

Reserved on:19.10.2020

Delivered on: 07.01.2021

“A.F.R.”

Court No. - 3

Case :- APPLICATION U/S 482 No. - 13804 of 2020

Applicant :- Anmol Singh

Opposite Party :- State Of U.P. And 3 Ors

Counsel for Applicant :- Hari Prakash Singh

Counsel for Opposite Party :- G.A.

Hon'ble Ravi Nath Tilhari,J.

1. Heard Shri Hari Prakash Singh, learned counsel for the applicant and learned A.G.A. appearing for the State and perused the material brought on record.

2. This application/petition under Section 482 Code of Criminal Procedure (Cr.P.C.) has been filed challenging the order dated 17.07.2020, passed by learned Chief Judicial Magistrate, Court No. 11, Janupur in Criminal Misc. Application No. 180 of 2020 (Anmol Singh versus Krishan Kumar Singh and others) under Section 156(3) Cr.P.C. Police Station-Sarai Khwaja, District- Jaunpur, whereby the said application has been registered as a complaint case.

3. Considering the nature of the order under challenge; the pre-cognizance stage of the case at which the proposed accused have no right of hearing, that keeping this application pending would serve no fruitful purpose which would delay the proceedings of the criminal case as well as the order proposed to be passed, the notice to the private respondents is dispensed with.

4. Briefly stated the facts of the case as per the application/petition are that on 05.05.2020 at about 8.30 a.m. the accused opposite party nos. 2 to 4 forcibly entered in the house of the applicant armed with lathi and danda, abused and misbehaved the applicant and her mother. They also threatened the applicant to kill him. The accused committed sexual assault

on the mother of the applicant. The applicant was medically examined but no medical examination of the mother was conducted in spite of request. The accused are related to influential persons. The applicant's report was not being registered, therefore, the application under Section 156(3) Cr.P.C. was filed on which the order under challenge was passed.

5. Learned counsel for the applicant submits that the application under Section 156(3) Cr.P.C. discloses commission of cognizable offence and as such the Magistrate must have directed the registration of the first information report and investigation by police, instead of treating the application as a complaint case. He further submits that the order under challenge has been passed mechanically and in a routine manner, which does not manifest the application of judicious mind to the facts of the case and law applicable therein. He has placed reliance on the cases of *'Lalita Kumari Vs. Government of India and others'*, reported in *2014(2) SCC 1*; *'Jitendra Kumar Vs. State of U.P. and 2 others'*, Criminal Revision No.1768 of 2018, decided on 29.05.2018; *'Shiv Mangal Singh Vs. State of U.P. and others'*, Criminal Revision No.715 of 2019, decided on 25.02.2019 and *'Ashok Kumar Pathak Vs. State of U.P. and another'*, passed in application under Section 482 Cr.P.C. No.43271 of 2018, decided on 30.11.2018.

6. Learned AGA has submitted that the Magistrate has the jurisdiction to direct the police to register the F.I.R. and make investigation without taking cognizance. But, he has also the jurisdiction to take cognizance and proceed to inquire the matter by himself, registering the application as a complaint case. In such circumstance he has to follow the procedure prescribed for complaint case. He has submitted that the Magistrate while proceeding as a complaint case has still the power to direct for police investigation, in view of Section 202(1) Cr.P.C. If the Magistrate in his discretion has adopted the option of registering the application as a complaint case, no illegality has been committed by the Magistrate. Learned A.G.A. has placed reliance on the case of *'Sukhwasi Vs. State of*

U.P. and others' 2007 (59) ACC 739 (Allahabad) (D.B.) in support of his contention that it is in the discretion of the Magistrate to direct for police investigation before taking cognizance under Section 156(3) Cr.P.C., or after taking cognizance to proceed with the application as a complaint case.

7. I have considered the submissions as advanced by the learned counsel for the applicant, the learned AGA and perused the material brought on record.

