

**IN THE HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

...
**CRM(M) No.113/2020
Crlm No. 316/2020**

Reserved on: 26.08.2020

Pronounced on: 31.08 .2020

Sami-ullah Naqashbandi

.....Petitioner

Through: Mr Mohsin Qadri, Advocate

V/s

Sadaf Niyaz Shah

.....Respondent(s)

Through: Mr Azhar-ul-Amin, Advocate

CORAM:

HON'BLE MR JUSTICE ALI MOHAMMAD MAGREY, JUDGE

Whether approved for reporting?

Yes/No

JUDGMENT

01. The instant petition, filed under Section 482 of Code of Criminal Procedure (for short "Code"), seeking quashment of order dated 25.06.2020, read with order dated 11.05.2020 passed by the Judicial Magistrate 1st Class (3rd Additional Munsiff/JMIC, Srinagar.)

Brief facts

02. Petitioner while performing his duties as Naib Tehsildar, Executive Magistrate, Khanyar, came to know about filing of the compliant by respondent against him as well as other accused persons. The said complaint stated to be filed for commission of offences under Section 166, 166-A, and 167, 354, 201, 209 and 120-B IPC. The said compliant was assigned to the Court of Judicial Magistrate 1st Class (3rd Additional Munsiff/JMIC, Srinagar), by the learned CJM, Srinagar. In the said complaint, petitioner has prayed for registration of FIR or in the alternative

cognizance of offence mentioned in the complaint. It is stated that the grouse of respondent revolved around possession and dispossession of respondent herein from the property, violation of lease agreement, rights of respondent at the hands of non-applicants therein. It is stated that upon presentation of the complaint the Judicial Magistrate 1st Class (3rd Additional Munsiff/JMIC, Srinagar), passed the following order.

“After going through the averments made in the application, I deem it proper to get the matter investigated before issuing any process in the matter against the accused person. Since the applicant has put allegations against Tehsildar and Naib Tehsildar also, therefore, the investigation shall be conducted in the instant matter by the SSP Srinagar. Accordingly, the SSP Srinagar is directed to investigate the matter either by himself or through any police officer not below the rank SDPO in the earnest and submit his report before the undersigned.... ”

03. On receipt of the order, SSP, Srinagar, got the matter enquired through SDPO, Nehru Park, Srinagar, and the report of the enquiry was submitted before the Court of Judicial Magistrate 1st Class (3rd Additional Munsiff/JMIC, Srinagar), through CPO, Srinagar, on 23.05.2020. It is stated that the enquiry report reflected that the matter and allegations levelled against the petitioner and other accused persons were not substantiated.

04. The Judicial Magistrate 1st Class (3rd Additional Munsiff/JMIC, Srinagar), on receipt of the report from SSP, Srinagar, and on consideration of the matter and while recording that the SSP, has not taken any action in the matter, directed the SSP, Srinagar, to take action under the provisions of Section 156(3), of Criminal Procedure Code in the earnest and get the matter investigated through SP concerned vide order dated 25.06.2020, which order is under challenge in the instant petition on the grounds detailed out as under:-

(a) That the impugned orders passed by the Judicial Magistrate 1st Class (3rd Additional Munsiff/JMIC, Srinagar), directing the SSP, Srinagar to investigate the matter and to take action under the provisions of Section

156(3) of Criminal Procedure Code is contrary to the provisions of law inasmuch as the offence which is non-cognizable has been allowed to be investigated by the Police by a cryptic incomplete order of the learned Magistrate.

- (b) That in the present case, admittedly the complainant had neither approached the SHO concerned nor SSP, Srinagar, before approaching the learned Magistrate. The assumption of jurisdiction by the magistrate is contrary to the Judgment and provisions of Hon'ble Supreme Court of India in Priyanka Srivastava's case, therefore, is bad in law and consequently direction to register the FIR is also bad and contrary to the law laid down by the Hon'ble Supreme Court.
- (c) That the Magistrate could not have ordered enquiry under Section 202, as there was no material available in the complaint and consequentially issue of jurisdiction under Section 156(3) Cr. P.C. is without jurisdiction and without following the mandate of law. Both the orders passed by the Magistrate on the same application run contrary to each other and direction to register FIR is, accordingly bad in law and the orders are liable to be quashed.
- (d) That the Magistrate has not applied her mind nor has given reasons for arriving at so called satisfaction with regard to the commission of non-cognizable offence. Non speaking order passed by the Magistrate is in itself a ground seeking annulment of the order, the petitioner prays accordingly.

