

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.181 of 2015

Arising Out of PS.Case No. -null Year- null Thana -null District- PATNA

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1. Ashok Kumar Sinha, S/o Late Ram Binay Singh, Resident of Village & Post - Bariyarpur, P.S.- Piar, District -Muzaffarpur (Bihar).
 2. Ram Nandan Choudhary, S/o Late Munni Lal Choudhary, Mohalla-Azad Road, Chandwara, P.S. Town (Muzaffarpur), District Muzaffarpur (Bihar).

.... Petitioners

Versus

1. The State of Bihar through it's the Principal Secretary, Home Department, Govt. of Bihar, Patna.
2. The Director General of Police, Vigilance Investigation Bureau, Govt. of Bihar, Patna, Cabinet Vigilance Deptt.
3. The Superintendent of Police, Vigilance Investigation Bureau, Cabinet Vigilance Deptt. 6 Circular Road, Patna, Bihar.
4. The Deputy Superintendent of Police, Vigilance Investigation Bureau, Cabinet Vig. Deptt. 6 Circular Road, Patna, Bihar.

.... Respondents

With

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Criminal Writ Jurisdiction Case No. 183 of 2015

Arising Out of PS.Case No. -null Year- null Thana -null District- PATNA

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Dr. Dharmadeo Singh, S/o Late Awadh Singh, Resident of village - Basudeopur, P.S.- Bajpatti, District - Sitamarhi, Bihar

.... Petitioner

Versus

1. The State of Bihar through it's the Principal Secretary, Home Department Govt. of Bihar, Patna
2. The Director General of Police, Vigilance Investigation Bureau, Cabinet Vig. Deptt., Govt. of Bihar, Patna
3. The Superintendent of Police, Vigilance Investigation Bureau, Cabinet Vig. Deptt. Govt. of Bihar, Patna
4. The Deputy Superintendent of Police, Vigilance Investigation Bureau, Cabinet

Vig. Deptt. Govt. of Bihar, 6 Circular Road, Patna, Bihar

.... Respondents

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Appearance :

(In Cr. WJC No. 181 of 2015)

For the Petitioner/s : Mr. Kumar Dharendra Pratap Singh, Advocate
Mr. Niraj Kumar, Advocate

For the Respondent-State: Ms. Archana Jha, AC to GA-13

(In Cr. WJC No. 183 of 2015)

For the Petitioner/s : Mr. Kumar Dharendra Pratap Singh, Advocate

For the Respondent/s-State: Mr. Mritunjay Kumar, AC to SC-23

For the Vigilance : Mr. Santosh Kumar Pandey, AC to Mr. Ramakant
Sharma, Sr. Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 10-12-2015

These two applications under Articles 226 & 227 of the Constitution of India arise from a common first information report (For short 'FIR') and the prayer of the petitioners in these cases is also identical and therefore they have been heard together and are being disposed of by a common order. The petitioners in these applications seek quashing of the order dated 29.05.2014 passed by the learned Special Judge, Vigilance, North Bihar, Muzaffarpur in Complaint Case No. 106/2009 whereby the Superintendent of Police, Vigilance Investigation Bureau, Patna has been directed to institute an FIR against the petitioners. They further seek quashing of the FIR of the Vigilance P.S. Case No. 69 of 2014 registered under Sections 409, 420, 467, 468, 471, 477-A,

120-B, 201 of the Indian Penal Code and Section 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 (For short “P.C. Act”).

2. One Sudhir Kumar Ojha, an advocate, filed Complaint Case No. C-106/2009 against the then Civil Surgeon, Dr. Dharmdeo Singh (petitioner in Cr. W.J.C. No. 183 of 2015) for his corrupt practice on several counts in the court of learned Special Judge, Vigilance, North Bihar, Muzaffarpur on 15.12.2009. The learned Special Judge, after going through the allegations made in the complaint and after hearing the submissions made by the complainant called for an inquiry report in respect of the allegations made in the complaint from the Superintendent of Police, Vigilance Investigation Bureau, Patna. Thereafter, the complaint case was adjourned several times awaiting the receipt of the inquiry report of the Superintendent of Police.

3. In compliance with the order passed by the learned Special Judge, Vigilance, the Superintendent of Police, Vigilance Investigation Bureau, Patna got the allegations made in the complaint inquired into through a police officer posted in the Vigilance police station and a report vide Letter No. 696 dated 29.04.2014 was submitted in the Court. After going through the inquiry/investigation report submitted by the police officer who had



conducted the preliminary inquiry and after hearing the learned counsel for the complainant, the learned Special Judge, Vigilance, directed the Superintendent of Police, Vigilance Investigation Bureau, Patna to register an FIR against Dharmdeo Singh, the then Civil Surgeon and two others, namely, Ram Nandan Chaudhary, the then Head Clerk and Ashok Kumar Sinha, the then Clerk posted in the Civil Surgeon office, Muzaffarpur for defalcation and misappropriation of the government money and causing revenue loss to the government vide impugned order dated 29.05.2014. Accordingly, the aforesaid Vigilance P.S. Case No. 69 of 2014 was registered on 29.09.2014 against the petitioners and investigation is going on.

