

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

MONDAY, THE 13TH DAY OF FEBRUARY 2023 / 24TH MAGHA, 1944

CRL.MC NO. 9620 OF 2022

AGAINST THE ORDER DATED 23.11.2022 IN CMP NO.2948/2022 OF
JUDICIAL MAGISTRATE OF FIRST CLASS-IV (IN CHARGE OF JFMC-I),
THIRUVANANTHAPURAM

PETITIONER/COMPLAINANT:

FEMEENA.E, AGED 41 YEARS
W/O MUHAMMED SHA, MANNATH, SOUTH ROAD
MUDAVANMUGAL, POOJAPPURA,
THIRUVANANTHAPURAM, PIN - 695012.

BY ADVS.SRI.PRASUN.S
N.A.RETHEESH

RESPONDENT/STATE:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA,
ERNAKULAM, PIN - 682031.

G SUDHEER,PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 13.02.2023, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

"C.R."

ORDER

The challenge in this Crl.M.C. is to the order dated 23.11.2022 in CMP.No.2948 of 2022 passed by the Judicial First Class Magistrate Court-I, Thiruvananthapuram. The petitioner is the complainant in the Court below. She is an entrepreneur in the field of preschool education for children. She is running a kindergarten at Pongumoodu. The kindergarten was established on a property having an extent of 30 cents of land with a building bearing No.BN-52 (SIVA); T.C.5/4372 at Bapuji Nagar, Thiruvananthapuram. The land and building were leased out by one Sivaprakash to the complainant.

2. Sri.Sivaprakash initiated steps to evict the petitioner from the tenanted premises. The petitioner filed a suit before the Munsiff's Court, Thiruvananthapuram, against Sri.Sivaprakash seeking protection against forcible eviction. An interim order was passed by the Munsiff's Court in favour of the petitioner. During the pendency of the suit, Sri.Sivaprakash entered into an agreement with one Sri.Ajaya Kumar for the sale of the tenanted premises. Sri.Sivaprakash and his lawyer Sri.Zakeer Husain jointly made an attempt to evict the petitioner. On

11.10.2022, the petitioner found new locks installed on the doors of the building. The petitioner filed a complaint before the Station House Officer, Sreekaryam Police Station. Sri.Sivaprakash and his lawyer committed theft of the valuables that belong to the petitioner between the evening of 28.10.2022 and the morning of 31.10.2022, and thereafter, a suit was instituted as O.S.No.1620/2022 before the Munsiff's Court claiming that the petitioner had voluntarily vacated the tenanted premises and that she has attempted to trespass upon the building.

3. The petitioner instituted a complaint against Sri.Sivaprakash and Sri.Zakeer Husain alleging offences under Sections 294(b), 341, 380, 447, 448, 451(ii), 509 and 34 of the Indian Penal Code.

4. The petitioner prayed for referring the complaint to the Police under Section 156(3) of Cr.P.C. The learned Magistrate passed the following order:-

“Since the matter is pending consideration before the civil courts, I find that an enquiry u/s.202 of Criminal Procedure Code is suitable and necessary in this case. In the result, the case is posted for recording the sworn statement of the complainant to 05.12.2022.”

This order is under challenge in this Crl.M.C.

5. Heard the learned counsel for the petitioner and the learned Public Prosecutor.

6. The learned counsel for the petitioner contended that the Court below failed to apply sound judicial reasoning while exercising the discretion under Section 156(3) Cr.P.C.

7. Section 156 reads thus:-

“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.”

8. The expression “may” in Section 156(3) Cr.P.C. indicates the discretion of the Magistrate to direct the complainant to examine witnesses under Sections 200 and 202 Cr.P.C. instead of directing an investigation under Section 156(3).

9. In **Sakiri Vasu v. State of U.P. [(2008) 2 SCC 409]**, the Apex Court , while dealing with the scope of Section 156(3) Cr.P.C., held that if 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. It was further held that the Magistrate could also, under the same provision, monitor the investigation to ensure a proper investigation.

10. In **Sakiri Vasu** (supra), the Apex Court observed that 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.

11. In **Srinivas Gundluri and Others v. Sepco Electric Power Construction Corporation and Others [(2010) 8 SCC 206]**, the Apex Court observed that on a bare reading of the complaint, if the Magistrate finds that a cognizable offence is disclosed, then the Magistrate instead of applying his mind to the complaint for deciding whether or not there are sufficient grounds for proceeding, may direct the Police for investigation.

12. In **Sakiri Vasu** (supra) on the scope of Section 156(3) Cr.P.C., the Apex Court observed thus:-

“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.”

