction of Police post, Chinore under the supervision of Sh. Alias Khan, SDM, North at about 9 A.M in the morning and after due entry in the Roznamcha of Police Post, Chinore, police personnel were deployed to assist the revenue officials in their anti-encroachment drive.

3. It is also stated in the instant petition that since the area of anti-encroachment drive, falls within the jurisdiction of the petitioner, the petitioner also visited the spot at Upper Thather, Bantalab at about 11 A.M on 04th August, 2018, by which time the revenue officials had already removed some encroachments and were proceeding towards the land under the illegal encroachment of the respondent No. 3 (Complainant) and the respondent No. 3 had also come on the spot. As soon as the revenue officials started proceeding towards the land encroached by the respondent No. 3, she started arguing with the revenue officials, who advised the petitioner to allow them to perform their official duty, but the respondent No. 3 did not allow the revenue officials to proceed to her land and even stood in front of the JCB, whereupon the petitioner instructed the Incharge Police Post, Chinore present on spot to engage some ladies from the adjoining houses, who had gathered on spot to persuade the respondent No. 3 to allow the removal of encroachment peacefully and at the same time, further instructed the Incharge Police Post, Chinore to requisition some lady constables. For more than one hour, the revenue officials and the ladies gathered on the spot, tried to persuade to respondent No. 3 to allow smooth retrieval of the State land from encroachment, but the respondent No. 3 did not budge an inch and even chased and attacked officials of the revenue department and also picked up stones threatening the police and revenue officials and JCB driver of bodily harm in case they proceed with the anti-encroachment drive. In the meantime, one lady constable along with one lady home guard from Police Station, Domana reached the spot, who tried to remove the respondent No. 3 from the spot, but the respondent No. 3 even forcefully resisted the lady constables and in the scuffle, the respondent No. 3 as well the lady constables fell down and she might have suffered some bruises and her clothes also got torn and with great effort, the lady constables took control of the respondent No. 3 and she was brought to Police Post, Chinore. Thereafter, the revenue officials removed only a portion of the plinth existing on the State land, encroached by the respondent No. 3. On the State land under encroachment of the respondent No. 3, there existed only a plinth and a small structure not fit for habitation while the entire land was covered with china grass and the respondent No. 3 is residing at a distance of about 1.5 Kms from the encroached land.

4. It is also stated in the instant petition that after the petitioner left the spot at about 1.30 P.M and went to his office and after getting an information that some people had blocked Chinore Chowk went there where the people of the area were protesting for the killing of one local resident, namely, Murafad Shah and remained there till late in the evening upto about 7 P.M where even the Tehsildar

concerned was also camping due to the volatile situation existing there, trying to calm down the protesting people when the husband of the respondent No. 3 approached the petitioner at about 5 P.M at Chinore Chowk and told the petitioner that his wife has some temperamental issues and she may be released, as he guaranteed that the respondent No. 3 will not repeat this again. The petitioner told the husband of the respondent No. 3 to wait for some time and it was only at about 7 P.M, when the protest ended and the protesting people left the Chinore Chow, the petitioner along with the Tehsildar went to the Police Post, Chinore.

5. It is further stated that having regard to the fact that the husband of the respondent No. 3 also belongs to the forces and had undertaken that the respondent No. 3 will be repentant, the petitioner enquired from the Incharge Police Post, Chinore regarding the action taken against the respondent No. 3, who informed the petitioner that taking a lenient view, no FIR has been lodged against the respondent No. 3, however, the respondent No. 3 has been proceeded under Section 107/151 Cr. P.C, whereupon the petitioner requested the Tehsildar, who was present in the Police Post, Chinore, per chance, to admit the respondent No 3 to bail and after completing the formalities, the respondent No. 3 was let of, handing her over to her husband at about 8 P.M after the husband of the respondent No. 3 executed the surety bond. Since the time, the respondent No. 3 was taken into custody and till the times, she was released from custody at about 8 P.M, the two lady constables remained in the Police Post, Chinore and left the Police Post after the respondent No. 3 left with her husband and reported back at Police Station, Domana at 9.40 P.M. Since by that time, the petitioner was completely exhausted due to the hard day labour. The petitioner also went to his residence after some time holding discussions to handle next day's volatile situation created due to Murafad Shah's killing, as his body was to be given last rites next day and stayed at his residence till the next morning. The petitioner thereafter remained silent and it was only after almost ten days that the respondent No. 3 started making false, vague and motivated accusation of rape against the petitioner and others probably as a well thought out tactic to deter the public servants from performing their official duties fearlessly and re-encroach the retrieved land.

