

Neutral Citation No. - 2024:AHC-LKO:21034

Reserved on 05.12.2023

Delivered on 07.03.2024

Court No. - 07

Case :- APPLICATION U/S 482 No. - 4298 of 2023

Applicant :- Mobeen

Opposite Party :- State Of U.P Thru. Prin. Secy. Home. Civil Sectr. Lko. And Another

Counsel for Applicant :- Prabhaat Kumar Tripathi

Counsel for Opposite Party :- G.A.

Hon'ble Saurabh Lavania,J.

1. Heard Shri Prabhaat Kumar Tripathi, learned counsel for the applicant and Shri Aniruddh Singh, learned A.G.A. for the State.
2. Shri Prabhaat Kumar Tripathi, learned counsel for the applicant has submitted written submissions, which are taken on record, and based upon the same, he advanced his submissions. The submissions are extracted hereunder:-

“1. That Article 21 of the Constitution of India confers the following fundamental right on all person living in India:-

"Protection of Life and Personal Liberty. No person shall be deprived of his life of personal liberty except according to procedure established by law".

Our Constitutional forefathers, though inspired by Fourtsenth Amendment of the U.S. Constitution, substituted its words **"without due process of law" with "procedure established by law"**, emphasising the importance of procedure that the state has mandatorily to adopt while prosecuting an accused. The relevant Article of U.S. Constitution reads as under:-

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S; nor snail any State deprive any person of life, !!herty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

2. That it is most respectfully submitted that the procedure to be adopted in prosecution of an accused is prescribed in the Cr.P.C. & Police Regulation Act of States. The letter though cannot prevail over Cr.P.C but would be subject to its provisions. However, all these mandatory provisions have been given a complete go by in the applicant's case, hence all the criminal proceedings initiated against the applicant are void ab-initio, and are liable to be quashed by the Hon. Court, as they have been launched contrary to the fundamental right of the applicant as enshrined in Article 21 of our Constitution, as observed in the Constitution in Lalita Kumari Versus Government of Utter Pradesh and others (2014 (2) SCS 1) also in Para 106 of the Judgment has been pleased to observe that,

Para 106 "Another stimulating argument raised in support of preliminary inquiry is that mandatory registration of FIRs will lead to arbitrary arrest, which will directly be in contravention of Article 21 of the Constitution."

3. That the admitted brief facts of the case are that a Fauti Report was recorded in G.D. in P.S. Thakurganj on 08/01/2012 by one Sri Kallu informing the Police that his sister late Smt. Bitan had informed him that she was not feeling well & asked to supply some medicines to him. Thereafter, informant father and mother (Nasruddin & Rihana respectively) visited the home of their daughter then they saw that there was lock on the door and after breaking the door, they saw that their daughter Bitan was on the floor in the dead condition. Information is being given and to take necessary action. These are the allegations which have been recorded in the case diary.

4. That though there was nothing in the said Fauti Report containing allegation of commissioning of any offence or the applicant's name, the SHO? Sri Sashi Kant Yadav decided to hold preliminary enquiry and came to the conclusion that the applicant has assassinated his wife Smt. Bitan, where after the so called Charge Sheet dated 06/02/2013 (Annexure No.-1) was submitted to the Magistrate, without lodging F.I.R., further also allot FIR No/ Case Crime No very arbitrarily

5. That surprisingly, the Charge Sheet gives Crime Case No.-641/112 dated 12/11/2012 without registering an FIR. It has been admitted by the said I.O. Sri Sashi Kant Yadav, in his cross - examination made before the trial Court on 03/02/2020, that no F.I.R has been registered in the case & the prosecution has proceeded on the basis of Fauti Report only The true copy of his statement has been filed as Annexure No.-1 to the applicant's supplementary affidavit dated 01/05/2023.

6. That it is most respectfully submitted that without registering an FIR. neither the case crime number can be allotted / given in the charge sheet, nor any investigation could be proceeded against the applicant. No doubt the I.O. could have held a preliminary enquiry to satisfy himself whether the information given in the Fauti Report was result of commission of a crime or not. If he had reached at the conclusion that a crime was committed, he was under statutory duty to first register an F.I.R., & only after that he could undertake any investigation. It would have given opportunity to the accused to know charges & evidence against him before his arrest which would have given him time & opportunity to produce his own evidence in support of his innocence