4. Mr. Kumar Dharendra Pratap Singh, learned counsel for the petitioners has sought to question the order passed by the learned Special Judge, Vigilance, inter alia, on the grounds that such complaint at the instance of a private individual could not have been acted upon in absence of valid sanction for prosecuting the public servants against whom the charges have been made. He has further contended that the learned Special Judge, Vigilance could not have invoked the powers conferred under Section 156(3) of the Code of Criminal Procedure, 1973 (For short 'Cr PC') after taking cognizance of the offence under Section 190(1)(a) Cr PC.

5. Mr. Singh has submitted that after taking cognizance of the offence under the procedure prescribed under Chapter XV of the Cr PC, the learned Special Judge, Vigilance could not have switched back to the pre-cognizance stage and directed the police for institution of an FIR.

6. *Per contra*, Mr. Ramakant Sharma, learned Senior Counsel for the Vigilance has submitted that there is no illegality in the order passed by the learned Special Judge, Vigilance. According to him, there is no illegality in filing a complaint alleging corruption charges against the public servants and if the learned Special Judge after going through the preliminary inquiry report submitted by the Vigilance Investigation Bureau formed an opinion that the matter needs investigation by the police and referred the complaint to the police for investigation in exercise of power conferred under Section 156(3) of the Cr PC, no fault can be found with such order.

7. I have heard learned counsel for the parties and perused the record.

8. The facts, which are not in dispute, are as under:-

(a) Initially, a complaint case was filed by the complainant Sudhir Kumar Ojha against the aforesaid Dr. Dharmdeo Singh the then Civil Surgeon, Muzaffarpur on 15.12.2009.

(b) After going through the allegations made in the complaint and after hearing the complainant, the learned Special Judge called for an inquiry report from the Superintendent of Police, Vigilance Investigation Bureau, Patna.

(c) Pursuant to the order passed by the Court, the matter was inquired into by an officer of the vigilance police station and a report was sent to the court.

(d) Awaiting the inquiry report, the learned Special Judge, Vigilance, Muzaffarpur had adjourned the case several times.

(e) After receipt of the inquiry report, the learned Special Judge, North Bihar, Muzaffarpur heard learned counsel on behalf of the complainant, perused the record and directed the Superintendent of Police, Vigilance Investigation Bureau, Patna to institute a criminal case not only against Dr. Dharmdeo Singh but other two petitioners also for defalcation and misappropriation of government money vide order dated 29.05.2014 pursuant to which the FIR was instituted against the petitioners of these two cases on

29.09.2014.



9. In view of sub-section (4) of Section 5 of the P. C. Act, a Special Judge dealing with offences under the P.C. Act is deemed to be a Magistrate. Being armed with all magisterial powers provided under the Cr PC, when a private complaint is filed before a Special Judge, he has two options:- (a) he may take cognizance of the offence under section 190 Cr PC; or (b) he may proceed further for enquiry or trial. A Special Judge, who is otherwise competent to take cognizance, may, without taking cognizance under section 190 Cr PC, direct for investigation under section 156(3) Cr PC. When a Magistrate orders investigation under Chapter XII of the Cr PC, he does so before he takes cognizance of the offence. However, the investigation referred under Section 202 Cr PC is after taking cognizance. Such investigation is only for the purpose of the deciding whether or not there is sufficient ground to proceed further.

10. Section 156(3) Cr PC falling under Chapter XII and Section 202 Cr PC falling under Chapter XV, operate in distinct spheres and at different stages. Any Judicial Magistrate when before taking cognizance of the offence orders investigation under section 156(3) Cr PC then, he has not to hear the complainant because he does not take cognizance of any offence.

therein.

11. The word “cognizance” has not been defined in Cr.P.C. but the said expression has been considered by the Courts several times. The conditions in which cognizance can be taken are stated in Clauses (a), (b) and (c) of Section 190(1) Cr PC. Whether the Magistrate has or has not taken cognizance would depend on the circumstances of a particular case including the mode in which the case is sought to be instituted and the nature of action, if any, taken by the Magistrate. When on receiving a complaint the Magistrate applies his mind for the purpose of proceeding under section 200 Cr PC and proceeds in terms of the procedures prescribed in Chapter XV Cr PC, it would be presumed that he has taken cognizance within the meaning of Section 190(1)(a) Cr PC. If, instead of proceeding under Chapter XV, at the very initial stage the Magistrate orders investigation under Section 156(3) of the Cr PC, such investigation would be of a different kind. Such investigation would end up with a police report contemplated in Section 173 of the Cr PC.