6. It has further been stated that the respondent No. 3 filed frivolous and motivated complaints against the petitioner and others to the Inspector General of Police, Jammu as well as before his Excellency The Governor of the State of J&K, but since the allegations in the complaints were prima facie frivolous, vexatious and motivated, made with some malafide intention to deter the public servants, the same were found to be false in preliminary enquiries to the knowledge of the petitioner. In furtherance to her malafide intention, the respondent No. 3 has filed a Complaint again, leveling accusations of rape against the petitioner and two others before the learned Chief Judicial Magistrate, Jammu and the learned Chief Judicial Magistrate, Jammu vide order dated 15th October, 2018 has directed the Senior Superintendent of Police, Jammu to

register FIR under relevant provisions of law and investigate the matter after treating it as application under Section 156 (3) Cr. P.C. The accusations made in the Complaint are so vague, improbable and after thought besides being self-contradictory, but the learned Chief Judicial Magistrate without applying its mind to the facts and circumstances of the case, has mechanically passed the order dated 15th October, 2018, directing the registration of the FIR. The said Complaint of the respondent No. 3 is an abuse of process of law and the impugned order of the learned Chief Judicial Magistrate, Jammu is illegal and is contrary to law, as the allegations in the application/complaint are self-contradictory and motivated and the petitioner seeks the quashment of the impugned order dated 15th October, 2018 on the following grounds:-

(a) That a bare reading of the allegations made in the complaint before the Learned CJM, Jammu and the complaints made before Worthy IGP Jammu and His Excellency, the Governor clearly shows that allegations in the application are self- contradictory, motivated and after thought and even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the petitioner, as the respondent no.3 is alleging the incident of rape in the intervening night of 3rd & 4th August 2018 when as per the own admission of the respondent No.3 in complaint before His Excellency The Governor that she was taken in custody during the anti-encroachment drive which was held on 4th August 2018 and it is a fact that the respondent no.3 was taken in custody only on 4th August, 2018 at around 1 P.M. and released from the custody at about 8 P.M. same day in presence of her husband.

(b) That the Learned CJM Jammu has failed to appreciate that it was not the complaint alone which was before the Learned CJM, Jammu, but along with the complaint, the respondent no.3 had also annexed earlier complaints, which documents also form part of the complaint and a bare perusal of these complaints would show that the respondent no.3 has tried to falsely implicate the petitioner herein by consistent change of stance and all these complaints have to be read together to form the prima facie opinion as to the commission of cognizable offence.

(c) That the action of the respondent no.3 in filing the complaint impugned herein is actuated with malafide, as the respondent no.3 has deliberately and knowingly tried to deter the public servants from performing their official duties fearlessly under the threat of false accusations of rape so that the respondent no.3 could re-encroach the retrieved land without any objection.

(d) That the allegations made in the complaint against the petitioner are contrary to the established facts as even the respondent no.3 has leveled allegation of manhandling by six to seven male police personals when the incident of her taking into custody by two female police personals has been video-graphed. Further, the blatant lie of the respondent no.3 that she was residing in the house demolished in the anti- encroachment drive when there was no house on the

spot is also verifiable from the video recorded at spot. Compact disc (CD) containing videos of the incidents of respondent no.3 attacking Govt. officials, stone pelting at JCB driver and lady police officials taking her into custody is enclosed and marked as Annexure-H

(e) That the Learned CJM Jammu, while passing the order impugned, has acted in a mechanical manner thereby committing a grave error of law as before passing such an order, the learned CJM, Jammu was required to satisfy itself as to whether the allegations leveled in the complaint discloses the commission of the offences complained of and as to whether any enquiry is required into the alleged allegations before directing registration of the FIR as mandated by Section 202 Cr.PC.