7. That the First Information Report is in fact the information that is received first in point of time, which is either given in writing or is reduced to writing. It is not the substance of it, which is to be entered in the diary prescribed by the State Government. The term General Diary (also called as Station Diary or Daily Diary in some States) is maintained under the provisions of Section 44 of the Police Act, 1861 in the States to which it applies, or under the respective provisions of the Police Act(s) applicable to a State or under the Police Manual of a

State, as the case may be. Section 44 of the Police Act, 1861 is reproduced below: -

44. Police-officers to keep diary

...., "it shall be the duty of every officer in charge of a police-station to keep a general diary in such form as shall, from time to time, be prescribed by the State Government and to record therein all complaints and charged preferred, the names of all persons arrested, the names of the complainants, the offences charged against them, the weapons or property that shall have been taken from their possession or otherwise, and the names of the witnesses who shall have been examined. The Magistrate of the district shall be at liberty to call for any inspect such diary."....

8. That it is pertinent to note that during the year 1861, when the aforesaid Police Act, 1861 was passed, the Code of Criminal Procedure, 1861 was also passed. Section 139 of that Code dealt with registration of FIR and this Section is also referred to the word diary, as can be seen from the language of this Section, as reproduced below: -

139. Every complaint or information preferred to an officer in charge of a Police Station, shall be reduced into writing, and the substance thereof shall be entered in a diary to be kept by such officer, in such form as shall be prescribed by the local government. Thus, Police Act, 1861 and the Code of Criminal Procedure, 1861, both of which were passed in the same year, used the same word diary.

9. That however, in the year 1872, a new Code came to be passed which was called the Code of Criminal Procedure, 1872. Section 112 of the Code dealt with the issue of registration of FIR and is reproduced below: -

112. Every complaint preferred to an officer in charge of a Police station shall be reduced into writing, and shall be signed, sealed, or marked by the person making it; and the substance thereof shall be entered in a book to be kept by such officer in the form prescribed by the Local Government.

10. That it is, thus, clear that in the Code of Criminal Procedure, 1872, a departure was made and the word book was used in place of diary. The word book clearly referred to FIR book to be maintained under the Code for registration of FIRs.

11. The question that whether the FIR is to be recorded in the FIR Book or in General Diary, is no more res integra. This issue has already been decided authoritatively by the Court in the several cases.

12. That in *Madhu Bala vs. Suresh Kumar*, (1997) 8 SCC, 476. the Hon'ble Supreme Court has been pleased to observe that

In *Madhu Bala vs. Suresh Kumar* (1997) 8 SCC 476, the Court held that FIR must be registered in the FIR Register which shall be a book consisting of 200 pages. It is true that the substance of the information is also to be mentioned in the Daily diary (or the

general diary). But, the basic requirement is to register the FIR in the FIR Book or Register. It is thus clear that registration of FIR is to be done in a book called FIR book or FIR Register. Of course, in addition, the gist of the FIR or the substance of the FIR may also be mentioned simultaneously in the General Diary as mandated in the respective Police Act or Rules, as the case may be, under the relevant State provisions.

(Pars 100, sub Para 10 in Lalita Kumari).

....."From the foregoing discussion it is evident that whenever a Magistrate directs an investigation on a 'Complaint' the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the above Rules. It, therefore, passes our comprehension as to how the direction of a Magistrate asking the police to 'register a case' make an order of investigation U/s 156(3) legally unsustainable. Indeed, even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(1) of the Code which empowers the police to investigate into a cognizable 'case' and the Rules framed under the Police Act, 1861 it 'the police' is duty-bound to formally register a case and then investigate into the same. The provision of the Code, therefore, do not in any way stand in the way of a Magistrate to direct the police to register a case at the police station and then investigate into the same. In our opinion when an order for investigation U/s 156(3) of the Code is to be made the proper direction to the police would be 'to register a case at the police station treating the complaint as the First Information Report and investigate into the same'.".....

13. That by arresting him within a week of Fauti Report and without any

F.I.R, as also filling of charge sheet against him and illegally giving case crime number has deprived him all his opportunities to defend himself, as he was put in prison for **seven & a half years**. He has no family or friends capable of engaging a counsel of his or their choice because of lack of money, It was only recently when the trial has already started that he could secure a bail Then he engaged his present counsels who are representing him pro-bono. The applicant is working as Safai Karmchari in a mosque and gets a salary which can hardly meet his two ends.

14. That the definition of "complaint in the definition clause of the Cr. P.C. reads as here under.-

“2. In this Code, unless the context otherwise requires.,-.....

