

(2013) 02 CHH CK 0019
In the Chhattisgarh High Court
Case No : Writ Petition (Cri.) No. 125 of 2012

Smt. Rakhi Patel

APPELLANT

Vs

State of Chhattisgarh and Others

RESPONDENT

Date of Decision : 07-02-2013

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 156, 156(3), 173, 190, 192
Penal Code, 1860 (IPC) — Section 34, 409, 420, 467, 468

Citation : (2013) 2 CGBCLJ 137 : (2013) 3 CGLJ 638 : (2013) 3 MPHT 66 :
(2013) 3 MPJR 131

Hon'ble Judges : T.P. Sharma, J

Bench : Division Bench

Advocate : Prafull Bharat and Mr. H.S. Patel, for the Appellant; Pankaj Shrivastava, Panel Lawyer for the State/Respondent No. 1 and Mr. Dhani Ram Patel, Advocate for the Respondent No. 2, for the Respondent

Final Decision : Disposed Off

Judgement

T.P. Sharma, J.—Heard. By this petition, the petitioner seeks to invoke the supervisory jurisdiction under Article 227 of the Constitution of India against the order dated 29-4-2011 passed by the Judicial Magistrate First Class, Sarangarh in an unregistered criminal complaint case of the year 2008 (Prem Sagar Patel Vs. Jailal Sarthi and others), whereby (he Judicial Magistrate First Class has directed for registration of the First Information Report (for short ""the FIR") and investigation u/s 156(3) of the Code of Criminal Procedure, 1973 (for short "the Code").

2. Learned Counsel for the petitioner submits that complaint for the offence punishable under Sections 409, 420, 467, 468 and 471 read with Section 34 of the IPC has been filed at the instance of respondent No. 2 herein before the Court of Judicial Magistrate First Class, Sarangarh on 17-11-2008. On 17-11-2008, the Judicial Magistrate First Class has directed the police concerned for investigation and submission of report. Finally, report was submitted on

17-12-2008, thereafter, the Judicial Magistrate First Class fixed the case for recording of evidence before registration for several dates, but has not recorded evidence. On 26-8-2009, an application u/s 156(3) of the Code was filed by respondent No. 2 and after hearing respondent No. 2, the order impugned dated 29-4-2011 has been passed by the Judicial Magistrate First Class. Learned Counsel further submits that after receiving complaint under Chapter XV of the Code, the Court of Judicial Magistrate First Class has proceeded under Chapter XV of the Code and has directed for investigation to the police u/s 202 of the Code. After receiving investigation report, even the Judicial Magistrate First Class has fixed the case for recording evidence before registration for several dates, thereafter, the Judicial Magistrate First Class has allowed the application filed u/s 156(3) of the Code and directed the police for registration of FIR and investigation u/s 156(3) of the Code. Learned Counsel also submits that after proceeding under Chapter XV of the Code for enquiry into the complaint by the Magistrate, the Magistrate is not competent to proceed under Chapter XII of the Code. The provisions contained in Sections 156(3) and 202 of the Code are not one and same. The provisions contained in Section 156(3) of the Code are related to investigation by police and the provisions contained in Section 202 of the Code are related to investigation after taking cognizance of the offence by the Magistrate on the complaint. Learned Counsel contends that by passing the order impugned and by taking cognizance of the offence, the Trial Court has committed illegality which requires interference in exercise of supervisory jurisdiction.

3. Learned Counsel for the petitioner places reliance in the matter of Mohd. Yousuf Vs. Smt. Afaq Jahan and Another, , in which the Supreme Court has held that after taking cognizance of the offence on the basis of complaint, the Magistrate is empowered to proceed u/s 202(1) of the Code and same is different from investigation u/s 156(3) of the Code.

4. On the other hand, learned Counsel for respondent No. 2 opposes the petition and submits that although the Trial Court has directed the police for submission of enquiry report, but before sending the complaint to the police u/s 156(3) of the Code, the Magistrate concerned has not taken cognizance of the offence, therefore, by passing the order impugned, the Magistrate has not committed any illegality warranting any interference in exercise of supervisory jurisdiction.