(f) That keeping in view the contradictory stands taken by the respondent no.3 at different times in her different complaints, the learned CJM, Jammu while passing the order impugned, has failed to exercise the jurisdiction vested in it under Section 202 Cr.PC, as under the circumstances, the learned CJM, Jammu should have at least exercised the powers u/s 202 Cr.PC calling for the report of any enquiry, if any, by the Worthy IGP, Jammu or Worthy SSP, Jammu instead of straightway directing the registration of FIR, thereby abdicating its judicial duty and causing prejudice to the petitioner, who is being victimized for performing his official duty that too in compliance to the directions of the Division Bench of the Hon'ble High Court in a Public Interest Litigation.

(g) That the learned CJM, Jammu has also failed to appreciate that it would be setting a very dangerous precedent in case FIR for accusation of rape on such vague complaints are directed to be registered mechanically against Senior Police Officials for performing their official duties, as it will encourage the violators of law to use the false accusation of rape to deter them from taking any action against the violators of law leading to lawlessness in the society.

(h) That the order impugned has been passed by the learned CJM, Jammu in complete breach of the law laid down by the Hon'ble Supreme Court of India in Priyanka Srivastava's case reported in 2015 AIR (SC) 1758, wherein it has been categorically held 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 the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out, but the learned CJM, Jammu while passing the impugned order, has failed to follow the mandate of law, as such the order impugned is liable to be set aside.

(i) That the present case squarely falls within the parameters indicated by the Hon'ble Supreme Court in Bhajan Lal's case for quashing the proceedings under the inherent powers of the Hon'ble Court, as continuance of the proceedings in the complaint will be nothing, but an abuse of the process of law and in terms of

the guidelines laid down by the Hon'ble Supreme Court that in case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold and where a criminal proceeding is manifestly attended with mala-fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, the same is liable to be quashed, as such the impugned order and the complaint are liable to be quashed.

7. I have heard counsels for parties. Counsel for petitioner has reiterated all grounds taken in memo of petition, whereas counsel for complainant has argued that this petition is not maintainable as from perusal of complaint, heinous and cognizable offences have been made out against petitioner and other accused. I have given my thoughtful consideration to whole aspects of matter.

8. The facts necessary for the disposal of this petition are that a Criminal case in terms of Section 156(3) of Cr.P.C. was filed by the respondent No.3 against the petitioner and other accused contending inter alia that (Relevant para):-

(9) That in an ongoing PIL, which is pending adjudication before the Hon'ble court being PIL No. 19/2011 titled Sh. S K Bhalla vs. State of J&K & ors., orders were passed by the Hon'ble High Court and formal notices issued to the encroachers of land falling in khasra Nos. 458, 459 and 48 of village Thather North District, Jammu. A perusal of this notice would reveal that the names of as many as 33 persons have been mentioned, who were held to be encroachers and the notices have been served upon them. This notice was issued by the Tehsildar, Jammu (North) bearing notice No. TJN(AC)/OQ/2018/01-35 dated 18.7.2018. The name of the complainant does not figure anywhere in the notice of encroachers issued by the Tehsildar, Jammu (North). A copy of this notice issued by the Tehsildar, Jammu (North) in compliance to the orders passed in the Public interest litigation afore-titled is enclosed herewith for facility of reference and marked as Annexure-D.

(10) That on the unfortunate morning of 3.8.2018, a team of officials led by the SDM North-Elias Khan with Rafiq Ahmed Jaral-Tehsildar Jammu (North), SDPO Domana- Sh. Sandeep Gupta, Incharge Police Post Chinore-Sh. Rajesh Kumar along with police personnel (all males) numbered 15 to 20 along with JCBs, tippers visited the house of the complainant without a notice or any warning whatsoever. The complainant was manhandled on the spot by senior police officers. She was forcibly put into the police van.