(d). "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.

Explanation. A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant

15. That the Apex Court has also held in Pr. 107 in the case of Lalita Kumari as under,

Para 107 Lalita Kumari).

....."while registration of FIR is Mandatoty, 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 concept under the law, and there are several safeguards available against arrest.".....

16. That in AIR 1945 PC 18 lays down that the function of the Court begins after charged is prepared and submitted before it

17. That in 1992 AIR 604, State of Haryana & ors vs. Ch. Bhajan Lal & ors., the Apex Court has held --
(Kindly refer 3 & 4 of judgment. Please see 1192 AIR 604, State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors., Kindly refer Para No. 2, 3, 4, 6 to 9 also)

18. That in the Constitution Bench Judgment, (2014) 2 SCC 1, vs. Lalita Kumari vs Government of UP & Others., the Hon'ble Supreme Court has further considered conflicting judgments, and held as under:-
Kindly refer Pr Nos. (Section 157 Cr.P.C.- procedure) 37.1, 37.5 (1), 37.6, 48 (30), 49, 50, 58, 59, 62, 63, 64 to 67, 669 (last Para), 70, 72, 76, 83, 85, 86, 93, 94 to 98, 106, 107 & 120.

19. That in (2006) 2 SCC 677, Ramesh Kumari vs. State. Pr-4. (last para) and 5, the Apex Court has been pleased to hold :- (Quote)

4.....," That a police officer mandatorily registers a case on a complaint of a cognizable offence by the citizen under Section 154 of the Code is no more res integra. The point of law has been set at rest by this Court in State of Haryana v. Bhajan Lal".....

General Diary & FIR

20. That the General Diary is a record of all important transactions/events taking place in a police station, including departure and arrival of police staff, handing over or taking over of charge, arrest of a person, details of law and order duties, visit of senior officers etc. It is in this context that gist or substance of each FIR being registered in the police station is also mentioned in the General Diary since registration of FIR also happens to be a very important event in the police station.

"FIR" Para 63 of Lalita Kumari

Para 63....., "it is thus clear that registration of FIR is to be done in a book called FIR book or FIR register. Of course, in addition, the gist of the FIR or the substance of the FIR may also be mention

simultaneously in the General Diary as mandated in the respective Police Act or Rule, as the case may be under the relevant State provisions."

21. That Since General Diary is a record that is maintained chronologically on day-to-day basis (on each day, starting with new number 1), the General Diary entry reference is also mentioned simultaneously in the FIR Book, while FIR number is mentioned in the General Diary entry since both of these are prepared simultaneously

22. That It is relevant to point out that FIR Book is maintained with its number given on an annual basis. This means that each FIR has a unique annual number given to it. This is on similar lines as the Case Numbers given in courts. Due to this reason, it is possible to keep a strict control and track over the registration of FIRs by the supervisory police officers and by the courts, wherever necessary. Copy of each FIR is sent to the superior officers and to the concerned Judicial Magistrate.

23. That on the other hand, General Diary contains a huge number of other details of the proceedings of each day. Copy of General Diary is not sent to the Judicial Magistrate having jurisdiction over the police station, though its copy is sent to a superior police officer. Thus, it is not possible to keep strict control of each and every FIR recorded in the General Diary by superior police officers and/or the court in view of enormous amount of other details mentioned therein and the numbers changing every day.

"General Diary" Para 64 of Lalita Kumari

Para 64....,"The General Diary is a record of all important transactions /events taking place in a police station, including departure and arrival of police staff, handing over or taking over of charge, arrest of a person, details of law and order duties, visit of senior officers, etc. it is in this context that gist or substance of each FIR being registered in the police station is also mentioned in the General Diary since registration of FIR also happens to be a very important event in the police station. Since General Diary is a record that is maintained chronologically on day to day basis (on each day, starting with new Number 1), the General Diary entry reference is also mentioned simultaneously in the FIR book, while FIR number is mentioned in the General Diary entry since both of these are prepared simultaneously"

24. That the signature of the complainant is obtained in the FIR Book as and when the complaint is given to the police station. On the other hand, there is no such requirement of obtaining signature of the complainant in the general diary. Moreover, at times, the complaint given may consist of large number of pages, in which case it is only the gist of the complaint which is to be recorded in the General Diary and not the full complaint. This does not fit in with the suggestion that what is recorded in General Diary should be considered to be the fulfilment/ compliance of the requirement of Section 154 of registration of FIR. In fact, the usual practice is to record the complete complaint in the FIR book (or annex it with the FIR form) but record

only about one or two paragraphs (gist of the information) in the General Diary.

