

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

WRIT PETITION No. 16284 of 2016

ORDER:

1) This Writ Petition, under Article 226 of the Constitution of India, is filed by the petitioners seeking the following relief:

“ ...to issue a writ , order or direction especially in the nature of Writ of Certiorari to call for the records relating to FIR No.55 of 2016 on the file of the 1st respondent police station and consequently quash the docket order, dated 31.03.2016 in CCSR No.1726 of 2016 on the file of the XI Additional Chief Metropolitan Magistrate, Secunderabad and the consequential investigation in Crime No.55 of 2016 on the file of the Kharkhana Police Station, Hyderabad City.”

2) The averments in the affidavit filed in support of the writ petition would show that the 3rd respondent filed a private complaint before the Court of XI Additional Chief Metropolitan Magistrate, Secunderabad, alleging that he invested an amount of Rs.21,50,000/- on 30.03.2013 in accused No.1 firm and the other accused promised that they will give partnership in the said firm but failed to give the partnership. Subsequently, accused No.2 is alleged to have executed a promissory note on 15.06.2015 and thereafter issued a cheque on 15.12.2015 for Rs.21,50,000/-. On presentation of the said cheque the same was dishonoured. It is further alleged that the office of accused No.1 closed.

3) It is stated in the affidavit that though the contents of the complaint do not make out the offence, the Court below without

recording any reasons and without support of affidavit of the *de facto* complainant, straight away referred the complaint to the 1st respondent police station. Basing on such reference, a case in Crime No.55 of 2016 came to be registered for the offences under Sections 406, 420 and 506 read with 120-B IPC. Hence, the present writ petition came to be filed seeking quashing of the same.

4) Learned counsel for the petitioners mainly submits that while making a reference under Section 156 (3) Cr.P.C. reasons have to be recorded showing application of mind while directing the police to investigate into the non-cognizable offences, failing which great prejudice would be caused to the accused. It is his case that in a mechanical manner the matter was referred to the police under Section 156 (3) Cr.P.C. He also submits that guidelines laid down by the Apex Court in *Priyanka Srivastava and another v. State of U.P. and others*¹ were not followed by the Court below.

5) On the otherhand, learned counsel appearing for the 3rd respondent would submit that the allegations made in the complaint do constitute the offences alleged as such the petitioners are not entitled for any relief. He further submits that no prejudice would be caused to the petitioners if the complaint is not accompanied by the sworn affidavit of the complainant as directed by the Apex Court in *Priyanka Srivastava* case (1 supra).

¹ (2015) 6 SCC 287

6) The short question that falls for consideration is whether there was any application of mind by the trial Court while referring the matter to the police under Section 156 (3) of Cr.P.C.

7) In order to appreciate the same, it would be useful to extract the docket order, which reads as under:

“This is a private complaint filed by complainant against accused for the offences under Sections 406, 420 and 506 read with 120-B IPC. Heard the counsel for the complainant and perused the material before the Court. In view of the circumstances of the case and contents of the complaint and other material, I feel it requires some intensive and deep investigation by police. Therefore, the case is referred to S.H.O., P.S. Kharkana for investigation and report under Section 156 (3) Cr.P.C. by 27.05.2006.”

8) A reading of the order **only** shows that while referring the case the Court below perused the material placed before the Court; in view of the contents of the complaint and other material, felt that the same requires investigation.

9) Situation some what identical to the case on hand came up for consideration before the Apex Court in *Anil Kumar v. M.K.Aiyappa*². Dealing with the same, the Apex Court held as under:

"The scope of **Section 156(3)** CrPC came up for consideration before this Court in several cases. This Court in *Maksud Saiyed* [(2008) 5 SCC 668] examined the requirement of the application of mind by the Magistrate

² (2013) 10 SCC 705

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."

10) Similarly in *D.K.Pattanaik and another v. Station House Officer, Nallabelly Police Station and another*³ a learned Single Judge of this Court while dealing with an identical issue observed as under:

"29. On a careful consideration of the Scheme of the Code and the above mentioned judgments, I am of the view that even for ordering investigation by Police under [Section 156\(3\)](#) Cr.P.C., the Magistrate cannot act merely as a post office and he is bound to apply his mind before so doing."

11) Following the judgments referred to above, this Court in *S.Purnachandra Rao and another vs. State of Andhra Pradesh rep. by its Public Prosecutor, High Court of A.P., and another*

³ (2008) 1 ALT (CrI.) 321 (A.P)

remanded the matter back to the concerned Magistrate directing him to pass an order showing application of mind to the facts in issue while referring the case to police for investigation into a non-cognizable offences.

12) A reading of the material placed before the Court does not anywhere indicate that the trial Court has followed the procedure laid down by the Apex Court in Priyanka Srivastava Case (1 supra).

In the said case the Apex Court held as under:

“27. In our considered opinion, a stage has come in this country where [Section 156\(3\)](#) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under [Article 226](#) of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores. We have already indicated that there has to be prior applications under [Section 154\(1\)](#) and [154\(3\)](#) while filing a petition under [Section 156\(3\)](#). Both the aspects should be clearly spelt out in the application and necessary

documents to that effect shall be filed. The warrant for giving a direction that an application under [Section 156\(3\)](#) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under [Section 156\(3\)](#). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.”

- 13) Having regard to the above, the order under challenge is *set aside* and the matter is remanded back to the Court below with a direction to pass reference order afresh, in accordance with the guidelines laid down in the judgments referred to above. It is to be noted that since the defect in filing the complaint without the affidavit of the complainant, as directed in Priyanka Srivastava case (1 supra), is a curable one, the complainant is at liberty to file sworn affidavit before the Court below within a period of six (06) weeks from today.

14) Accordingly, the writ petition is allowed. There shall be no order as to costs. Consequently, miscellaneous petitions, if any, pending in this Writ Petition shall stand closed.

JUSTICE C. PRAVEEN KUMAR

03.04.2017
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