

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRM-M-36724-2016

Date of decision: 06.12.2016

Bismilla

.....Petitioner

Versus

State of Haryana & Ors.

.....Respondents

CORAM : HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Sarfaraj Hussain, Advocate,
for the petitioner.

Mr. Sanjay K. Saini, AAG, Haryana,
for respondent No.1-State.

Jaishree Thakur, J.

1. Challenge in the instant petition is to the order passed by learned Judicial Magistrate First Class, Hathin (Annexure P2) in a complaint case No. 15 dated 15.09.2016 titled as 'Bismilla Vs Ashu and Ors.', by which the relief sought of sending the complaint to the S.H.O. concerned under the provisions of section 156(3) of the Criminal Procedure Code, was declined.

2. In brief, the facts are that the petitioner complainant herein approached the Judicial Magistrate 1st Class alleging that on 22.05.2016 at about 10.00.a.m. her niece, namely, Aimna was coming to the house and on the way she was teased by Kamil son of Sabbu and Rashid son of Usman. The family members intended to get a case registered against Hamid and Rashid. Keeping this grudge, Hamid son of Sabbu came to the house of the elder brother of the complainant's husband and started abusing and after pushing the elder sister-in-law and her niece Aimna left the premises. A

Panchayat was convened in the village in which unconditional apology was tendered and matter was settled. On 25.05.2016 at about 11.00 a.m. the elder brother of the complainant's husband and the complainant's father-in-law, Abdul Hamid, went to a goldsmith for purchasing ornaments for the marriage of their son. Hamid son of Sabbu along with his companion Naim son of Deen Mohammad and Rashid son of Usman reached the spot and tried to loot the ornaments. When they tried to lodge protest they were given beatings due to which blood oozed. On hearing the noise, people of village gathered and on seeing them, the accused persons ran away. When brother-in-law and father-in-law of the complainant reached home, Deen Mohammad, Hamid son of Sabbu, Naim son of Deen Mohammad, Rajak son of Deenu and others, forcibly entered the house with an intention to kill them. The said persons were armed with country made pistol and other weapons. In the complaint it was alleged that accused persons wanted to kill the family members of the complainant while inflicting injuries with lathi, danda, apart from firing from the country made pistol. It was also alleged that there was looting as well. The complainant's sister-in-law, Ahmedi wife of Hakmudin, lost her four months unborn baby. In the said complaint various details were given as to who were the persons involved in the said occurrence. Thereafter they approached the police for recording of FIR and the statement, but on the one pretext or the other the same was postponed. A request was also made for registration of a case but no action was taken thereon against the accused persons. A letter was addressed through registered post to the police officers and seniors through mail but to date no action has been taken thereon. Aggrieved against the inaction of the

police in registration of the FIR a petition was lodged for lodging of case against all the accused persons under Section 156(3) Cr.P.C. Learned Judicial Magistrate 1st Class, Hathin on the presentation of the complaint declined the request for sending the matter under Section 156(3) Cr.P.C. and listed the case for evidence of complainant. Aggrieved against the said order the instant petition has been filed.

3. Mr. Sarfaraj Hussain, learned counsel appearing on behalf of the petitioner herein alleged that the impugned order is wholly without jurisdiction being illegal and deserves to be set aside at the very outset with a further prayer that a direction be issued for the registration of a FIR. It is argued that registration of FIR is mandatory under Section 154 Cr.P.C. if the application discloses commission of a cognizable offence and in this regard no preliminary enquiry is permissible. Reliance in this regard has been placed upon a constitutional Bench of the Hon'ble Supreme Court of India in ***Lalita Kumari Vs Govt. Of U.P. and others, reported as 2014(2) SCC 1.***

4. Per contra, Learned Counsel appearing on behalf of the State has submitted that an FIR No. 79 dated 25.05.2016 has been registered under Sections 147, 148, 149, 323, 302 IPC and 25 of the Arms Act at Police Station, Bahin alleging that there was an altercation took place between the residents in village Uttawar in which firing took place and on this information, ASI Manoj Kumar along with the Police party reached the spot and found that four persons namely, Hamid, Deen Mohammad, Rajjak, and Wasim had died by sustaining fire arm injuries. On investigation, it was found that an altercation had taken place between Hamid son of Sabbu and

Farukh son of Khubi in presence of the complainant and the altercation was settled. Later some persons namely Yahya Khan s/o Shadi Khan, Farukh s/o Khuki, Azharuddin s/o Farukh, Altaf s/o Islam and Jakir along with 30 others who were named and 20 who were unknown, while forming an unlawful assembly armed with deadly weapons like gun, country made pistol went to the house of Hamid son of Sabbu and gave them a *lalkara* and in the altercation that followed four persons died at the spot. It is also argued that the present petition has been filed as a counter blast to the complaint filed, just to put undue pressure on the witnesses and to compel the complainant for compromise and hence, the petition is not maintainable.