13. The declaration of law on the scope of Section 156(3) Cr.P.C. is that the Magistrate has wide powers under Section 156(3), which ought to be exercised for the ends of justice.

14. Coming to the discretion to be exercised by the Magistrate. While dealing with a complaint under Section 156(3) Cr.P.C., it is to be noted that the discretion implied in the expression “may” in Section 156(3) cannot be exercised arbitrarily. The discretion must be guided by judicial reasoning. The test to be applied, while considering the question whether a complaint is to be referred to the Police for investigation, is the “need for Police investigation”. The need for police investigation depends upon the nature of the allegations. In a case where the allegations warrant a recovery under Section 27 of the Evidence Act, it would be necessary to entrust that task to the Police. If it is alleged that the documents or other material objects are in the physical possession of the accused or other persons then, in the interest of justice, the Police would be given the task of investigating and recovering them by resorting to the power under the Cr.P.C. In such cases, without ordering an investigation as provided under Section 156(3), the complainant cannot be in a position to retrieve the relevant evidence regarding his allegations. This may lead to putting the

complainant handicapped in that he would be failing to prove his case without being able to bring the relevant materials having probative value on record.

15. While dealing with a complaint alleging sexual harassment wherein the Magistrate refused to refer the complaint for investigation, the Apex Court in **XYZ v. State of Madhya Pradesh and Others [2022 (5) KHC 403(SC)]**, held thus:-

“24. Therefore, in such cases, where not only does the Magistrate find the commission of a cognizable offence alleged on a prima facie reading of the complaint but also such facts are brought to the Magistrate's notice which clearly indicate the need for police investigation, the discretion granted in Section 156(3) can only be read as it being the Magistrate's duty to order the police to investigate. In cases such as the present, wherein, there is alleged to be documentary or other evidence in the physical possession of the Accused or other individuals which the police would be best placed to investigate and retrieve using its powers under the Code of Criminal Procedure, the matter ought to be sent to the police for investigation.

25. Especially in cases alleging sexual harassment, sexual assault or any similar criminal allegation wherein the victim has possibly already been traumatized, the Courts should not further burden the complainant and should press upon the police to investigate. Due regard must be had to the fact that it is not possible for the complainant to retrieve important evidence regarding her complaint. It may not be possible to arrive at the truth of the matter in the absence of such evidence. The complainant would then be required to prove her case without being able to bring relevant evidence (which is potentially of great probative value) on record, which would be unjust.

26. In this backdrop, we are clearly of the view that the JMFC ought to have exercised jurisdiction Under Section 156(3) of Code of Criminal Procedure to direct the police to investigate.”

16. In the present case, the learned Magistrate has lost sight of the principles discussed above.

17. The learned Public Prosecutor, relying on **Priyanka Srivastava v. State of U.P. [2015 (2) KLT 451 (SC)]**, submitted that while ordering an investigation under Section 156(3) Cr.P.C. the Magistrate is required to see whether the guidelines issued by the Apex Court were complied with or not. In **Priyanka Srivastava**, the Apex Court held that there have to be prior applications under Sections 154(1) and 154(3) while filing a petition under Section 156(3) Cr.P.C., and the complainant has to file an affidavit in support of the application under Section 156(3) to the effect that he had applied with the provisions in Sections 154(1) and 154(3) Cr.P.C. The learned counsel for the petitioner submitted that the petitioner/complainant had earlier lodged information as provided under Section 154(1), and by refusal on the part of the Police, the substance of information was forwarded to the Superintendent of Police concerned.

18. I have already held that the learned Magistrate has failed to apply his mind as to whether forwarding of the complaint under Section 156(3) Cr.P.C. was warranted or not. The reasoning applied by the Court below while refusing to send the complaint for investigation is not in accordance with the settled law on the subject. Therefore, the

impugned order is liable to be set aside. I hereby set aside the impugned order.

19. The learned Magistrate shall consider the issue afresh as to whether the complaint is to be sent for investigation to the Police under Section 156(3) Cr.P.C.

The Crl.M.C. is allowed.

Sd/-
K.BABU
Judge

TKS

APPENDIX OF CRL.MC 9620/2022

PETITIONER'S ANNEXURES

Annexure A1 THE TRUE SCANNED COPY OF THE ORDER DATED 23.11.2022 IN CMP NO.2948 OF 2022 OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT-IV, THIRUVANANTHAPURAM (IN CHARGE OF JFMC-I), THIRUVANANTHAPURAM.

Annexure2 THE TRUE SCANNED COPY OF PRIVATE COMPLAINT DATED 23.11.2022 PREFERRED BY HER BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT-IV, THIRUVANANTHAPURAM (IN CHARGE OF JFMC-I), THIRUVANANTHAPURAM.

TKS