

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.2199 of 2015

Arising Out of PS. Case No.-61 Year-2010 Thana- MOHANIYA District- Kaimur (Bhabua)

Sanjay Kumar Tiwari, Son of Sri Subash Tiwari, Resident of Village -
Betawar, P.S - Jamaniya, District - Gazipur (UP), At present posted as
Superintendent - Custom, Varanashi (UP)

... .. Petitioner/s

Versus

1. The State of Bihar
2. Shyam Lal Gupta @ Pappu ji, Son of Shri Purnmasi Gupta, Resident of G.T
Road, Mohaniya, Near Vijay Cinema, P.S - Mohaniya, District - Kaimur
(Bihar), Permanent Add. Resident of Vill. - Ratwar, P.S - Mohaniya, District
- Kaimur (Bhabhua)

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. Kamal Nayan Choubey, Sr. Advocate Mr. Rajesh Kumar Mishra, Advocate Mr. Prashant Kumar, Advocate
For the O.P. No. 2	:	Mr. Sandip Kumar, Advocate
For the State	:	Mr. Shyam Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT

Date : 15-07-2019

Heard learned counsel for the parties.

2. This application, under Section 482 Cr.P.C., is for
quashment of order dated 13.03.2014 passed in Mohaniya P.S.
Case No. 61 of 2010 whereby the learned court below has taken
cognizance against the petitioner for offences under Sections 386,
384 and 120B of the Indian Penal Code.

3. The background of the case is that investigation of
Narcotics Control Bureau Crime No. 111/INV/SEIZ/09/08 was
going on. During investigation of the case, co-accused Bhim Singh



made statement of disclosure before the Narcotics Authorities under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short "NDPS Act). In that statement, besides other admissions, Bhim Singh disclosed that he is in business of the narcotics and through Ayodhya Chouhan and Raghuveer Pandey, he used to send the narcotics to Bangladesh. Thereafter, the authorities raided the house of Ayodhya Chouhan. Ayodhya Chouhan was not present at the time of raid, rather his wife Sushila Chauhan was there. Statement of Sushila Chauhan was also recorded under Section 67 of the NDPS Act on 18.07.2009. In her statement Sushila Chauhan disclosed that her husband prepares heroin in the backside of the bathroom of the house. Besides others, Pappu, Son of Purnmasi of village Ratwar, Bhabua used to visit her house to purchase heroin. Thereafter, the petitioner being Officer of the Narcotics Control Bureau send notice to Pappu, Son of Purnmasi (complainant of this case) under Section 67 of the NDPS Act on 24.11.2009. On non-response by Pappu, another notice was sent on 18.12.2009 vide Annexure 5 and 6 respectively. This notice was also not responded by Shyamlal Gupta @ Pappu, rather the present complaint case was filed by Shyamlal Gupta @ Pappu on 16.02.2010 against the petitioner.



4. Allegation in the complaint based FIR is that the complainant is proprietor of Rice Mill at Mohaniya. Both the accused persons i.e. the petitioner and co-accused Jitendra Kumar Tiwary visited the business premise of the complainant and they disclosed their identify as Officer of the Narcotics Control Bureau. They further stated that they have power to seize any vehicle and put seal on any business premise under the Narcotics Act. Co-accused Jitendra Kumar Tiwary took the complainant at lonely place and demanded Rs.50,000/- (rupees fifty thousand) immediately and asked for further payment of Rs.1,50,000/- (one lac fifty thousand) in near future. The complainant managed Rs.30,000/- (thirty thousand) available with him and he paid to co-accused Jitendra Kumar Tiwary and in turn co-accused, Jitendra paid the said amount to the petitioner. According to complaint petition, these acts were committed on 02.11.2009. Further disclosure is that in the meantime, the petitioner sent registered notices already referred as Annexure-5 and 6 and even called on mobile of the complainant for payment of the remaining amount. Thus, the allegation is of commission of extortion.

5. Learned counsel for the petitioner submits that the petitioner is a public servant posted in the Narcotics Control Bureau and was competent to call for information from the



complainant in view of the powers under Section 67 of the NDPS Act and for his official duties, the petitioner is immune from criminal prosecution under Section 69 of the NDPS Act which reads as follows: “no suit, prosecution or other legal proceeding shall lie against the Central Government or a State Government or any officer of the Central Government or of the State Government or any other person exercising any powers or discharging any functions or performing any duties under this Act, for anything in good faith done or intended to be done under this Act or any rule or order made thereunder”.

6. Submission is that the petitioner apparently acted in good faith by sending notices to the complainant under Section 67 of the NDPS Act to furnish certain information in the light of disclosure made by Sushila Chauhan regarding involvement of the petitioner in the crime alleged. The petitioner was exercising his power being authorized officer under Section 42 of the NDPS Act to perform the aforesaid duty. The complainant with mala fide intention without complying direction of the petitioner lodged false complaint case of demand and extortion as alleged in the complaint petition, just to pressurize and save skin from the clutches of law.