(11) That at the time when the house of the complainant was raided, the husband of the complainant was in Srinagar while both her sons were in the boarding school at Sainik School, Nagrota. The complainant was living with one girl, namely Sonia, who happens to be the niece of the complainant and also an orphan of the age of 16 years. The complainant when was forcibly put in the police van taken to the Police Post, Chinore by six to seven male police

constables, who misbehaved with the complainant all throughout on the way till they reached police post, Chinore. It is submitted that the complainant was kept in the Police Post, Chinore for two nights starting from 3/8/2018 to 5/8/2018.

(12) That with a view to justify the illegal arrest of the complainant, the police has framed a false, frivolous and vexatious complaint under Section 107/151 of the Cr.PC against the complainant and produced a challan before Tehsildar Jammu (North) on 14.8.2018. The challan was deliberately produced before the Tehsildar, Jammu (North) because of the simple reason that the Tehsildar, Jammu (North) was himself a part of the nexus with all the accused persons.

(13) That during the day time on 3.8.2018, the complainant was kept on the first floor of the building of the Police Post, Chinore and in the evening of 3rd of August, 2018, she was shifted to the ground floor of the other building in a very secluded room behind the main building of the police post. This room was a solitary room.

(14) That during the intervening night of 3rd/4th of August, 2018, the Tehsildar, Jammu (North), namely, Rafiq Ahmed Jaral, -Accused No. 1-Sh. Sandeep Gupta, SDPO Domana-Accused No. 2 and Sh. Rajesh Kumar, Incharge Police Post, Domana -Accused No. 3 came to police post after 11 PM at dead of night.

(15) That the SDPO, Domana, Sh. Sandeep Gupta -Accused No. 2 came into the room alone and bolted the room from inside. He asked the complainant to remove her clothes. Since she had been already maltreated by the police constables while on the way to the police post and in the Police Post, Chinore, she was totally depressed and was not aware as to what had happened to her house from where she was picked. When the complainant resisted in opening her clothes on insistence of the SDPO Domana, she was brutally slapped and molested by the said SDPO. This resulted into tearing of the clothes of the complainant on the portion covering the complainant's breast. When the complainant resisted the attempt and ran in the room to save herself from the clutches of the said SDPO, Sh. Sandeep Gupta-SDPO Domana caught hold of the complainant from the bottom of her shirt on the right side. In this mille, the stitches of the shirt were torn and body of the complainant got exposed. The remaining portion of the shirt and the clothes on the body of the complainant were brutally removed by said Sh. Sandeep Gupta, SDPO Domana, who also forcibly removed the salwar of the complainant. The complainant cried her lungs out, which was all futile, as her cries disappeared in the wilderness at the dead of the night. The said SDPO forcibly raped the complainant and quenched his sexual lust.

(16) That after the SDPO Domana-Sh. Sandeep Gupta had satisfied his sexual beastness, the Tehsildar, Jammu (North)- Sh. Rafiq Ahmed Jaral entered in the room and he also raped the complainant, who had already been raped by SDPO Domana-Sh. Sandeep Gupta. The complainant was in the state of mental and physical trauma. After the Tehsildar, Jammu (North) Sh. Rafiq Ahmed Jaral and

SDPO Domana-Sh. Sandeep Gupta indulged into the forcible rape on the complainant, both of them left the Police Post, Chinore after quenching their sexual desire. Sh. Rajesh Kumar, Incharge Police Post, Chinore also came to the room, where the complainant was stationed and he also raped the complainant. The whole process continued for about 3 to 4 hours. The complainant was traumatized after having been perpetuated to forcible rape by the accused persons. There was no body at the home of the complainant except for 16 years old niece and the husband of the complainant was stationed at Srinagar, combating with the militancy, whereas two minor children were boarded at Sainik School, Nargotra. In these circumstances, there was nobody around, who could look after the interest of the complainant so that she could avail the legal recourse.

