

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.

CRM-M-15873-2018 (O&M)
Date of Decision: 29.11.2018

Vijay Kumar Sharma

.....PETITIONER(s).

VERSUS

Bharat Somastamb and others

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

Present: Mr. Deepender Singh, Advocate
for the petitioner.

RAJ SHEKHAR ATTRI, J.(Oral)

Through this petition filed under Section 482 of Code of Criminal Procedure (in short, “Cr.P.C.”), the petitioner sought setting aside of order dated 19.4.2017 passed by learned Judicial Magistrate, 1st Class, Faridabad vide which he declined to register FIR under Section 156 (3) of Criminal Procedure Code (in short, “the Code”) rather took cognizance under Section 200 of Cr.P.C. of the complaint and also assailed order dated 20.12.2017 (Annexure P-4) passed by learned Revisional Court vide which revision filed by the petitioner was dismissed.

Brief facts as set out by first revisional court are as under : -

“ That petitioner had friendly relations with Bipin Somastamb and his brother Bharat Somastamb till the year

2015.

That Bipin Somastamb and Bharat Somastamb, i.e., the respondents, wanted to purchase cars and since they were blacklisted by banks as their Cibil records are not in accordance with the bank norms for grant of loan, they requested the petitioner to take loan for cars in petitioner's name and they will be regularly paying installments. They enticed the petitioner taking recourse to his friendships and succeeded in brainwashing and enticing the petitioner.

That being enticed, petitioner applied for loan and purchased two cars i.e. Tata Strom Car bearing No.HR-51-AU-8182 in January, 2013 after availing the loan from State Bank of India. The petitioner was further enticed to purchase another car i.e. Hyundai Verna Car bearing No.HR-51-AW-9987 in March, 2013 after availing the loan from Punjab National Bank.

That in view of the friendly relations with the aforesaid accused persons and the assurances given by accused persons at the time of purchase of said cars and obtained the possession of the said cars from the petitioner for their personal use and assured the petitioner that they shall continue to deposit the bank EMIs of the aforesaid cars to the respective banks and the petitioner need not worry about the same. However, despite using the said cars, the accused persons intentionally and malafidely did not pay the bank EMIs contrary to the assurances given to the petitioner, apparently with a view to cheat and defraud the petitioner in preplanned manner.

That the petitioner asked the accused persons several times to deposit the EMIs as due to the default in the repayment of EMIs, the petitioner is under sever tension and distress due to calls from the banks for recovery of the

defaulted EMIs of the said cars. The accused persons assured the petitioner for repayment of all the pending EMIs of the aforesaid cars.

That the petitioner due to intentional and malafide defaults of the accused persons in repayment of EMIs, has not been able to pay the EMIs of the said cars to banks since the dates of defaults in payment of EMIs by the accused persons.

That the petitioner had obtained a loan of Rs. 9,00,000/- from Punjab National Bank and loan of Rs. 10,00,000/- from State Bank of India. As both the aforesaid cars have been used and possessed by Bharat Somastamb and his family members since the date of their purchase, he was liable to pay the EMIs of the aforesaid cars to the petitioner. He was also liable to return the aforesaid loan to the petitioner.

That in October, 2015, the accused persons citing their friendly relations with the petitioner and assuring him that they need to sell both the aforesaid cars and as accused No.1 is well versed in the sale and purchase of cars and he would be able to find a prospective buyer for sale of aforesaid cars and want to pay petitioner's money with help of sale proceeds. They further represented that on finding customer, they might have to affect the transfer instantaneously as the customer might not be willing to wait to get the papers signed from the petitioner. Therefore for enabling themselves to get money for cars from customer immediately, Bharat Somastamb and Bipin Somastamb took signatures of petitioner on blank undated forms/documents for transfer of aforesaid cars.

That for the aforesaid acts, the above persons are liable for the offences of Criminal Breach of Trust and cheating in as much as they took possession of above cars of

petitioner and blank forms for transfer of said cars by deceiving the petitioner to make payment thereof to the petitioner. The intention of the accused persons is apparent from their conduct as they in a preplanned manner hatched a conspiracy to cheat and deceive the petitioner and during the period had issued several cheques towards repayment of the amount. However, even the said cheques could not be encashed and the EMIs were paid by petitioner. The accused persons have neither made payment of EMIs due against the aforesaid cars nor have they handed over the possession of the aforesaid cars, which stand hypothecated with the respective banks, who have initiated the legal action against the petitioner. The above persons never had any intention to make payment of said cars to the petitioner.

That for the above said facts, the petitioner made several complaints/representations to various police authorities on different intervals but police did not register any case and did not take any action against the above named accused persons.”

