

\$~24

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 14th January, 2019

+ **CRL.REV.P. 41/2019**

VIJAY GUPTA Petitioner

Through: Mr. Kunal Kalra, Advocate

versus

DEVELOPMENT CREDIT BANK LTD. & ORS..... Respondents

Through: Mr. Parth Tandon, Advocate

CORAM:

HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J. (ORAL)

CRL.M.A.575/2019

Allowed, subject to all just exceptions.

The application is disposed of.

CRL.REV.P. 41/2019 & CRL.M.A.576/2019

1. This criminal revision petition has been filed under Section 397 of the Code of Criminal Procedure, 1973 (Cr. PC) for quashing of the order dated 16.11.2018 [hereinafter referred to as 'impugned order'] passed by the learned Special Judge (PC Act) (CBI)-3, Saket Courts, New Delhi [hereinafter referred to as 'Trial Court'] without application of its judicial mind while dismissing the application under Section 156(3) Cr.PC in CC No.679/2018 titled Vijay Kumar Gupta v. Development Credit Bank Ltd.

2. The brief facts emanating from the record which can be summarized from the impugned order are that the complainant/petitioner Vijay Kumar Gupta, who was engaged in the business of promotion, development and construction of real estate etc. had entered into a property development agreement dated 21.02.2003 with Mallika Verma in respect of property bearing No. L-8, Kalkaji measuring 300 sq. yards. She had purchased the property after taking loan from Development Credit Bank Ltd. At the time of making of the agreement, she had assured the complainant that she would make the payment of the entire loan amount to the bank. In lieu of payment of Rs.1,15,00,000/- and construction of the entire building, she would execute the sale deed of the second floor after taking 'No Objection' from the bank. It is stated that the property had already been mortgaged with the bank when the agreement was entered into. It was agreed upon that the complainant at his own cost and expenses would reconstruct the building comprising of basement, stilt, ground floor, first floor, second floor and third floor with terrace thereon after obtaining requisite permission, sanction/approval from the competent authority. It is stated that the complainant raised the entire construction in terms of the agreement to the entire satisfaction of Ms Mallika Verma within the stipulated period as per the agreement. After

the construction, he sent a notice to Ms Mallika Verma calling upon to make arrangement for the execution of the Sale Deed in his favour in respect of the second floor. He also handed over the entire building to her except the second floor on her assurance that she would execute the Sale Deed of the second floor in his favour. He had already made the payment of Rs.1,15,00,000/- to her. It is stated that instead of executing the Sale Deed in his favour, she executed the Sale Deed of first floor and third floor in favour of a third party after taking 'NOC' from the bank without repaying the loan amount. It is further stated that though Ms Mallika Verma had undertaken to ensure the payment of the entire bank loan and release the title deeds of the said property from the bank but with the connivance of the bank and its officials, she took 'No Objection' for selling the other floors except the second floor without making the payment of the loan amount for transfer of ownership of basement, first floor and third floor. She after conniving with the bank and its officials shifted the entire loan amount only to the second floor. It is stated that she did not pay the loan amount even after selling the other floors and that the aforesaid loan became NPA.

It is stated that Mallika Verma and her husband Hemant Verma in the similar manner had also mortgaged other properties with the banks

for taking loan which also turned into NPA. They are in the habit of creating disputes in respect of the properties with their partners and defrauding the people. Few FIRs have also been registered against them. The bank and its officials in order to wriggle out from their illegal acts declared the loan amount NPA and filed the recovery case for Rs.5.30 crores approximately before DRT claiming its right on the second floor which was to go to the complainant. In addition, Ms Mallika Verma also received Rs.1.15 crores from the complainant without depositing it with the bank towards repayment of loan. The same bank within two days i.e. on 23.09.2015 for the first time issued the Public Notice that the property is under mortgage and cautioned the public not to deal with the borrowers in respect of the above property and on 25.09.2015 i.e. within two days, she voluntarily surrendered the physical possession of whole of the building. It is stated that the accused persons committed various offences including cheating, criminal breach of trust etc. The complainant approached the police but no action was taken. He also approached the higher officials but no action was taken. It is also stated that the accused persons are liable for the offences punishable under Sections 403, 406, 420, 120B/34 Indian Penal Code, 1860 and other provisions of law and they may be prosecuted.