(17) That as if the happening of the night of 3rd/4th of August, 2018 was not enough, the complainant was kept in the police custody for the night of 4th and 5th of August, 2018 as well for no offence except for a complaint under Section 107/151 Cr.PC, wherein the complainant was entitled to release on bail as a matter of right with the intervention of the court. There can be no justification whatsoever to keep the complainant in the police custody on the night intervening of 4th/5th of August, 2018 except that the complainant was to be subjected to rape again by the accused Nos. 1, 2 and 3.

18) That in the morning of 4.8.2018, the complainant was not shifted anywhere from that room of solitary confinement till the night wherein nobody visited the complainant not even for water. The custodians of the law, namely, Sh. Rafiq Ahmed Jaral- Tehsildar Jammu (North), SDPO Domana- Sh. Sandeep Gupta and Sh. Rajesh Kumar, Incharge Police Post, Chinore raped the complainant once again one after the other on the intervening night of 4th/5th of August, 2018.

19 That the complainant is still in possession of the clothes that were torn during the course of the incidence. After she was released from the Police Post, Chinore on 5th of August, 2018, the accused persons No. 1, 2 and 3 made sure that she was not allowed to go for a medical test at Chinore. However, the complainant had taken pictures of her naked body and the marks which were inflicted upon her during the course of rape were clicked after she was released. The pictures would reflect the sign of molestation on the breast of the complainant. Copies of these pictures are enclosed herewith for perusal of this court and marked as Annexure-E.

9. The Judicial Magistrate First Class, (CJM), Jammu on 15.10.2018 passed the following order;-

"The applicant has sought the indulgence of this court in seeking the lodging of FIR and conducting investigation u/s 156(3) Cr.P.C. I have gone through the application and the record appended with the application and I have applied my mind into the present facts and circumstances of the case. A perusal of the application transpires that the commission of cognizable offence is disclosed

against the accused persons. The applicant had also availed the remedy u/s 154(1) Cr.P.C and 154(3) CPC. The application is duly supported with an affidavit. Accordingly, Sr. Superintendent of Police, Jammu is directed to register the FIR under relevant provisions of law and investigate the matter."

10. This fact has not been denied that petitioner is public servant as IPS officer posted as SDPO of concern area ; and has gone along with police official and revenue officer to implement the court order of this passed in WPIL NO.19/2011 in case titled Prof. S.K. Bhalla v state, with regard to recovering of state land. It is also the case of complainant that she possesses land under kh.no. 482 situated at Thather, Jammu by virtue of agreement to sell; As per Annexure D, the notice issued by Tehsildar under section 133 of Land Revenue Act , in compliance to High court order, land under Kh.no. 482 is state land.

11. The Supreme Court in the case of Priyanka Srivastava and anr. v. State of U.P. and Ors. reported in (2015) 6 SCC 287 has held as under:-

"20. The learned Magistrate, as we find, while exercising the power under Section 156(3)Cr.P.C. has narrated the allegations and, thereafter, without any application of mind, has passed an order to register an FIR for the offences mentioned in the application. The duty cast on the learned Magistrate, while exercising power under Section 156(3) Cr.P.C., cannot be marginalized. To understand the real purport of the same, we think it apt to reproduce the said provision:

"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) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned."

21. Dealing with the nature of power exercised by the Magistrate under Section 156(3) CrPC, a three-Judge Bench in Devarapalli Lakshminarayana Reddy and others v. V. Narayana Reddy and others(1976) 3 SCC 252, had to express thus:

"17.....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 under Section 156 and ends with a report or charge- sheet under Section 173."

22. In *Anil Kumar v. M.K. Aiyappa* (2013) 10 SCC 705, the two-Judge Bench had to say this:

"11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in *Maksud Saiyed* (2008) 5 SCC 668 examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation."