5. I have heard learned counsel for the parties and have gone through the record.

6. The question that arises for determination in the instant petition is whether the court could direct a preliminary investigation as has been done by invoking Section 156(3) Cr.P.C

7. The Constitutional Bench of the Hon'ble Supreme Court in ***Lalita Kumari's*** case (supra), formulated a question as to whether “*a police officer is bound to register a First Information Report (FIR) upon receiving any information relating to commission of a cognizable offence under Section 154 of the Code of Criminal Procedure, 1973 (in short 'the Code') or the police officer has the power to conduct a “preliminary inquiry” in order to test the veracity of such information before registering the same?*”

8. A writ petition was filed under Article 32 of the Constitution by

one Lalita Kumari (minor) through her father for issuance of a writ of Habeas Corpus or direction(s) of like nature for the protection of his minor daughter who had been kidnapped. It was alleged in the writ petition that a written report was submitted by the petitioner before the officer in-charge of the police station concerned who did not take any action on the same. Thereafter, the Superintendent of Police was approached and FIR was registered. According to the petitioner, even after the registration of an FIR no steps were taken for apprehending the accused persons, or for the recovery of the minor girl child. Because of conflict of several judgments, matter was eventually referred to a Larger Bench, wherein the aforementioned question was framed. While dealing with several issues, the Hon'ble Apex Court held as under :-

“83) *In terms of the language used in Section 154 of the Code, the police is duty bound to proceed to conduct investigation into a cognizable offence even without receiving information (i.e. FIR) about commission of such an offence, if the officer in charge of the police station otherwise suspects the commission of such an offence. The legislative intent is therefore quite clear, i.e., to ensure that every cognizable offence is promptly investigated in accordance with law. This being the legal position, there is no reason that there should be any discretion or option left with the police to register or not to register an FIR when information is given about the commission of a cognizable offence. Every cognizable offence must be investigated promptly in accordance with law and all information provided under Section 154 of the Code about the commission of a cognizable offence must be registered as an FIR so as to initiate an offence. The requirement of Section 154 of the Code is only that the report must disclose the commission of a cognizable offence and that is sufficient to set*

the investigating machinery into action.

84) *The insertion of sub-section (3) of Section 154, by way of an amendment, reveals the intention of the legislature to ensure that no information of commission of a cognizable offence must be ignored or not acted upon which would result in unjustified protection of the alleged offender/accused.*

85) *The maxim expression unius est exclusion alterius (expression of one thing is the exclusion of another) applies in the interpretation of Section 154 of the Code, where the mandate of recording the information in writing excludes the possibility of not recording an information of commission of a cognizable crime in the special register.*

86) *Therefore, conducting an investigation into an offence after registration of FIR under Section 154 of the Code is the "procedure established by law" and, thus, is in conformity with Article 21 of the Constitution. Accordingly, the right of the accused under Article 21 of the Constitution is protected if the FIR is registered first and then the investigation is conducted in accordance with the provisions of law."*

9. Thereafter while concluding, the Hon'ble Apex Court came to hold as under :

"119) Therefore, in view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given

clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR.

Conclusion/ Directions:

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

- i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.*
- ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.*
- iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.*
- iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable*

offence.