05. Mr. Azhar-ul-Amin, learned appearing counsel for the complainant seeks dismissal of the petition as having no merit with further support of the order of Magistrate being consisting with law. Learned counsel further submits that Police cannot refuse to register FIR in pursuance to direction under Section 156(3) of Cr.

PC and no investigation can commence without registration of FIR. Learned counsel further submits that the direction under Section 156 (3) Cr. PC, passed by the Judicial Magistrate 1st Class (3rd Additional Munsiff/JMIC, Srinagar), for registration of FIR can be challenged under Section 397 Cr. PC, before the Revisional Court, therefore, there is no scope for this Court to entertain this petition, seeking quashment of the orders, filed under Section 482, Cr. PC. Learned counsel further submits that the Magistrate cannot adopt the wrong procedure while directing investigation under Section 156(3) Cr. PC. Learned counsel averred that the Court has the power to ensure impartial and honest investigation once the Police is seemingly not fair in investigating the complaint. Learned counsel laid emphasis on the conduct of the civil and Police administration being in collusion while issuing the process of attachment under Section 145, Cr.PC, thereby depriving the petitioner from the valuable right of retaining the property. He submits that two revision petitions were filed against the orders of Magistrate, before the Court of 3rd Additional Sessions Judge, Srinagar, which got dismissed on 02.07.2020 and 03.07.2020, therefore, the petitioner knowing well that the third revision against the orders impugned is barred under Section 397 (3) of Cr. PC., has chosen to file the instant petition, seeking quashment of the orders impugned.

06. Mr. Mohsin Qadri, learned appearing counsel for the petitioner while strengthening his arguments for seeking quashment of impugned orders on the ground that the Magistrate's order, directing the investigation under Section 156(3) is permissible at pre-cognizance stage, while enquiry under Section 202 is at post stage, therefore, the orders being against the procedure deserves to be quashed. Learned counsel while strengthening his claim for the relief prayed for, has referred to and relied upon the Judgment of Hon'ble Supreme Court in case titled Rameshbhai Pandurao Hedau Vs. State of Gujrat, reported in 2010 (4) SCC 185

and in case titled Ramdev Food Products Pvt. Ltd. Vs. State of Gujrat, reported in AIR 2015 Supreme Court 1742.

07. Heard learned counsel for the parties, perused the records and considered the matter.

08. From the perusal of the compliant it is evident that the respondent has filed the complaint before the Magistrate on 11.05.2020, and on the same day, it was forwarded to SSP, Srinagar, for holding of enquiry and thereafter submitted the report, which report formed the basis for Magistrate to direct investigation in terms of Section 156(3), Cr. PC., because as per Police no cognizable offence appears to have been made out.

09. The foremost question, thus, arises as to whether the Magistrate was right in issuing direction for investigating the matter in terms of Section 156(3) of Cr. PC., after the process was deferred till completion of enquiry in terms of Section 202 of Cr. PC.

10. Perusal of the order reveals that the Magistrate had on the consideration of the complaint on motion hearing, deferred the issuance of process and directed enquiry to get satisfied about the correctness of the allegations. On receipt of the report, the Magistrate instead of proceeding further in tune with the mandate of law, has in terms of Section 156(3) of Cr. PC, directed investigation, which is the question as to whether the Magistrate has abused the powers of the Court or not.

11. The arguments of Mr. Mohsin Qadri, learned appearing counsel for the petitioner that the Magistrate has first deferred issuance of process and then reverted back to direction under Section 156(3) of Cr. PC, is illegal. The Magistrate on the motion hearing of the complaint has issued directions to SSP, Srinagar, to investigate the matter in terms of Section 202 Cr. PC. The Judgments

referred to and relied upon by the learned counsel appearing for the petitioner has to be examined in light of the claim made in this petition.

12. I may first deal with the question as to whether the Magistrate ought to have proceeded under Section 156(3), after receipt of enquiry report from Senior Superintendent of Police, Srinagar, sought on taking cognizance of complaint and after deferment of process or was required to proceed under Section 202(1) and what are the parameters for exercise of power under the two provisions.

13. The two provisions are in two different chapters of the Code, though common expression 'investigation' is used in both the provisions. Normal rule is to understand the same expression in two provisions of an enactment in same sense unless the context otherwise requires. Heading of Chapter XII is "Information to the Police and their Powers to Investigate" and that of Chapter XV is "Complaints to Magistrate". Heading of Chapter XIV is "Conditions Requisite for Initiation of Proceedings". The two provisions i.e. Sections 156 and 202 in Chapters XII and XV respectively are as follows :

"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.