3. The Trial Court, while passing the order, observed in paras 10, 11 and 12 as under:

“10. It is well settled that when a Magistrate receives a complaint u/s 156(3) Cr. PC, he is not bound to take immediate cognizance even if the facts (as alleged in the complaint) disclose the commission of the offence. If on a reading of the complaint, the Magistrate finds that the allegations therein disclose a cognizance offence and forwarding of the complaint to the police for investigation u/s 156(3) Cr. PC will be conducive to justice and save the valuable time of the Court from being utilized in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as a preferred alternative to immediately taking cognizance of the offence and himself holding the enquiry.

11. Power to order police investigation u/s 156(3) Cr. PC is different from the power to direct investigation conferred by section 202 (1) Cr. PC. This power u/s 156(3) Cr. PC has to be exercised judicially on proper grounds and not in a mechanical manner. If the complaint does not indicate that any evidence is required to be collected and preserved and the accused with their names and addresses as well as the witnesses are known to the complainant, then in such a case, no investigation by the police is required. The Court may proceed to take cognizance and decline the request u/s 156(3) Cr. PC. The word *may*, *not*, *shall* have been used in this section.

12. In *M/s Skipper Beverages Pvt. Ltd v State*, 2001 (2) JCC (Delhi) 67 and *Arvindbhai Ravjibhai Patel v. Dhirubhai Shambhubhai* 1998(1) Crimes 351, it was observed that if all the evidence is within the reach and knowledge of the complainant, nothing new is to be collected for which the assistance of police agency is

required and the identity of the accused persons is known to the complainant. There is no ground for the court to exercise jurisdiction u/s 156(3) Cr. PC.”

4. The Trial Court, while disposing of the application under Section 156(3) Cr. PC and allowing the complaint to proceed under Section 200 Cr. PC, passed a detailed order and held in paras 15 and 16 as under:

“15. Facts and circumstances of the present case although disclose commission of cognizable offence but in this case all the information and the details are in the possession of the complainant and his witnesses and there is no need for directing the investigation u/s 156(3) Cr PC. I am of the view that forwarding of this complaint to the police for investigation would not be conducive to justice. The complainant is well conversant with the identity of proposed accused persons. Further, the option for the police investigation u/s 202 Cr PC is kept open for consideration.

16. After going through the complaint and the documents placed alongwith the complaint, I do not find any ground to direct investigation u/s 156(3) Cr. PC. Let the complaint be proceeded u/s 200 Cr. PC.”

5. Learned counsel for the petitioner submitted that the learned Trial Court has failed to appreciate that investigation is required to be done by the police and the petitioner has not been able to gather all the evidence and the documents. Learned counsel for the petitioner further submitted that the Trial Court has failed to appreciate that the respondents have committed various offences and the police has failed to do its duty.

Therefore, the Trial Court ought to have passed a direction for investigation of the present case. Learned counsel for the petitioner further submitted that the Trial Court has not passed a reasoned order and has erred in law while passing the impugned order, as it is a well-settled law that the registration of the FIR is mandatory.

6. It would now be appropriate to discuss the law in this regard. The Apex Court has, time and again, held that direction in Section 156(3) of the Cr. PC is to be issued 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 straightway direct investigation, such a direction is issued. Cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine “existence of sufficient ground to proceed”. The exercise of discretion is guided by interest of justice from case to case. The power, in short, in effect under Section 156(3) Cr. PC warrants application of judicial mind. The litigant cannot, at its own whim, invoke authority of the Magistrate. Therefore, the applications

under Section 156(3) of the Code are to be supported by an affidavit, duly sworn by the applicant seeking invocation of jurisdiction of the Magistrate under Section 156(3) of the Cr. PC.

7. This Court, in **Smt. Mithlesh v. The State of NCT of Delhi & Ors.**, in Crl.Rev.P.337/2008, decided on 12.8.2009, held that “it is not incumbent in each and every case that the Magistrate must direct registration of an FIR and the consequent investigation by the local police. The Magistrate can proceed under Section 200 Cr.P.C. by examining the complainant and the other witnesses which are produced and then proceed to deal with the complaint under Sections 202 to 204 Cr. P.C. It seems that the petitioner wants to put pressure on the other side by registration of the FIR. This is so on account of the fact that once an FIR is registered, the other side namely the accused persons would be on the run because they will face an imminent threat of arrest and secondly, it becomes convenient for the complainant as well because it becomes a State’s case where the presence of the complainant is not required on each and every date of hearing. That is the modus operandi which is invariably adopted and aimed at by every petitioner. This cannot be permitted to be done more so in a case of the present nature where the petitioner is in litigation with the accused persons/respondents.