12. In the matter of **Md. Yousuf Vs. Afaq Jahan (Smt) and Another** reported in **(2006) 1 SCC 627**, the Supreme Court has elaborately dealt with the difference between an investigation under chapter XII and an investigation under chapter

XV Cr PC in Paras 6 to 10 which read as under:-

“6. Section 156 falling within Chapter XII, deals with powers of police officers to investigate cognizable offences. Investigation envisaged in Section 202 contained in Chapter XV is different from the investigation contemplated under Section 156 of the Code.

7. Chapter XII of the Code contains provisions relating to “Information to the police and their powers to investigate”, whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of any offence on a complaint. Provisions of the above two chapters deal with two different facets altogether, though there could be a common factor i.e. complaint filed by a person. Section 156, falling within Chapter XII deals with powers of the police officers to investigate cognizable offences. True, Section 202, which falls under Chapter XV, also refers to the power of a Magistrate to “direct an investigation by a police officer”. But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code.

8. The various steps to be adopted for investigation under Section 156 of the Code have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in



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

9. But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code makes the position clear that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed

further. This can be discerned from the culminating words in Section 202(1) i.e.

“or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding”.

10. This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.”

13. In the matter of **Rameshbhai Pandurao Hedau Vs. State of Gujarat [(2010)4 SCC 185]**, while dealing with the difference between an investigation ordered by the Magistrate under Chapter XII containing “Section 156(3) Cr PC” and under Chapter XV containing “Section 202 Cr PC”, the Supreme Court held as under in para 23 to 25 :-

“23. Reference was also made to the decision of this Court in Mohd. Yousuf vs. Afaq Jahan [(2006) 1 SCC 627], where it has been held that when a Magistrate orders investigation under Chapter XII of the Code, he does so before he takes cognizance of the offence. Once he takes cognizance of the offence, he has to follow the procedure envisaged in Chapter XV of the Code. The inquiry contemplated under Section 202(1) or investigation by a police officer or by



any other person is only to help the Magistrate to decide whether or not there is sufficient ground for him to proceed further on account of the fact that cognizance had already been taken by him of the offence disclosed in the complaint but issuance of process had been postponed. 24. The law is well-settled that an investigation ordered by the Magistrate under Chapter XII is at the pre-cognizance stage and the inquiry and/or investigation ordered under Section 202 is at the post-cognizance stage. What we have to consider is whether the Magistrate committed any error in refusing the appellant's prayer for an investigation by the police under Section 156(3) of the Code and resorting to Section 202 of the Code instead, since both the two courses were available to him.

25. The power to direct an investigation to the police authorities is available to the Magistrate both under Section 156(3) Cr PC and under Section 202 Cr PC. The only difference is the stage at which the said powers may be invoked. As indicated hereinbefore, the power under Section 156(3) Cr PC to direct an investigation by the police authorities is at the pre-cognizance stage while the power to direct a similar investigation under Section 202 is at the post-cognizance stage.”

14. In **Dharmeshbhai Vasudevbbhai & Ors Vs. State**



of Gujarat & Ors. [(2009) 6 SCC 576], while considering the power of the Magistrate to recall an order passed by him under section 156(3) Cr PC, the Supreme Court observed that before taking cognizance the Magistrate can invoke his powers under section 156(3) but once he takes cognizance, he has to proceed in accordance with the procedure involved in Chapter XV thereof including the power to take enquiry or investigation under section 202 Cr PC.

15. In **Suresh Chand Jain Vs. State of M.P. & Anr. [(2001)2 SCC 628]**, while considering the powers of a Magistrate under section 156(3), the Supreme Court held that such power is vested in the Magistrate before taking cognizance of the offence and not thereafter.

16. The cases referred to hereinabove make it clear that the investigation contemplated in Chapter XII Cr PC can be commenced by the police without the order of a Magistrate. However, a Magistrate may also order investigation under Section 156(3) Cr PC. In both cases investigation must end up with the report submitted under Section 173 Cr PC. But the investigation referred to under Section 202 Cr PC is after taking cognizance and of a limited nature. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for



him to proceed further. A Magistrate would not be authorized in law to order investigation under Chapter XII Cr PC after taking cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV Cr PC. The object of an investigation under Section 202 Cr PC is not to initiate afresh police case but to assist the Magistrate in completing proceedings already instituted upon a complaint before him.