8. In the cases of **Suresh Chandra Jain vs State of M.P. and another** (2001) 2 SCC 628; **Mohd. Yousuf Vs. Smt. Afaq Jahan & another** (2006) 1 SCC 627; **Ram Babu Gupta Vs. State of U.P. & others** [2001 (43) ACC 50 (FB)]; **Sukhwasi Vs. State of U.P. & others** [2007 (9) ADJI (DB) & **Ram Dev Food Products Vs. State of Gujarat** (2015) 6 SCC 439 it has been laid down that the Magistrate empowered under section 190 Cr.P.C. may order an investigation by police under section 156 (3) but he need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance he has to follow the procedure envisaged in Chapter XV of the code. The magistrate should apply judicial mind while exercising his powers under Section 156 (3) Cr.P.C. He could not act in a mechanical or casual manner and go on with the complaint after getting the report. The course adopted by the Magistrate i.e. direction to the police for registration of FIR and making investigation or to treat the application as a complaint case, must be supported by reasons. The order must also reflect that the Magistrate on relevant considerations has adopted one of these two modes open to him. Mere mention in the order that he has gone through the complaint and the police investigation is not required or otherwise, would not be sufficient compliance of application of judicial mind while deciding application under Section 156(3) Cr.P.C.

9. In the case of **Lalita Kumari Vs. Government of India and others reported in 2014 (2) SCC 1** the Hon'ble Supreme Court has held as under:

"120) In view of the aforesaid discussion, we hold:

"i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

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

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

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

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

vi) As to what type and in which 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.

vii) 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.

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

10. The case of **Lalita Kumari (supra)** came to be considered in Ramdev Food Products Private Ltd. Vs. State of Gujarat (2015) 6 SCC 439 the first question as framed therein was "whether the discretion of the Magistrate to call for a report under Section 202 Cr.P.C. instead of directing investigation under Section 156(3) Cr.P.C. is controlled by any defined parameters? The Hon'ble Supreme Court answered the first question by holding that the direction under Section 156(3) Cr.P.C. 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 issuance of process and finds that a case is made out to proceed forthwith, direction under the 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 straightway direct investigation, such a direction is issued. The cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate is yet to determine existence of sufficient ground to proceed. The category of cases falling under para 120.6 in Lalita Kumari may fall under section 202 Cr.P.C. Subject to these broad guidelines available from the scheme of the Court, exercise of discretion by the Magistrate is guided by interest of justice from case to case. Para Nos. 22 to 22.3 of Ramdev Food Products (P) Ltd. (supra) is being reproduced as under:

"22. Thus, we answer the first question by holding that:

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 the issuance 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". Category of cases falling under para 120.6 in Lalita Kumar may fall under Section 202 Cr.P.C..

22.3. Subject to these broad guidelines available from the scheme of the Code, exercise of discretion by the Magistrate is guided by interest of justice from case to case."

11. It would also be appropriate to refer to the judgment of this Court in the case of Gulab Chand Upadhyay Vs State of U.P. and others 2002 SCC OnLine All 1221 in which this Hon'ble Court has held as under:

"20. In these circumstances, the question arises that when a Magistrate is approached by a complainant with an application praying for a direction to the police under Section 156 (3) to register and investigate an alleged cognizable offence, why should he

(A) grant the relief of registration of a case and its investigation by the police under Section 156 (3) Cr.P.C. and when should he

(B) treat the application as a complaint and follow the procedure of Chapter XV of Cr.P.C.

21. The scheme of Cr.P.C. and the prevailing circumstances require that the option to direct the registration of the case and its investigation by the police should be exercised where some investigation is required, which is of a nature that is not possible for the private complainant, and which can only be done by the police under whom statute has conferred the powers essential for investigation, for example

(1) where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation, or

(2) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or

(3) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved. To

illustrate by example cases may be visualised where for production before Court at the trial (a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or (b) recovery of case property is to be made and kept sealed; or (c) recovery under Section 27 of the Evidence Act; or (d) preparation of inquest report; or (e) witnesses are not known and have to be found out or discovered through the process of investigation.