Therefore, the Court was of the considered view that the learned Magistrate was well within its right in refusing to give directions to the local police to register the FIR and investigate into the matter.”

8. In ***Chandrika Singh v. State of U.P. & Ors.***, (xviii) 2007 ACC 777, it was held that “the Magistrate is not always bound to pass an order to register the case and order investigation after receipt of the application under Section 156(3) Cr. PC disclosing a cognizable offence. The Magistrate may use his discretion judiciously and if he is of the opinion that in the circumstances of the case, it will be proper to treat the application as a complaint case then he may proceed according to the procedure provided under Chapter XV of the Cr. PC. The Court was also of the opinion that it is not always mandatory in each and every case for the Magistrate to pass an order to register and investigate on receipt of the application under Section 156(3) Cr. PC.”

9. The Division Bench of the Allahabad High Court, in the matter of ***Sukhwasi v. State of Uttar Pradesh***, 2008 CrLJ 472, held that “the Court is always apprehensive whether it would be safe to even initiate investigation. The use of the word “may” in Section 156(3) Cr. PC instead of “shall” is very significant and clearly indicates that the Magistrate has the discretion in the matter and can, in appropriate cases,

refuse to order investigation. The Court further held that applications under Section 156(3) Cr. PC are now coming up in torrents and hence, provisions under Section 156(3) Cr. PC should be used sparingly. They should not be used unless there is something unusual and extra ordinary like miscarriage of justice, which warrants a direction to the Police to register a case. Such applications should not be allowed because the law provides them with an alternative remedy of filing a complaint, and therefore, recourse should not normally be permitted for availing the provisions of Section 156(3) Cr. PC. It is not incumbent upon a Magistrate to allow an application under Section 156(3) Cr. PC and there is no such legal mandate. He may or may not allow the application in his discretion and can treat an application under Section 156(3) Cr. PC. as a complaint.”

10. I would like to reiterate *M/s Skipper Beverages Pvt. Ltd v State* (supra), at the end, wherein it is observed that if all the evidence is within the reach and knowledge of the complainant, nothing new is to be collected for which the assistance of police agency is required and the identity of the accused persons is known to the complainant. There is no ground for the court to exercise jurisdiction u/s 156(3) Cr. PC.

11. Thus, the Magistrate is not supposed to act mechanically and direct registration of FIR in each and every case in routine and casual manner. Criminal law is not expected to be set in motion on mere asking of a party. There has to be some substance in the complaint filed and it is only if it appears that the allegations are serious enough and establish the commission of cognizable offence required through investigation by the police, an FIR should be ordered to be registered. The Magistrate can treat an application under Section 156(3) Cr. PC as a complaint case, adopt the procedure of the complaint case by recording evidences under Sections 200 and 202 Cr. PC and then either proceed under Section 203 Cr. PC and dismiss the complaint if no offence is made out on summoning the accused under Section 204 Cr. PC whose complicity is disclosed in the inquiry conducted by it under Sections 200 and 202 Cr. PC.

12. Now, reverting back to the present case. I fully concur with the findings of the Trial Court that in this case, all the information and details are in possession of the petitioner and his witnesses, which fact also stands even demonstrated from the copy of the complaint filed at the Police Station and sent to the higher Officers of the Police. The Trial Court has properly applied its judicial mind while passing the impugned

order, holding that forwarding of the complaint for investigation would not be conducive to justice, as the complainant is well conversant with the identity of the proposed accused persons and all the information and details are in his possession as well as in the possession of his witnesses, however, the option for the police investigation under Section 202 Cr.PC is kept open for consideration. As such, if need arises for police investigation, such possibility is not precluded as the Trial Court has kept such option open for consideration under Section 202 Cr.P.C.

13. In view of the above facts and the judgments discussed hereinabove, this Court is of the view that no interference is required in the impugned order. The petition lacks merit and deserves to be dismissed. The same is accordingly dismissed. Pending application is also dismissed.

CHANDER SHEKHAR, J

JANUARY 14, 2019/tp