25. That FIR is to be recorded in the FIR Book, as mandated U/s 154 Cr.P.C, and it is not correct to state that information will be first recorded in the General Diary and only after preliminary inquiry, if required, the information will be registered as FIR.

26. That the Respondents have relied upon the following two cases :-

i. Indian Kanoon, 10 April 2003, Superintendent of Police of CBI Vs Tapan Kumar Singh,

ii. 2010 CR.I L.J. 805.

Obviously both cases are neither applicable to the fact of the applicant's case, nor can overrule / prevail upon Constitution Bench Judgments of Bhajan Lal or Lalita Kumari, for the reasons given below.

State of Haryana Vs Bhajan Lal 1992 SCC (Cri) 426 Pg 355 Para 33

Para 33 "if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of section 154 (1) of the Code, 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."

27. So far as Tapan Kumar's case is concerned,

i. It is a case of CBI under Delhi Police Act, not under Cr.P.C...

ii. In this case the O.P. received information that the Respondent was leaving for Nagpur from Train No. & time given with illegal money, within half an hour, he made a GD entry and on the instruction of the superior officer, he proceeded to confirm the correctness of the information given on phone, which he found to be correct. Thereafter he came back & registered an FIR against the Respondent in the case. In the circumstances, GD entry, FIR & investigation under taken was upheld by the High Court as well as Supreme Court. But in this case also, FIR was registered before investigation, which was held not on GD entry only / or a Fauti Report, without registering an FIR, as is the applicant's case.

iii. Further, this case has also been considered in the case of Lalita Kumari by the Apex Court in Pr. No.-99 & 118. The Constitution Bench has, in Pr. No. 118, has stated that.-

"118 Similarly, in Tapan Kumar Singh, this Court has validated a preliminary inquiry prior to registering an FIR only on the ground that at the time the first information is received, the same does not disclose a cognizable offence".

Thus, only preliminary inquiry is to be held as valid, not investigation without registering an FIR.

28. That 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

29. That so far as the case of Abdul Sufan above of Gauhati High Court is concerned :-

- i. In the first place a written ejahar was filed before P.S. against another person, it was the question of delay in lodging FIR only for which the Hon. High Court had undertaken to re-appreciate the evidence even. In it the proposition propounded in Para-8 of the judgment. Kindly refer to it.
- ii. Above all, a High Court Judgment cannot prevail upon the Constitution Bench Judgments.

30. That it is submitted that the Respondents have not been able to show any provision either in Cr.P.C. or even in Police Act, giving them power to start investigation of a cognizable offence without registering an FIR or allotting a case crime number. No case law relied upon by the respondents, holds that on the basis of a Fauti Report in GD, investigation can be carried without filing an FIR.

31. That the entire investigation / proceedings undertaken by the Police were without the authority of the law & void ab-initio, hence are liable to be quashed by the Hon. Court to uphold the dignity of law / mandatory procedure prescribed in the Cr.P.C.

32. Above all, they encroach upon the fundamental right of the applicant as enshrined in our Constitution.

33. That the Hon'ble Court may be pleased to take note of the fact that the applicant has already been kept in jail for 7 & 1½ years illegally, which has resulted into a total denial of a fair opportunity to defend himself, which is against the basic concept of criminal jurisprudence.”

3. From the submissions of the learned counsel for the applicant, quoted above, it appears that the prayer sought in the present application to quash the proceedings of Session Trial No. 843 of 2013 arising out of Case Crime No. 641 of 2012 pending before Additional District Judge, Room No. 11, Lucknow, is based upon the sole ground that, in the instant case, the entire investigation was carried out by the Investigation Officer/Police Authorities on the basis of GD entry of "**fauti**" and as such the investigation carried out by the Police Authorities is vitiated in law and based upon the same, case shall not proceed.