7. Next contention is that the complaint petition was filed in a casual manner after three months of the occurrence which was allegedly committed in the month of November, 2009 without any information to the police or approach to the police for immediate action and the learned Magistrate in a casual manner directed institution of the FIR in exercise of power under Section 156(3) Cr.P.C. On the last page of the complaint petition, the Magistrate has recorded as follows, “Copy of Complaint No. 174 of 2010 be forwarded to the S.H.O., Mohaniya, Mohaniya Police Station for institution of F.I.R. and investigation”. The aforesaid order was recorded on 17.02.2010.

8. Learned counsel for the petitioner submits that the case of the petitioner is covered by the judgment of the Hon’ble Supreme Court in **Mrs. Priyanka Srivastava & Anr. vs. State of U.P. & Ors.** reported in **2015(3) PLJR (SC) 78**.

9. On the other hand, learned counsel for the opposite party no. 2 submits that the trial is at the stage of prosecution evidence and the petitioner never brought to the notice of the learned court below that the petitioner has already challenged the cognizance order before the High Court nor the petitioner filed a petition for discharge at the appropriate stage of hearing on the charges, stating the fact that no offences alleged are made out.



Petitioner candidly succumbed to the jurisdiction of the court to face trial. Hence, this Court should not interfere with the cognizance order considering the stage of the trial. Next contention is that **Priyanka Srivastava's** case (**supra**) is not applicable in the present facts and circumstances of this case because in **Priyanka Srivastava's** case (**supra**), the complainant had prayed for sending the complaint petition for registration of a police case without following the procedure of Section 154 Cr.P.C. especially sub-section 3 of Section 154 Cr.P.C. In the present case, simple prayer of the complainant was for proceeding with the case and the Magistrate under Section 156(3) Cr.P.C. is competent to order a police investigation of the case, suo motu.

10. The factual position of this case is that the petitioner is empowered under Section 42 of the NDPS Act, as such, competent to call for information in exercise of power under Section 67 of the NDPS Act. The petitioner had material before him to call for information from the complainant of this case as involvement of the complainant in the referred criminal case was perceivable in view of the disclosure statement of Sushila Chauhan. The petitioner sent last notice to the complainant on 18.12.2009 and after receipt of notice, the complaint was filed on 16.02.2010 though alleged act of demand of money took place on



02.11.2009. Thus, apparently the good faith of the petitioner is evident. As such, the petitioner is protected from any prosecution in view of Section 69 of the NDPS Act.

11. In view of the protection of law available to the petitioner from inception, it cannot be argued that since the stage of trial has changed/progressed without any objection by the petitioner before the learned trial court, the legal protection of the petitioner has no meaning and it loses its force.

12. In **Anil Kumar vs. M.K. Aiyappa** reported in **2013(10) SCC 705**, the Hon'ble Supreme Court observed as follows:-

“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 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.”

13. In Priyanka Srivastava’s case (supra), the Hon’ble
Supreme Court observed as follows:-

“25. Issuing a direction stating "as per the application" to lodge an FIR creates a very unhealthy situation in the society and also reflects the erroneous approach of the learned Magistrate. It also encourages the unscrupulous and unprincipled litigants, like the respondent no.3, namely, Prakash Kumar Bajaj, to take adventurous steps with courts to bring the financial institutions on their knees. As the factual exposition would reveal, he had prosecuted the earlier authorities and after the matter is dealt with by the High Court in a writ petition recording a settlement, he does not withdraw the criminal case and waits for some kind of situation where he can take vengeance as if he is the emperor of all he surveys. It is interesting to note that during the tenure of the appellant No.1, who is presently occupying the position of Vice-President, neither the loan was taken, nor the default was made, nor any action under the SARFAESI Act was taken. However, the action under the SARFAESI Act was taken



on the second time at the instance of the present appellant No.1. We are only stating about the devilish design of the respondent No.3 to harass the appellants with the sole intent to avoid the payment of loan. When a citizen avails a loan from a financial institution, it is his obligation to pay back and not play truant or for that matter play possum. As we have noticed, he has been able to do such adventurous acts as he has the embedded conviction that he will not be taken to task because an application under Section 156(3) Cr.P.C. is a simple application to the court for issue of a direction to the investigating agency. We have been apprised that a carbon copy of a document is filed to show the compliance of Section 154(3), indicating it has been sent to the Superintendent of police concerned.

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 of Article 226 of the Constitution of India. (*emphasis is mine*)

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 Sections 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 the 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.”



14. It is evident that the complaint petition is not affidavited and the order of the Magistrate referring the matter for registration of police case under Section 156(3) Cr.P.C. reflects non-application of judicial mind, inasmuch as, the learned Magistrate did not consider that the petitioner being a public servant has got protection from prosecution for anything done by him in good faith in exercise of power under the NDPS Act. Therefore, the order of the Magistrate directing issuance of process is itself bad in law. Hence, entire criminal prosecution arising out of that order is unsustainable. Accordingly, the impugned order and the subsequent criminal proceeding against the petitioner stands hereby quashed.

(Birendra Kumar, J)

Kundan/-

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	16.07.2019
Transmission Date	16.07.2019