17. In the present case, apparently after receiving the complaint petition the learned Special Judge did not refer the matter to the Vigilance Investigation Bureau for investigation under section 156 (3) of the Cr PC before taking cognizance of the offence. He decided to proceed with the complaint and called for an inquiry report from the Superintendent of Police, Vigilance. The moment he retained the complaint with himself and call for an enquiry report from the police, it would mean that he had taken cognizance of the offence and was proceeding for an enquiry as contemplated under Section 202 Cr PC in Chapter XV. He adjourned the complaint awaiting the inquiry report. When the report of a police officer was submitted by the Superintendent of Police in the Court, the learned Special Judge again adjourned the matter for hearing the complainant and after hearing the complainant referred the police report for investigation under

Section 156(3) of the Cr PC. The entire exercise conducted by the learned Special Judge before referring the matter under Section 156(3) of the Cr PC was under Chapter XV of the Cr PC which contains Section 202(1) of the Cr PC, which reads as under :-

“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, 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”

18. Apparently, the learned Special Judge was exercising his powers at the post-cognizance stage under Chapter XV Cr PC. Under such circumstances, he was not competent to switch back to the pre-cognizance stage and to issue a direction under section 156(3) Cr PC for investigation. Furthermore, while exercising the powers conferred under Section 156(3) Cr PC, there is no scope for any addition or subtraction in the name of accused persons mentioned in the complaint made by the complainant. In the present case, the complainant had lodged the complaint only against the accused Dharmdeo Singh, the then Civil Surgeon,



Muzaffarpur but after holding enquiry the learned Special Judge directed for institution of FIR against two more persons, namely, Ashok Kumar Sinha and Ram Nandan Chaudhary. The nature of the order passed by the learned Special Judge clearly shows that he had applied his mind to the facts of the case after looking into the materials available on record. At this stage, under no circumstance, he could have ordered for investigation under Section 156(3) of the Cr PC. The entire procedure adopted by him in the matter was wholly illegal and impermissible in law.

19. In view of the discussions made, hereinabove, I am of the considered opinion that the impugned order dated 29.05.2014 passed by the learned Special Judge, Vigilance, North Bihar, Muzaffarpur is wholly illegal and untenable in the eye of law.

20. Coming back to the next point argued by the learned counsel for the petitioner in respect of the locus to file a complaint by a private individual, I am of the view that there is nothing in the Cr PC which prohibits filing of a complaint by a private individual alleging corruption charges against public servants but there are essential pre-requisites in such special cases under the Prevention of Corruption Act, which need to be satisfied before the Special Judge trying special cases may proceed with the

same.

21. An identical issue had come up for consideration before the Supreme Court in **Anil Kumar & Ors. Vs. M.K. Aiyappa & Anr. [(2013) 10 SCC 705]**, where the issue framed was “whether the Special Judge/Magistrate is justified in referring a private complaint made under Section 200 Cr PC for investigation by the Deputy Superintendent of Police, Karnataka Lokayukta, in exercise of powers conferred under Section 156(3) Cr PC without the production of a valid sanction order under Section 19 of the Prevention of Corruption Act, 1988”. The Supreme Court, taking note of the judicial pronouncements rendered on the issue in **Subramanian Swamy Vs. Manmohan Singh [(2012) 3 SCC 64]**, **State of U.P. Vs. Paras Nath Singh [(2009) 6 SCC 372]**, **State of W.B. Vs. Mohd. Khalid [(1995) 1 SCC 684]** and **Additional Director General, Army Headquarter Vs. C.B.I. [(2012) 6 SCC 228]**, while upholding the right of an individual to file complaints under the P.C. Act has proceeded to clarify that in absence of a previous sanction for prosecution of the public servants charged with acts of corruption, the Magistrate concerned can neither take cognizance and hold enquiry under Section 202 nor can order for investigation against the public servant, under Section 156(3) Cr PC. Thus obtaining a sanction to prosecute public servants charged

with acts of corruptions has been held an essential pre-condition for filing of a complaint by a private individual under the provisions of the Act.

22. Admittedly, in the present case the complaint was not accompanied with any sanction order. Hence, in view of the law laid down by the Supreme Court in Anil Kumar (Supra), the learned Special Judge, Vigilance, North Bihar, Muzaffarpur could not have entertained the complaint and proceeded with the same either under Chapter XII or under Chapter XV Cr PC without there being a valid sanction order to prosecute the public servants.

23. For the reasons, aforementioned, the impugned order dated 29.05.2014 passed by the learned Special Judge, Vigilance, North Bihar, Muzaffarpur in Complaint Case No. 106/2009, is set aside resulting into quashing of the FIR of Vigilance P.S. Case No. 69 of 2014 pending before the learned Special Judge, Vigilance, North Bihar, Muzaffarpur.

24. These applications stand allowed.

(Ashwani Kumar Singh, J.)

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