4. Learned A.G.A. while opposing the present application based upon the judgment of Hon'ble Apex Court passed in the case of **Superintendent of**

Police, CBI and Others Vs. Tapan Kumar Singh reported in (2003) 6 SCC 175 submitted that in some cases, the GD entry can be treated as an FIR and investigation based upon the same can be carried out. He referred Para 15, 16 & 19 from the judgment of the **Tapan Kumar Singh (supra)** which were taken note of by the Hon'ble Apex Court in para 71 of the judgment passed in the case of **Lalita Kumari Vs. Government of Uttar Pradesh and Others** reported in (2014) 2 SCC 1. Para 71 of the judgment of **Lalita Kumari (supra)**, on reproduction, reads as under:

“However, this Court in **Tapan Kumar Singh (supra)**, held that a GD entry may be treated as First information in an appropriate case, where it discloses the commission of a cognizable offence. It was held as under:

“15. It is the correctness of this finding which is assailed before us by the appellants. They contend that the information recorded in the GD entry does disclose the commission of a cognizable offence. They submitted that even if their contention, that after recording the GD entry only a preliminary inquiry was made, is not accepted, they are still entitled to sustain the legality of the investigation on the basis that the GD entry may be treated as a first information report, since it disclosed the commission of a cognizable offence.

16. The parties before us did not dispute the legal position that a GD entry may be treated as a first information report in an appropriate case, where it discloses the commission of a cognizable offence. If the contention of the appellants is upheld, the order of the High Court must be set aside because if there was in law a first information report disclosing the commission of a cognizable offence, the police had the power and jurisdiction to investigate, and in the process of investigation to conduct search and seizure. It is, therefore, not necessary for us to consider the authorities cited at the Bar on the question of validity of the preliminary inquiry and the validity of the search and seizure.

xxx xxxx

19. The High Court fell into an error in thinking that the information received by the police could not be treated as a first information report since the allegation was vague inasmuch as it was not stated from whom the sum of rupees one lakh was demanded and accepted. Nor was it stated that such demand or acceptance was made as motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show in exercise of his official function, favour or disfavour to any person or for rendering, attempting to render any service or disservice to any person. Thus there was no basis for a police officer to suspect the commission of an offence which he was empowered under [Section 156](#) of the Code to investigate.”

5. Learned A.G.A. further submitted that the judgment of the Apex Court in **Tapan Kumar Singh (supra)** has not been overruled or distinguished rather a perusal of the judgment of **Lalita Kumari (supra)** would show that the same

has been affirmed. He further submitted that the issue before the Hon'ble Apex Court in the judgment passed in the case of **Lalita Kumari (supra)** was with regard to lodging of an FIR and after dealing with the entire law on the issue including the relevant statutory provisions such as 154 Cr.P.C., Section 44 - "Expression of General Diary" of Police Act, 1861, Section 166(A) Cr.P.C. and various pronouncements on the subject concluded in para 120 and in this para, the Hon'ble Apex Court has not observed that GD entry cannot be considered as an FIR, as observed in **Tapan Kumar Singh (supra)**.

6. Para 120 of the case of **Lalita Kumari (supra)** referred by both the learned counsels namely Shri Prabhaat Kumar Tripathi, learned counsel for the applicant and Shri Aniruddh Singh, learned A.G.A. for the State is extracted herein-under:

“120. In view of the aforesaid discussion, we hold:

120.1 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.

120.2 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.

120.3 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.

120.4 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.

120.5 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.

120.6 As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/ family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7 While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8 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.”

7. Considered the submissions advanced by learned counsel for the parties and perused the record.

8. Undisputed facts of the case are that on an information received, the concerned Police Officer sent the body recovered on 08.11.2012 within the jurisdiction of Police Station- Thakurganj, District- Lucknow for post-mortem and after post-mortem, the authorities came to know about the fact that the death was due to 'asphyxia' as a result of ante mortem 'throttling' and this fact was entered in GD No. 129 and thereafter, the investigation was carried out and the charge-sheet was submitted before the competent Court of jurisdiction upon which the cognizance was taken and the case was committed to the Trial Court/Sessions Court and thereafter, the Trial Court proceeded in the case.

9. It would be apt to indicate that the applicant is the husband of the deceased namely Bitan @ Nisha Khatoon.

10. Upon due consideration of the aforesaid facts of the case and observations made by the Hon'ble Apex in para 71 and para 120 of the judgment passed in the case of **Lalita Kumari (supra)**, this Court is of the view that in some cases GD entry can be treated as an FIR and in the instant case upon GD entry, the investigation was carried out and on completion of investigation the charge sheet was submitted against the applicant, who is the husband of the deceased, and in this view of the matter, no interference of this Court is required in the instant application U/S 482 Cr.P.C.

11. Accordingly, the instant application U/S 482 Cr.P.C. is hereby **dismissed**. Cost made easy.

Order Date: 07.03.2024/Mohit Singh/-