Along with the complaint, an application under Section 156 (3) of the Code was filed for the purpose of registration of the case but the said request was declined by learned Magistrate by passing the following order : -

“Complaint presented before me being illaqua Magistrate. A request for sending the present complaint under Section 156 (3) Cr.P.C. made. Finding no substance in sending the present complaint under the above stated section, prayer is hereby declined.

Complaint be checked and registered. Complainant was directed to step into the witness box but he sought adjournment. Heard. Allowed. Now, the case is adjourned to

12.5.2017 for preliminary evidence of the complainant.”

Learned Magistrate opted to take cognizance of the complaint and directed the petitioner to get record his statement under the provisions of Section 200 Cr.P.C. but inspite of giving his statement, the petitioner sought adjournment and preferred a criminal revisino before the learned Sessions Judge.

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

This Court has carefully considered the submission made on behalf of the parties and find no reason to interfere with the impugned order.

Under Chapter XIV of the Code, the conditions requisite for invoking of proceedings has been elaborately provided. Section 190 of the Code provides a stage to take cognizance of the offence by the Magistrate. It reads as under : -

“190. Cognizance of offences by Magistrates.

[\(1\)](#) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

[\(a\)](#) upon receiving a complaint of facts which constitute such offence;

[\(b\)](#) upon a police report of such facts;

[\(c\)](#) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

[\(2\)](#) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-

section (1) of such offences as are within his competence to inquire into or try.”

A bare perusal of the above said provisions transpires that the Magistrate can take cognizance in three conditions as stipulated in Section 190 Cr.P.C.

Now this Court will deal the moot question as to whether the Magistrate ought to have proceeded under Section 156 (3) of the Cr.P.C. or was justified in proceedings under Section 202(1) of Cr.P.C.

The two provisions are in two different chapters of the Code, though common expression 'investigation' is used in both the provisions. Normal rule is to understand the same expression in two provisions of an enactment in same sense unless the context otherwise requires. Heading of Chapter XII is "Information to the Police and their Powers to Investigate" and that of Chapter XV is "Complaints to Magistrate". Heading of Chapter XIV is "Conditions Requisite for Initiation of Proceedings". The two provisions i.e. Sections 156 and 202 in Chapters XII and XV respectively are as follows :

"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.

202. Postponement of issue of process. -

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, [and shall in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] 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 :

Provided that no such direction for investigation shall be made, -

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath :

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have

for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

Cognizance is taken by a Magistrate under Section 190 (in Chapter XIV) either on "receiving a complaint", on "a police report" or "information received" from any person other than a police officer or upon his own knowledge.

Chapter XV deals exclusively with complaints to Magistrates. Reference to Section 202, in the said Chapter, shows that it provides for "postponement of issue of process" which is mandatory if accused resides beyond the Magistrate's jurisdiction (with that situation this case does not concern) and discretionary in other cases in which event an enquiry can be conducted by the Magistrate or investigation can be directed to be made by a police officer or such other person as may be thought fit "for the purpose of deciding whether or not there is sufficient ground for proceeding". This Court is skipping the proviso as it does not concern the question under discussion. Clause (3) provides that if investigation is by a person other than a police officer, he shall have all the powers of an officer incharge of a police station except the power to arrest.

Chapter XII, dealing with the information to the police and their powers to investigate, provides for entering information relating to a 'cognizable offence' in a book to be kept by the officer incharge of a police station (Section 154) and such entry is called "FIR". If from the information, the officer incharge of the police station has reason to

suspect commission of an offence which he is empowered to investigate subject to compliance of other requirements, he shall proceed, to the spot, to investigate the facts and circumstances and, if necessary, to take measure, for the discovery and arrest of the offender (Section 157(1).

In *Lalita Kumari v. Govt. of U.P., 2013(4) R.C.R. (Criminal) 979 : 2013(6) Recent Apex Judgments (R.A.J.) 389 : (2014) 2 SCC 1*, this Court dealt with the questions :

"30.1. (i) Whether the immediate non-registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have a complaint immediately investigated upon allegations being made; and

30.2. (ii) Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused."

These questions were answered as follows :

"49. Consequently, the condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of Section 154(1), 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. The provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on

the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.

"Shall"

72. 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.

"Information"

73. The legislature has consciously used the expression "information" in Section 154(1) of the Code as against the expression used in Sections 41(1)(a)* and (g) where the expression used for arresting a person without warrant is "reasonable complaint" or "credible information". The expression under Section 154(1) of the Code is not qualified by the prefix "reasonable" or "credible". The non-qualification of the word "information" in Section 154(1) unlike in Sections 41(1)(a)* and (g) of the Code is for the reason that the police officer should not refuse to record any information relating to the commission of a cognizable offence on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, reasonableness or credibility of the said information is not a condition precedent for the registration of a case.