- v) *The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.*
- vi) *As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:*
 - a) *Matrimonial disputes/ family disputes*
 - b) *Commercial offences*
 - c) *Medical negligence cases*
 - d) *Corruption cases*
 - e) *Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.*
- vii) *While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.*
- viii) *Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.”*

Therefore, what can be culled out from the judgment referred to

above is that the registration of an FIR is mandatory under Section 154 of the Code of Criminal Procedure, if such information discloses commission of a cognizable offence and that no “**preliminary inquiry**” is permissible in such a situation. But would the same situation arise when a complaint is referred to the Magistrate about the inaction of the police by invoking Section 156(3) Cr.P.C? Is the Magistrate bound to issue a direction to lodge an FIR or can he take note of the offences as such and if *information discloses commission of a cognizable offence can then direct registration of FIR without preliminary inquiry ?*

11. It would be germane to note that if a person has a grievance that the police station is not registering his FIR under Section 154 Cr.P.C., then he can approach the Superintendent of Police under Section 154(3) Cr.P.C. by an application in writing. Even if that does not result in the registration of FIR or an investigation is not held, it is open to the aggrieved person to file an application under Section 156 (3) Cr.P.C. before the learned Magistrate concerned. If such an application under Section 156 (3) Cr.P.C. is filed before the Magistrate, the Magistrate can direct the FIR to be registered and can also direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.

12. In ***Mohd. Yousuf vs. Smt. Afaq Jahan & Anr. 2006(1) RCR (Criminal) 450*** it was observed :

“The clear position therefore is that 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 investigating 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.”

13. A similar view was taken in the case reported as ***Dilawar Singh V State Of Delhi 2007(4) RCR (Criminal) 115:***

“17. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of Cr.P.C. 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 Cr.P.C. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Cr.P.C. 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 Cr.P.C. only thereafter.”

14. In ***Sakiri Vasu vs. State Of U.P. And Others, 2008 R.C.R. (Criminal) 392*** the Supreme Court held that :

“17. In our opinion Section 156 (3) Cr.P.C. is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an F.I.R. and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156 (3) Cr.P.C., though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.”

15. In the case of ***Ramdev Foods Pvt Limited vs State Of Gujarat, 2015 (6) SCC 439*** the appellant sought direction for investigation under Section 156(3) of the Code. The Magistrate instead of directing investigation as prayed, thought it fit to conduct further inquiry under Section 202 Cr.P.C. and sought report of the Police Sub Inspector within thirty days. It was argued that in view of the allegation that documents had been forged with a view to usurp the trademark an investigation ought to have been ordered under Section 156(3) instead of conducting inquiry under Section 202. Thus, there was non application of mind by the Magistrate. A question was framed *“Whether in the present case, the Magistrate erred in seeking report under Section 202 instead of directing investigation under Section 156(3)?”* The Supreme court while dealing with the power of the Magistrate under section 156 Cr.P.C. held that:

19. *“Thus, this Court has laid down that while prompt registration of FIR is mandatory, checks and balances on power of police are equally important. Power of arrest or of investigation is not mechanical. It requires application of mind in the manner provided. Existence of power and its exercise are different. Delicate balance had to be maintained between the interest of society and liberty of an individual. Commercial offences have been put in the category of cases where FIR may not be warranted without enquiry.*

20. *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 (2013) 10 SCC 705, 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).

16. Therefore a conjoint reading of the judgements as referred to above it can be held that the Magistrate has ample powers under Section 156(3) to direct the registration of an FIR or direct an investigation in the matter. However, this power has to be exercised judiciously with thoughtful consideration and application of mind which ought to be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant would not be sufficient though a detailed expression of his views is also not required nor warranted. The Magistrate would also be required to keep in mind the category of cases where preliminary inquiry would be required as detailed in the directions laid out in **Lalita Kumari's** case (Supra).

17. In the case at hand, the JMFC without recording reasons as to why the matter is not being referred directly for investigation and registration of an FIR, has ordered that the matter be inquired into by leading preliminary evidence. There is no discussion or an opinion formed as to why the request for sending the complaint for registration of an FIR has been declined. This is not in consonance with the law laid down in **Anil Kumar vs. M.K. Aiyappa** case (supra). The allegations made in the complaint pertain to the offences of theft, loot, destruction of crops, forcibly

entering house of the complainant and causing loss of property apart from injuries that were sustained at the hands of the accused. Therefore, the JMIC as per the guidelines laid down in ***Ramdev Foods Pvt Limited*** (supra) could have referred for preliminary investigation in terms of the guidelines laid down thereunder.

18. Therefore, while setting aside the impugned order the matter is remanded back to the trial Court, Hathin for taking fresh decision in accordance with the law.

19. The petition is accordingly disposed of.

06.12.2016

sp

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
No.