5. Learned State Counsel also formally opposes the petition.

6. As per copies of order sheets, complaint has been filed by respondent No. 2 on 17-11-2008. First order sheet reads thus: --

The Magistrate has received enquiry report on 17-12-2008, thereafter, vide order dated 18-2-2009, concerned Magistrate has fixed the case for recording evidence before registration which reads thus: --

7. After considerable time, on 26-8-2009 an application u/s 156(3) of the Code has been filed by respondent No. 2 and after hearing respondent No. 2 the

Magistrate has passed the order impugned dated 29-4-2011 whereby the Magistrate has directed the police for registration of FIR and investigation u/s 156(3) of the Code recording the reason that cognizance has not been taken till that date.

8. Chapter XII of the Code provides investigation by investigating agency. i.e. the police. Sub-section (3) of Section 156 of the Code empowers the Magistrate for investigation before taking cognizance of the offence. Chapter XV of the Code deals with power of the Magistrate taking cognizance. The Magistrate taking cognizance is also empowered u/s 202 of the Code to postpone the issue of process and direct an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding.

9. Section 156(3) of the Code reads thus: --

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

10. Section 202 of the Code reads thus: --

Postponement of issue of process.--(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him u/s 192, may, if he thinks fit, and shall in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath u/s 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

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

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

11. While dealing with the power directing investigation, pre and post taking

cognizance by the Magistrate under Sections 156(3) and 202 of the Code, the Supreme Court in the matter of Tula Ram and Others Vs. Kishore Singh, has held that where a Magistrate chooses to take cognizance, he has following options (a) in case he is satisfied that there is sufficient ground for further proceeding, he can straightway issue process to the accused after complying with the requirement of Section 200 of the Code; (b) postpone the issue of process and direct an enquiry by himself; and (c) postpone the issue of process and direct an enquiry by any other person or an investigation by the police, and thereafter pass order but the Magistrate not taking cognizance of the offence is empowered to order for investigation by the police u/s 156(3) of the Code. The Supreme Court has observed in Para 14 of the said judgment as follows: --

14. In these circumstances, we are satisfied that the action taken by the Magistrate was fully supportable in law and he did not commit any error in recording the statement of the complainant and the witnesses and thereafter issuing process against the appellants. The High Court has discussed the points involved thread-bare and has also cited number of decisions and we entirely agree with the view taken by the High Court. Thus, on a careful consideration of the facts and circumstances of the case the following legal propositions emerge: --

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

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

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

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

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

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

(4) Where a Magistrate orders investigation by the police, before taking

cognizance u/s 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightway issue process against the accused or apply his mind to the complaint filed before him and take action u/s 190 as described above.

12. In the matter of Mohd. Yousuf (*supra*), the Supreme Court has observed in Paras 8 and 9 of its judgment as follows: --

8. The various steps to be adopted for investigation u/s 156 of the Code have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer in charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that chapter can be commenced by the police even without the order of a Magistrate. But that does not mean that when a Magistrate orders an investigation u/s 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence.

9. But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow that procedure envisages in Chapter XV of the Code. A reading of Section 202(1) of the Code makes the position clear that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1), i.e., "or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding".

13. On a plain reading of Section 156(3) of Chapter XII of the Code and Section 202 of Chapter XV of the Code, it is clear that the Magistrate is empowered to direct the police for investigation u/s 156(3) of the Code before taking cognizance of the offence or if he has chosen not to take cognizance of the offence, the Magistrate is also empowered to direct for investigation u/s 202 of the Code, if he chooses to take cognizance and after taking cognizance, both are stages of pre and post taking cognizance. Once the Magistrate has taken cognizance and proceeded under Chapter XV of the Code, then he is not empowered to direct for investigation u/s 156(3) of the Code.

14. As per copies of the order sheets, the Magistrate has directed for investigation not u/s 156(3) of the Code, after receiving report he has proceeded for recording evidence before registration and thereafter, he has passed order u/s

156(3) of the Code. These order sheets reveal that the Magistrate has taken cognizance of the offence on 17-11-2008 and proceeded for enquiry under Chapter XV of the Code. Therefore, he was not competent to pass any order u/s 156(3) of the Code. By passing such order and proceeding u/s 156(3) of the Code vide order impugned, the Magistrate has committed illegality requiring interference in exercise of supervisory jurisdiction.

15. Consequently, the petition deserves to be allowed and is hereby allowed. Order impugned dated 29-4-2011 passed by the Judicial Magistrate First Class, Sarangarh in an unregistered criminal complaint case of the year 2008 (Prem Sagar Patel Vs. Jailal Sarthi and others) is hereby quashed. No order as to costs.

16. I.A. No. 1 stands disposed of. Certified copy as per rules.