22. But where the complainant is in possession of the complete details of all the accused as well as the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done only by the police, no "investigation" would normally be required and the procedure of complaint case should be adopted. The facts of the present case given below serve as an example. It must be kept in mind that adding unnecessary cases to the diary of the police would impair their efficiency in respect of cases genuinely requiring investigation. Besides even after taking cognizance and proceeding under Chapter XV the Magistrate can still under Section 202 (1) Cr.P.C. order investigation, even thought of a limited nature (see para 7 of JT (2001) 2 (SC) 81: ((2001) 2 SCC 628: AIR 2001 SC 571)."

12. Recently, in the case of '**Lalaram Vs. State of U.P. and 13 others**' passed in Criminal Revision No.1611 of 2020, decided on 18.12.2020, this Court has summarized the well settled proposition of law on the scope of Section 156(3) Cr.P.C., the power and jurisdiction of the Magistrate while deciding such an application. It would be appropriate to reproduce paragraph no.40 of the case of **Lalaram (Supra)**, as under:-

"40. From the aforesaid judgments, some of the following proposition of law, well settled, may be summarized as under:-

(40.01). Under Section 154 of the Code, if the information discloses commission of a cognizable offence it is the mandatory duty of the police officer in charge to register the FIR. He cannot avoid his duty of registering offence, if cognizable offence is made out.

(40.02). If FIR is not registered, the person aggrieved by a refusal to record the information has remedy to approach the Superintendent of Police by submitting an application in writing and by post to enable him to satisfy if such information discloses the commission of a cognizable offence and in case of such satisfaction, either to investigate himself or direct an

investigation to be made by any police officer subordinate to him.

(40.03). If the person still feels aggrieved from inaction of the police authorities he has the remedy to approach the Magistrate by way of application under Section 156(3) Cr.P.C.,

(40.04). On such an application having been made, if, the Magistrate finds that a cognizable offence is made out, the Magistrate may direct the police to register the FIR and investigate the matter, without taking cognizance.

(40.05). The other option open to the Magistrate is to take cognizance on the complaint, register it as a complaint case and proceed as per the procedure prescribed under Chapter XV Cr.P.C. The Magistrate would record the statement of the complainant and the witnesses if any present, under Section 200 Cr.P.C. He may, if he thinks fit and shall in cases where accused resides out side the area of exercise of jurisdiction of the Magistrate concerned, 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, under Section 202(1) Cr.P.C. Thereafter, he shall pass order, either under Section 203 dismissing the complaint, for brief reasons to be recorded, or he shall issue process under Section 204 Cr.P.C.

(40.06). In either case, i.e. issuing direction for investigation by the police officer under Section 156(3) Cr.P.C. or taking cognizance and registering it as a complaint case, the Magistrate has to apply judicial mind. There cannot be mechanical exercise of jurisdiction or exercise in a routine manner. Mere statement in the order that he has gone through the complaint, documents and heard the complainant will not be sufficient. What weighed with the Magistrate to order investigation or to take cognizance should be reflected in the order, although a detailed expression of his view is neither required nor warranted.

(40.07). The exercise of discretion by the Magistrate is basically guided by interest of justice, from case to case.

(40.08). However, where some investigation is required which is of a nature that is not possible for the private complainant and which can only be done by the police officer upon whom statute has conferred the powers essential for investigation, the option to direct the registration of the FIR and its investigation by the police officer should be exercised, for example:-

(i) where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation, or

(ii) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or

(iii) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved, and to illustrate this, by few example cases may be visualised where for production before Court at the trial

(a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or

(b) recovery of case property is to be made and kept sealed; or

(c) recovery under [Section 27](#) of the Evidence Act; or

(d) preparation of inquest report; or

(e) witnesses are not known and have to be found out or discovered through the process of investigation.

(40.09). Where the complainant is in possession of the complete details of all the accused and the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done only by the police, no "investigation" would normally be required and the procedure of complaint case should be adopted.

*(40.10). Category of cases falling under para 120.6 in **Lalita Kumari (Supra)** i.e.*

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases,

(d) Corruption cases

(e) Cases where there is abnormal delay in filling criminal complaint etc. may fall under Section 202 Cr.P.C .

