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Neutral Citation No. - 2024:AHC:149752

Court No. - 75

Case :- APPLICATION U/S 482 No. - 24716 of 2024

Applicant :- Mukesh Kharwar
Opposite Party :- State Of U.P. And 3 Others
Counsel for Applicant :- Kailash Pati Singh Yadav
Counsel for Opposite Party :- G.A.

Hon'ble Mrs. Manju Rani Chauhan,J.

1. Heard Mr. Manish Kumar Singh, Advocate holding brief of Mr. Kailash Pati Singh, learned counsel for the applicant as well as Mr. D.P. Singh, learned AGA for the State and perused the record.

2. This application under Section 482 Cr.P.C. has been filed to quash the impugned order dated 08.05.2024 passed by Special Judge SC/ST Act Chandauli in Criminal Misc. Case No.78 of 2024 (Mukesh Kharwar vs. Arun Kumar and Others), Police Station-Baluwa, District- Chandauli as well as stay the further proceedings of the aforesaid case, pending in the court of Special Judge SC/ST Act Chandauli.

3. Considering the nature of the order under challenge as well as order proposed to be passed, as purely equal question is involved, no fruitful purpose will be served in keeping this matter pending, therefore, the matter is being decided at this stage without calling for counter affidavit.

4. Brief facts of the case are that an application under Section 156(3) Cr.P.C. was moved by the applicant with the allegations that the applicant is an elected Member of Kshetra Panchayat, Kshetra Sankhya 83, Kshetra Papaura Vikas Khand Chahaniya, District-Chandauli. On 04.03.2024, the applicant along with 66 Kshetra Panchayat Members had gathered at the office of the District Magistrate, Chandauli to propose no confidence motion against

Arun Kumar Jaiswal, Block Pramukh Chahaniya, District-Chandauli. Annoyed by the aforesaid, on 14.03.2023 at about 08:15 am when the applicant was performing pooja at the village's Radha Krishna Mandir, villagers namely Gopal Singh @ Bablu and Monu Singh reached there and forced the applicant to sign on the affidavit in favour of Block Pramukh. When the applicant refused to sign the same, they used abusive language, caste indicative words and assaulted him. They forcefully tried to take him on the motorcycle and assaulted him with hand and fist. Hearing the noise, the applicant's wife and other villagers reached there and tried to intervene. It has been further alleged that the applicant tried to lodge an FIR by giving an application before the concerned police station but of no avail, therefore, the present application has been filed. The aforesaid application was treated as complaint case thus, refusing the prayer to issue direction to lodge the FIR on the ground that the facts of the case were known to the applicant.

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 for registration of first information report and investigation by the police, instead of treating the application as a complaint case. He further submits that the order impugned 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. In support of his submission, he has placed reliance upon the judgment passed by this Court in the case of **Anmol Singh vs. State of U.P. and Others** reported in **2021 (1) ADJ 400**.

6. Learned A.G.A. on the other hand has supported the impugned order and has pointed out that the grievance of the applicant has not gone unattended by the court below. The court below after taking into consideration the entire gamut of the facts and circumstances of the case has rightly concluded to treat the application filed by the applicant under Section 156 (3) Cr.P.C. as a

complaint. The applicant shall still have an opportunity to prove his case before the court below.

7. Having heard the learned counsel for the parties, the following question has come up for consideration before this Court :-

8. Whether the Magistrate is bound to pass an order on each and every application under Section 156(3) Cr.P.C. containing allegations of commission of a cognizable offence for registration of the F.I.R. and its investigation by the police even if those allegations, prima-facie, do not appear to be genuine and do not appeal to reason, or he can exercise judicial discretion in the matter and can pass order for treating it as 'complaint' or to reject it in suitable cases?

9. In other words, 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) Cr.P.C. to register and investigate an alleged cognizable offence, why he should :-

(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.

10. Before dealing with the question, it will be appropriate to discuss some provisions to answer the aforesaid question.

11. Section 154 and 156 Cr. P. C. provides for the registration and investigation of complaint. The same are reproduced herein under:-

"154. Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3)Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

12. Section 156 Cr.P.C. is quoted herein below:-

"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."

13. From the perusal of the aforesaid provision as well as Section 154 Cr.P.C., it is evident that the police can investigate into matters relating to commission of 'cognizable offences' brought to its notice under section 154 Cr.P.C. Officer-in-charge of police station has power to investigate U/S 156(1) in such case. Magistrate has power to take cognizance u/s 190 Cr.P.C. on receiving the 'complaint'. Thus the matter relating to section 156 (3) relates to power of Magistrate to order investigation by police in matters relating to cognizable offences brought before it through complaint. Complaint has been defined in section 2(d) Cr.P.C. of as follows : "complaint' means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but does not include a Police report." Code

of Criminal Procedure has given different type of powers to deal with such matters relating to commission of cognizable offences when brought before it. A Division bench of this Court in the case of '**Sukhwasi v. State of U.P., 2007(59) ACC 739**' held as under:

"Applications under section 156(3) Cr.P.C. are coming in torrents. Provisions under section 156(3) Cr.P.C. should be used sparingly. They should not be used unless there is something unusual and extra ordinary like miscarriage of justice which warrants a direction to the Police to register a case. Such application should not be allowed because the law provides them with an alternative remedy of filing a complaint; therefore, recourse should not normally be permitted for availing the provisions of section 156(3) Cr.P.C.

The reference is, therefore, answered in the manner that it is not incumbent upon a Magistrate to allow an application section 156(3) Cr.P.C. and there is no such legal mandate."

However, the said judgement does not provide any reason as to why FIR should not be registered in respect of a cognizable offence.

14. The Apex Court in the case of **Lalita Kumari Vs Goverment of Uttar Pradesh and another,** reported in **2014 (2) SCC 1** has discussed as follows :-

"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."

15. From the above discussion, it is clear that 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 upon 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.

16. Thus, 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. 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.

17. The position has been clarified in the judgement passed by the Apex Court in the case of **Suresh Chand Jain vs. State of M.P. and Another** reported in **(2001) 2 SCC 628** which while dealing with the issue has held as follows :-

"*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 disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

18. The Co-ordinate Bench of this Court while dealing with the issue in the case of **Lalaram v. State of U.P. and 13 others** passed in **Criminal Revision No. 1611 of 2020, decided on 18.12.2020 (Neutral Citation No. - 2020:AHC:119365)** has summarized the following propositions :-

"*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 outside 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."

19. Perusal of the impugned order shows that no sufficient reason has been disclosed, on the basis of which, the Magistrate has proceeded to treat the application under section 156(3) Cr.P.C. as a complaint. 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 impugned order does not assign any valid reason nor reflects application of judicious mind and has been passed in a mechanical manner only on the ground that the facts of the case were within the knowledge of the applicant, thus, the same is liable to be **set-aside**.

20. The present Application U/S 482 is **allowed**.

21. Accordingly, the impugned order dated 08.05.2024 is set aside with the direction to the court concerned to pass a fresh order on the application under Section 156(3) Cr.P.C. filed by the applicant after affording opportunity of hearing to both the parites, in accordance with law, within a period of **one month** from the date of production of certified copy of this order.

Order Date :- 2.9.2024
Kalp Nath Singh