94. Principles of democracy and liberty demand a regular and efficient check on police powers. One way of keeping check on authorities with such powers is by documenting every action of theirs. Accordingly,

under the Code, actions of the police, etc. are provided to be written and documented. For example, in case of arrest under Section 41(1)(b) of the Code, the arrest memo along with the grounds has to be in writing mandatorily; under Section 55 of the Code, if an officer is deputed to make an arrest, then the superior officer has to write down and record the offence, etc. for which the person is to be arrested; under Section 91 of the Code, a written order has to be passed by the officer concerned to seek documents; under Section 160 of the Code, a written notice has to be issued to the witness so that he can be called for recording of his/her statement, seizure memo/panchnama has to be drawn for every article seized, etc.

107. While registration of FIR is mandatory, 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 concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for "anticipatory bail" under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the court.

108. It is also relevant to note that in ***Joginder Kumar v. State of U.P., 1994(2) R.C.R.(Criminal) 601 : (1994)4 SCC 260***], this Court has held that arrest cannot be made by the police in a routine manner. Some important observations are reproduced as under: (SCC pp. 267-68, para 20)

"20. ... No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."

111. Besides, the Code gives power to the police to close a matter both before and after investigation. A police officer can foreclose an FIR before an investigation under Section 157 of the Code, if it appears to him that there is no sufficient ground to investigate the same. The section itself states that a police officer can start investigation when he has "reason to suspect the commission of an offence". Therefore, the requirements of launching an investigation under Section 157 of the Code are higher than the requirement under Section 154 of the Code.

The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.

114. It is true that a delicate balance has to be maintained between the interest of the society and protecting the liberty of an individual. As already discussed above, there are already sufficient safeguards provided in the Code which duly protect the liberty of an individual in case of registration of false FIR. At the same time, Section 154 was drafted keeping in mind the interest of the victim and the society. Therefore, we are of the cogent view that mandatory registration of FIRs under Section 154 of the Code will not be in contravention of Article 21 of the Constitution as purported by various counsel.

115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.

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."

Hon'ble Supreme Court had discussed the real scope of Section 156 (3) of the Cr.P.C. in **Anil Kumar and others v. M.K.Aiyappa and another**; 2013 (4) RCR (Criminal) 586 wherein it has been observed as under : -

"11. The scope of Section 156(3) Cr.P.C. 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 Cr.P.C., 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) Cr.P.C., 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."

In the opinion of this Court, the prosecution under Section 156 (3) of the Cr.P.C. is to be initiated only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone issuance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued.

The Magistrate can also assess on receipt of the complaint as to whether, he, while conducting an inquiry, at the pre-summoning stage will be able to collect material available on record especially in cases which are based on documentary evidence such as cheating, forgery etc. It is not in the interest of justice to order registration of FIR under Section 156 (3) of Cr.P.C.

Under Cr.P.C. the Magistrate has been given vast powers which are much more than a police officer. He has power to arrest a person and can order search of any place and impound the articles or material which are required for investigation.

In these circumstances, it shall not be in the interest of justice to order registration of FIR under Section 156 (3) of the Cr.P.C. rather it

shall be in the interest of justice that the complaint should be tried before the Magistrate. In the case in hand, the petitioner applied for loan and purchased two cars in January, 2013. After obtaining loan from different banks, the petitioner did not return the loan and in fact, possession of the cars were obtained by the respondents. Circumstances of the case reveals that the case of the complainant will not hamper if Magistrate is opined to proceed further with the complaint under the provisions of Section 200 Cr.P.C.

The Magistrate was fully within his power and jurisdiction when he refused to accede to demand of the petitioner to send the application under Section 156 of the Code to police station and took cognizance himself. The Magistrate is having absolute discretion under this provision of law either to send the application to the police under Section 156 of the Code or himself take cognizance after taking into facts and circumstances of the case into account.

On an independent appraisal of the material available on record, this Court is of the view that the impugned orders dated 19.4.2017 (Annexure P-2) and 20.12.2017 (Annexure P-4) do not suffer from any irregularity, infirmity and illegality and they do not warrant any interference by this Court. No other point is argued before me as such this petition is devoid of merits and the same is dismissed.

Nothing expressed above shall affect the merits of the case.

(RAJ SHEKHAR ATTRI)
JUDGE

November 29, 2018
Paritosh Kumar

Whether speaking/reasoned:
Whether Reportable:

Yes/No
Yes/No