(40.11). The Magistrate should also keep in view that primarily, it is the duty of the State/police to investigate the cases involving cognizable offence. Generally, the burden of proof to bring the guilt of the accused is on the State and this burden is a heavy burden to prove the guilt beyond all reasonable doubts. This burden should not unreasonably be shifted on an individual/complainant from the State by treating the application under Section 156(3) Cr.P.C. as a complaint case.

(40.12). The investigation which the police officer or such other person makes in pursuance of the direction of the Magistrate under Section 202(1) Cr.P.C. is the same kind of investigation as is required to be conducted by police officer, under Chapter XII Cr.P.C. which ends with submission of the report as per Section 173(2) Cr.P.C.

(40.13). The distinction between the investigation by the police officer under Section 156(3) and under Section 202(1) Cr.P.C. is that the former is at the pre-cognizance stage and the latter is at post cognizance stage, when the Magistrate is seisin of the case. The investigation under Section 202(1) Cr.P.C. is for the purpose of ascertaining the truth or false hood of the complaint for helping the Magistrate to decide, whether or not there is sufficient ground, for him to proceed further against the accused by issuing process, whereas, the inquiry report under Section 173(2) Cr.P.C. of the investigation made by the police of its own or under the directions of the Magistrate under Section 156(3) Cr.P.C. is for the purpose of enabling the Magistrate to take cognizance of an offence under Section 190(1)(a) Cr.P.C.

(40.14). Once cognizance is taken on the application under Section 156(3) Cr.P.C. by the Magistrate and he embarks upon the procedure embodied in Chapter XV, he would not be competent to revert to the pre-cognizance stage under Section 156(3) Cr.P.C.

(40.15). If the Magistrate did not order for police investigation under Section 156(3) Cr.P.C. and took cognizance of the case, that would not be bar to the exercise of the power of the Magistrate for directing the police investigation under Section 202(1) Cr.P.C."

13. In '**Jitendra Kumar**' (Supra), '**Shiv Mangal Singh**' (Supra) and '**Ashok Kumar Pathak**' (Supra) relied upon by the learned counsel for the applicant also it was held that the Magistrate shall pass order with due application of judicious mind.

14. It is true that every application under Section 156(3) Cr.P.C. disclosing commission of a cognizable offence may not be directed for investigation by police and the Magistrate has jurisdiction to treat the same as a complaint case but in exercise of such jurisdiction the Magistrate has to keep in view various factors as laid down in **Lalaram**

(supra), which are only illustrative and not exhaustive. The exercise of jurisdiction is basically guided by interest of justice, from case to case.

15. Perusal of the order clearly shows that the Magistrate has not applied judicious mind to the facts of the case and in particular paragraph no.3 of the application, which not only made out commission of a cognizable offence but an offence of molestation and sexual assault on the mother of the applicant. The application clearly stated that the accused persons are related to influential persons and as such neither the FIR was being lodged nor the medical of the applicant's mother was carried out. In such matters the medical examination of the victim is necessary. The medical report of the victim is of importance. Merely because the facts are in the knowledge of the applicant, direction to lodge FIR cannot be refused. The gravity/seriousness of the offence; the requirement of the evidence for the purpose of launching a successful prosecution, and basically the interest of justice depending on the facts of each case, need be considered in passing the order under Section 156(3) Cr.P.C. The offence, as per the contents of the application is not a matrimonial, commercial or family dispute, etc. The order does not assign any valid reason nor reflects application of judicious mind to relevant considerations and does not stand the test of the law as laid down in the cases of '**Ram Deo Food Products**' (Supra) and '**Gulab Chand Upadhyay**' (Supra).

16. The present petition/application is, therefore, **allowed**. The order under challenge is set-aside with the direction to the learned Magistrate to pass fresh orders on the application of the applicant after affording opportunity of hearing to him, in accordance with law, in the light of the observations made herein above, within a period of one month from the date of production of true/attested copy of this judgment before the learned Magistrate concerned.

17. No orders as to costs.

Order Date :- 07.01.2021
VKG

(Ravi Nath Tilhari,J.)