23. In *Dilawar Singh v. State of Delhi* (2007) 12 SCC 641, this Court ruled thus:
"18. ...

'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 is closed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

24. In *CREF Finance Ltd. v. Shree Shanthi Homes (P) Ltd.* (2005) 7 SCC 467, the Court while dealing with the power of the Magistrate taking cognizance of the offences, has opined that having considered the complaint, the Magistrate may consider it appropriate to send the complaint to the police for investigation under Section 156(3) of the Code of Criminal Procedure. And again: (*Madhao v. State of Maharashtra* (2013) 5 SCC 615, SCC pp.620-21, para 18)

"18. When a Magistrate receives a complaint he is not bound to take cognizance if the facts alleged in the complaint disclose the commission of an offence. The

Magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself. As said earlier, in the case of a complaint regarding the commission of cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3)."

25. Recently, in *Ramdev Food Products (P) Ltd. v. State of Gujarat* (2015) 6 SCC 439, while dealing with the exercise of power under Section 156(3) CrPC by the learned Magistrate, a three-Judge Bench has held that: (SCC p.456, para 22)

"22.1. The direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone instance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued.

22.2. The cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed."

26. At this stage, we may usefully refer to what the Constitution Bench has to say in *Lalita Kumari v. State of U.P.* (2014) 2 SCC 1, in this regard. The larger Bench had posed the following two questions: (SCC p.28, para 30)

"(i) Whether the immediate non- registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have a complaint immediately investigated upon allegations being made; and

(ii) Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused."

Answering the questions posed, the larger Bench opined thus: (*Lalita Kumari* case reported in (2015) 6 SCC 1), SCC pp.35- 36, 41 & 58-59, paras 49, 72, 111 & 115)

"49. Consequently, the condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the

requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.

72. It is thus unequivocally clear that registration of FIR is mandatory and also that it is to be recorded in the FIR book by giving a unique annual number to each FIR to enable strict tracking of each and every registered FIR by the superior police officers as well as by the competent court to which copies of each FIR are required to be sent.

111. ... the Code gives power to the police to close a matter both before and after investigation. A police officer can foreclose an FIR before an investigation under Section 157 of the Code, if it appears to him that there is no sufficient ground to investigate the same. The section itself states that a police officer can start investigation when he has "reason to suspect the commission of an offence". Therefore, the requirements of launching an investigation under Section 157 of the Code are higher than the requirement under Section 154 of the Code. The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.

115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint."(emphasis in original)

After so stating the constitution Bench proceeded to state that where a preliminary enquiry is necessary, it is not for the purpose for verification or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence. After laying down so, the larger Bench proceeded to state: (*Lalita Kumari v. State of U.P.*, (2014) 2 SCC 1), SCC p.61, para 120)

"120.6. As to what type and in which cases 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 reasons for delay. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a 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."

We have referred to the aforesaid pronouncement for the purpose that on certain circumstances the police is also required to hold a preliminary enquiry whether any cognizable offence is made out or not.

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 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.

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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 fellows 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 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 Section 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 the application under Section 156(3) be supported by an affidavit 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."

12. Further as the petitioner and persons involved are public servant, in Anil Kumar Vs. M. K. Aiyappa, (2013) 10 SCC 705, it is held as under:-

"9. We will now examine whether the order directing investigation under Section 156(3) Cr.P.C. would amount to taking cognizance of the offence, since a contention was raised that the expression "cognizance" appearing in Section 19(1) of the PC Act will have to be construed as post-cognizance stage, not pre-cognizance stage and, therefore, the requirement of sanction does not arise prior to taking cognizance of the offences punishable under the provisions of the PC Act. The expression "cognizance" which appears in Section 197 Cr.P.C. came up for consideration before a three-Judge Bench of this Court in State of Uttar Pradesh v. Paras Nath Singh (2009) 6 SCC 372, and this Court expressed the following view:

"6.And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far as public servants are concerned, the cognizance of any offence, by any

court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, "no court shall take cognizance of such offence except with the previous sanction". Use of the words "no" and "shall" makes it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of. According to Black's Law Dictionary the word "cognizance" means "jurisdiction" or "the exercise of jurisdiction" or "power to try and determine causes". In common parlance, it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty.

In *State of West Bengal and Another v. Mohd. Khalid and Others* (1995) 1 SCC 684, this Court has observed as follows:

"It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."