202. Postponement of issue of process.-

(1) Any Magistrate , on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under section 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 Sessions; 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 under section 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."

14. Cognizance is taken by a Magistrate under [Section 190](#) (in Chapter XIV) either on "receiving a complaint", on "a police report" or "information received" from any person other than a police officer or upon his own knowledge.

Chapter XV deals exclusively with complaints to Magistrates. Reference to Sections, 202, in the said Chapter, shows that it provides for "postponement of issue of process" which is mandatory if accused resides beyond the Magistrate's jurisdiction (with which situation this case does not concern) and discretionary in other cases in which event an enquiry can be conducted by the Magistrate or investigation can be directed to be made by a police officer or such other person as may be thought fit "for the purpose of deciding whether or not there is sufficient ground for proceeding". I am skipping the proviso as it does not concern the question under discussion. Clause (3) provides that if investigation is by a person

other than a police officer, he shall have all the powers of an officer incharge of a police station except the power to arrest.

15. Chapter XII, dealing with the information to the police and their powers to investigate, provides for entering information relating to a 'cognizable offence' in a book to be kept by the officer incharge of a police station ([Section 154](#)) and such entry is called "FIR". If from the information, the officer incharge of the police station has reason to suspect commission of an offence which he is empowered to investigate subject to compliance of other requirements, he shall proceed, to the spot, to investigate the facts and circumstances and, if necessary, to take measure, for the discovery and arrest of the offender ([Section 157\(1\)](#)).

16. In *Lalita Kumari vs. Govt. of U.P.*, reported in (2014) 2 SCC 1 (AIR 2014 SC 187), the Hon'ble Supreme Court dealt with the following questions :

"30.1. (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

30.2. (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."

17. These questions were answered as follows :

"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.

"Shall"

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.

"Information"

73. The legislature has consciously used the expression "information" in Section 154(1) of the Code as against the expression used in Sections 41(1)(a)* and (g) where the expression used for arresting a person without warrant is "reasonable complaint" or "credible information". The expression under Section 154(1) of the Code is not qualified by the prefix "reasonable" or "credible". The non-qualification of the word "information" in Section 154(1) unlike in Sections 41(1)(a)* and (g) of the Code is for the reason that the police officer should not refuse to record any information relating to the commission of a cognizable offence on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, reasonableness or credibility of the said information is not a condition precedent for the registration of a case.

94. Principles of democracy and liberty demand a regular and efficient check on police powers. One way of keeping check on authorities with such powers is by documenting every action of theirs. Accordingly, under the Code, actions of the police, etc. are provided to be written and documented. For example, in case of arrest under Section 41(1)(b) of the Code, the arrest memo along with the grounds has to be in writing mandatorily; under [pic]Section 55 of the Code, if an officer is deputed to make an arrest, then the superior officer has to write down and record the offence, etc. for which the person is to be arrested; under Section 91 of the Code, a written order has to be passed by the officer concerned to seek documents; under Section 160 of the Code, a written notice has to be issued to the witness so that he can be called for recording of his/her statement, seizure memo/panchnama has to be drawn for every article seized, etc.

107. While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for "anticipatory bail" under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the court.

108. It is also relevant to note that in *Joginder Kumar v. State of U.P.* (1994) 4 SCC 260], this Court has held that arrest cannot be made by the police in a routine manner. Some important observations are reproduced as under: (SCC pp. 267-68, para

20) "20. ... No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."

111. Besides, 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.

114. It is true that a delicate balance has to be maintained between the interest of the society and protecting the liberty of an individual. As already discussed above, there are already sufficient safeguards provided in the Code which duly protect the liberty of an individual in case of registration of false FIR. At the same time, Section 154 was drafted keeping in mind the interest of the victim and the society. Therefore, we are of the cogent view that mandatory registration of FIRs under Section 154 of the Code will not be in contravention of Article 21 of the Constitution as purported by various counsel.

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.

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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.

18. It has been held, for the same reasons, that direction by the Magistrate for investigation under Section 156(3) cannot be given mechanically. In Anil Kumar vs. M.K. Aiyappa case, reported in (2013) 10 SCC 705 (AIR 2014 SC (Supp) 180, it was observed :

"11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed case [(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."

The above observations apply to category of cases mentioned in Para 120.6 in Lalita Kumari (supra).

19. Power under Section 202 is of different nature. Report sought under the said provision has limited purpose of deciding "whether or not there is sufficient ground

for proceeding". If this be the object, the procedure under Chapter XV of the Code of Criminal Procedure are required to be adhered to in letter and spirit.

