IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 8861 of 2020

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SAHIDABEN RAHIMSHA FAKIR
Versus
STATE OF GUJARAT

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Appearance:
MR SL VAISHYA(960) for the Applicant(s) No. 1
for the Respondent(s) No.
10,11,12,13,14,15,16,17,18,19,2,20,21,22,23,24,25,26,27,28,3,4,5,6,7,8,9
MS. SHRUTI PATHAK, APP for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE A.S. SUPEHIA**

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Date : 24/12/2020
ORAL ORDER

1. By way of the present petition, the petitioner has prayed for to direct the respondent authorities to take legal action, given in a written complaint dated 25.07.2020 and register the complaint/FIR against the respondents No. 4 to 28 under Section 154 of the Code of Criminal Procedure, 1973.

2. It is the case of the present petitioner that on 27.02.2020 one Vinodbhai Ajabhai Makwana has lodged the complaint against her son i.e. Kasamshah at Radhanpur Police Station with regard to the offence of rape committed on his daughter. It is further submitted that the son of the petitioner have been released on bail. Thereafter, when the petitioner along with her two daughters were at home, at that time original accused Nos. 4 to 28 having with stick and pipe reached at her house and given a threat and assaulted them. Learned advocate Mr. though the written complaint is given by the applicant on 256.07.2020 no FIR is registered against the respondent Nos. 4 to 28. Thus, he has submitted that appropriate directions may be issued for registration of FIR against the respondents No.4 to 28.

3. At this stage, it would be apposite to incorporate the observations made by the Apex Court in the case of M. Subramaniam v. S. Janki dated 20.03.2020 passed in Criminal Appeal No.102 of 2011. The Apex Court has observed thus;-

> *"5. While it is not possible to accept the contention of the appellants on the question of locus standi, we are inclined to accept the contention that the High Court could not have directed the registration of an FIR with a direction to the police to investigate and file the final report in view of the judgment of this Court in Sakiri Vasu v. State Of Uttar Pradesh And Others in which it has been inter alia held as under:*
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> *"11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 of CrPC, then he can approach the Superintendent of Police under Section 154(3) CrPC by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application (2008) 2 SCC 409 under Section 156(3) CrPC before the learned Magistrate concerned. If such an application under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can 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.*
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> *12. Thus in Mohd. Yousuf v. Afaq Jahan this Court observed: (SCC p. 631, para 11) "11. 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 investigation 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 complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."*
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> *13. The same view was taken by this Court in Dilawar Singh v. State of Delhi (JT vide para 17). We would further clarify that even if an FIR has been registered and even if the police has made the investigation, or is*

actually making the investigation, which the aggrieved person feels is not proper, such a person can approach the Magistrate under Section 156(3) CrPC, and if the Magistrate is satisfied he can order a proper investigation and take other suitable steps and pass such order(s) as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under Section 156(3) CrPC.

14. Section 156(3) states:"156. (3) Any Magistrate empowered under Section 190 may order such an investigation as abovementioned." The words "as abovementioned" obviously refer to Section 156(1), which contemplates investigation by the officer in charge of the police station.

15. Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII CrPC. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

16. The power in the Magistrate to order further investigation under Section 156(3) is an independent power and does not affect the power of the investigating officer to further investigate the case even after submission of his report vide Section 173(8). Hence the Magistrate can order reopening of the investigation even after the police submits the final report, vide State of Bihar v. J.A.C. Saldanha (SCC : AIR para 19).

17. In our opinion Section 156(3) CrPC 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 FIR 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) CrPC, 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.

18. It is well settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary for its execution."

6. The said ratio has been followed in Sudhir Bhaskarrao Tambe v. Hemant Yashwant Dhage and Others2, in which it is observed.

*"**2.** This Court has held in Sakiri Vasu v. State of U.P., that if a person has a grievance that his FIR has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go to the High Court under Article 226 of the Constitution of India, but to approach the Magistrate*

> *concerned under Section 156(3) CrPC. If such an application under Section 156(3) CrPC is made and the Magistrate is, prima facie, satisfied, he can direct the FIR to be registered, or if it has already been registered, he can direct proper investigation to be done which includes in his discretion, if he deems it necessary, recommending change of the investigating officer, so that a proper investigation is done in the matter. We have said this in Sakiri Vasu case because what we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.*
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> ***3.*** *We are of the opinion that if the High Courts entertain such writ petitions, then they will be flooded with such writ petitions and will not be able to do any other work except dealing with such writ petitions. Hence, we have held that the complainant must avail of his alternate remedy to approach the Magistrate concerned under Section 156(3) CrPC and if he does so, the Magistrate will ensure, if prima facie he is satisfied, registration of the first information report and also ensure a proper investigation in the matter, and he can also monitor the investigation.*
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> ***4.*** *In view of the settled position in Sakiri Vasu case, the impugned judgment of the High Court cannot be sustained and is hereby set aside. The Magistrate concerned is directed to ensure proper investigation into the alleged offence under Section 156(3) CrPC and if he deems it necessary, he can also recommend to the SSP/SP concerned a change of the investigating (2016) 6 SCC 277 officer, so that a proper investigation is done. The Magistrate can also monitor the investigation, though he cannot himself investigate (as investigation is the job of the police). Parties may produce any material they wish before the Magistrate concerned. The learned Magistrate shall be uninfluenced by any observation in the impugned order of the High Court.*
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> ***8****. In these circumstances, we would allow the present appeal and set aside the direction of the High Court for registration of the FIR and investigation into the matter by the police. At the same time, our order would not be an impediment in the way of the first respondent filing documents and papers with the police pursuant to the complaint dated 18.09.2008 and the police on being satisfied that a criminal offence is made out would have liberty to register an FIR. It is also open to the first respondent to approach the court of the metropolitan magistrate if deemed appropriate and necessary. Equally, it will be open to the appellants and others to take steps to protect their interest."*

4. While referring to the judgment of ***Sudhir Bhaskarrao Tambe (supra)***, it is observed that if the High Court entertain such writ petitions seeking registration of FIR, then they will be flooded with such writ petitions and will not be able to do any other work, except dealing with them. It is specifically held that the complainant must avail of his alternate remedy to approach the Magistrate concerned under section

156(3) of Cr.P.C and if he does so, the Magistrate will ensure, if *prima facie* he is satisfied, registration of the FIR and also ensure a proper investigation in the matter. While approving the aforenoted view, the Supreme Court has set aside the direction of the High Court for registration of the FIR and has directed the respondent thereto to approach the court of Magistrate if deem appropriate and necessary. Thus, the law on the registration of FIR is well settled and has been reiterated in the recent judgment of the Supreme Court as noted herein above.

5. In the present case, the petitioner has not approached the concerned Magistrate and has directly approached this Court for the aforesaid prayer.

6. Under the circumstances and in light of the observations made by the Apex Court, the writ petition is rejected since the petitioner has the remedy to approach the approach the concerned Magistrate under section 156(3) of the Cr.PC.

7. It is noticed by this Court that various applications seeking registration of FIR are being filed before this Court directly without approaching the concerned Magistrate under Section 156(3) of the Code. Such applications which are directly filed are in direct conflict with the observations of the Apex Court. The Apex Court has expressed its concern with regard to filing of such applications/petitions directly before the High Court since filing of such petitions/applications are an unnecessary burden.

8. With these observations the present application is rejected.

Sd/-
(A. S. SUPEHIA, J)

NEHA GUPTA // Vishal Mishra