10. The meaning of the said expression was also considered by this Court in *Subramaniam Swamy* case (supra). The judgments referred to herein above clearly indicate that the word "cognizance" has a wider connotation and not merely confined to the stage of taking cognizance of the offence. When a Special Judge refers a complaint for investigation under Section 156(3) Cr.P.C., obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. When a Special Judge takes cognizance of the offence on a complaint presented under Section 200 Cr.P.C. and the next step to be taken is to follow up under Section 202 Cr.P.C. Consequently, a Special Judge referring the case for investigation under Section 156(3) is at pre-cognizance stage.

11. A Special Judge is deemed to be a Magistrate under Section 5(4) of the PC Act and, therefore, clothed with all the magisterial powers provided under the Code of Criminal Procedure. When a private complaint is filed before the Magistrate, he has two options. He may take cognizance of the offence under Section 190 Cr.P.C. or proceed further in enquiry or trial. A Magistrate, who is otherwise competent to take cognizance, without taking cognizance under Section 190, may direct an investigation under Section 156(3) Cr.P.C. The

Magistrate, who is empowered under Section 190 to take cognizance, alone has the power to refer a private complaint for police investigation under Section 156(3) Cr.P.C.

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13. Learned senior counsel appearing for the appellants raised the contention that the requirement of sanction is only procedural in nature and hence, directory or else Section 19(3) would be rendered otiose. We find it difficult to accept that contention. Sub-section (3) of Section 19 has an object to achieve, which applies in circumstances where a Special Judge has already rendered a finding, sentence or order. In such an event, it shall not be reversed or altered by a court in appeal, confirmation or revision on the ground of absence of sanction. That does not mean that the requirement to obtain sanction is not a mandatory requirement. Once it is noticed that there was no previous sanction, as already indicated in various judgments referred to hereinabove, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) Cr.P.C. The above legal position, as already indicated, has been clearly spelt out in Paras Nath Singh and Subramaniam Swamy cases (supra).

14. Further, this Court in Criminal Appeal No. 257 of 2011 in the case of General Officer, Commanding v. CBI and opined as follows:

"Thus, in view of the above, the law on the issue of sanction can be summarized to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him..... If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio."

13. If the order passed by the Trial Magistrate is considered in the light of the judgment passed by the Supreme Court in the case of Priyanka Srivastava (supra), then it is clear that while passing the order under Section 156 (3) of Cr.P.C the Judicial Magistrate First Class did not apply its mind to the allegations made in the complaint. He has passed order in casual manner; he was required to go through the allegations levelled in the complaint and law governing on the subject. If such orders are being passed against public servants, as in the present case, in casual manner, then definitely the order of court would not be implemented by executive agency due to apprehension of public servant of their involvement in such like cases. Petitioner being public servant has taken steps to discharge his duty along with other authorities on the direction of this court to recover possession of State land. It is very easy to level the allegations of rape, so Magistrate is required to conduct the inquiry before passing any order under law. The argument of counsel for respondent (complainant) that statement of victim in rape case has to be considered on better footing than that of injured

witness. There is no dispute in this regard, but in present case, the statement of the complainant/victim is yet to be recorded. There is only written complaint which has been cleverly drafted only to create illusion of criminal act. The petitioner herein is of young age and is at initial stage of his career as IPS Officer. The order of Magistrate directing registration of FIR without proper inquiry may ruin his future.

14. Thus, this Court is of the considered view that the order dated 15.10.2018 is not in accordance with law and has been passed without applying its mind to the allegations as contained in the complaint. Accordingly, the order dated 15.10.2018 passed by CJM (JMJC 1ST Class ,Jammu) is quashed. The matter is remanded back to the court below with a direction to decide the application filed under Section 156 (3) of Cr.P.C afresh in the light of the judgment passed by the Supreme Court in the case of Priyanka Srivastava (supra). The said exercise be done expeditiously. With aforesaid observations, the petition is allowed. Connected IAs also stand disposed of.