20. Admittedly the Magistrate has taken cognizance and find it necessary to postpone issuance of process, therefore, directed for enquiry by the Police and on receipt of the report from SSP, Srinagar, the Magistrate was required to proceed in terms of the provisions contained in Chapter XV of the Criminal Procedure Code. Thus, I answer the first question by holding that 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, when Magistrate takes cognizance and postpones issuance of process, the Magistrate has yet to determine "existence of sufficient ground to proceed" and these cases fall under Section 202. 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.

21. To reiterate for the guidance of all the Magistrates in the Union Territory of Jammu and Kashmir and Union Territory of Ladakh, it has become necessary to refer the Judgment reported in (2010) 4 Supreme Court Cases 185 titled Rameshbhai Pandurao Hedau Vs. State of Gujrat, which postulates that while the power to direct a police investigation under Section 156(3) is exercisable at the pre-cognizance stage, the power to direct an investigation or an enquiry under Section 202(1) is exercisable at the post-cognizance stage, when the Magistrate is in seisin of the case.

22. The settled legal position has been enunciated by the Hon'ble Supreme Court in several decisions and has observed that the Courts are ad idem on the question that the powers under Section 156(3) can be invoked by the Magistrate at a pre-cognizance stage, whereas powers under Section 202 of the Code are to be invoked after cognizance is taken on a complaint, but before issuance of process. Such a view has

been expressed in Suresh Chand Jain case reported in (2001) 2 SCC 628: 2001 SCC (Cri) 377 as well as in Dharmeshbhai Vasudevabhai case, reported in (2009) 6 SCC 576: (2009) 3 SCC (Cri) 76 and in Devarapalli Lakshminarayana Reddy case, reported in (1976) 3 SCC 252: 1976 SCC (Cri) 380.

23. On examination of the trial Court records, what transpired is that the learned Magistrate has in very mechanical manner and as a result of non-application of mind, issued directions to the Senior Superintendent of Police, Srinagar, for investigation under Section 156(3) of the Code, ignoring the very spirit of the law, in terms whereof the Magistrates have been authorized/empowered to issue directions for investigation under Section 156(3) of the Code. Thus, 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 straightway direct investigation, such a direction is issued. In the present case, the Magistrate takes cognizance and postpones the issuance of process, as the Magistrate has yet to determine “existence of sufficient ground to proceed.” Therefore, the Magistrate has abused the process of law by not adhering to the procedure.

24. I feel it necessary to refer the decision of the Hon’ble Supreme Court delivered in Dilawar Singh V. State of Delhi case, reported in (2007) 12 SCC 641: (2008) 3 SCC (Cri) 330, where the difference in the investigative procedure in Chapters XII and XV of the Code has been recognized and in that case the Hon’ble Supreme Court also appears to have taken the view that any Judicial Magistrate, before taking cognizance of an offence, can order investigation under Section 156(3) of the Code and in doing so, he is not required to examine the complainant since he was not taking cognizance of any offence therein for the purpose of enabling the police to start

investigation. Reference has been made to the decision of the Court in Suresh Chand Jain case reported in (2001) 2 SCC 628: 2001 SCC (Cri) 377. In other words, as indicated in the decisions referred to hereinabove, once a Magistrate takes cognizance of the offence, he is, thereafter, precluded from ordering an investigation under Section 156(3) of the Code.

25. In view of the above discussion, this petition is allowed and order dated 25.06.2020, passed by the Judicial Magistrate 1st Class (3rd Additional Munsiff/JMIC, Srinagar) is set aside, however, the Magistrate shall proceed from the stage on receipt of report in terms of Chapter XV of the Code, viz Section 202(1) onwards.

26. Since the Court has taken a view that the approach adopted by the learned Magistrate in conducting the case in hand, has not been in consistent with law, rather is an abuse of process of law, therefore, it has become necessary to send copy of the order to Registrar General of this Court for requesting the Director, Judicial Academy to arrange the training session on the subject for all the Magistrates in Union Territory of Jammu and Kashmir and Union Territory of Ladakh in phased manner. He shall also request the Director, Judicial Academy to circulate the Judgment amongst all the Magistrates well in advance of the training session.

Disposed of.

Registry to send down the records along with copy of order to the Judicial Magistrate 1st Class (3rd Additional Munsiff/JMIC), Srinagar, for enabling him to proceed in the matter in accordance with law.

(Ali Mohammad Magrey)
Judge

Srinagar
31.08.2020
Mohammad Yasin Dar

Whether the order is speaking: Yes/No

Whether the order is reportable: Yes/No