

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on: 20.02.2023
Pronounced on: 10.03.2023

CRM(M) No. 827/2021
c/w
CRM(M) No. 208/2022

Farooq Ahmad and ors.

.....Appellant(s)/ Petitioner(s)

Through: - Mr. K. S. Johal, Sr. Advocate with
Mr. Karman Singh Johal, Advocate
Mr. Rahul Pant, Sr. Advocate with
Mr. Anirudh Sharma, Advocate

Vs.

State of J&K and another

...Respondent(S)

Through: - Mr. Sumeet Bhatia, GA
Mr. Gagan Kohli, Advocate

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

CRM(M) No. 827/2021

1) The petitioners have challenged FIR No. 162/2021 for offences under Sections 458, 323, 149, 341, 504, 506, 427 IPC and 4/25 Arms Act registered with the Police Station, Udhampur.

2) As per the impugned FIR, on 29.04.2021, at about 6.00 PM, petitioner No. 1/accused misbehaved with the complainant/respondent No. 4 while he was standing on the gate of his house. Petitioner No. 1 is alleged to have used abusive and vulgar language against the family of the complainant, who

objected to the same but in the meantime, while the complainant was proceeding towards his house, petitioner No. 1 came from behind, armed with a baseball bat and he gave a beating to the complainant. It is alleged that petitioner No. 1 went back to his house after extending threats to the complainant and he came back after sometime alongwith other petitioners/accused, who are alleged to have criminally trespassed into the house of the complainant armed with lathies, baseball bat and tokas. The complainant was slammed and kicked by the petitioners/accused and even the ladies present in the house were also attacked and beaten up. It is further alleged that son of the complainant, Abuzar was also attacked by the petitioners. When brother of the complainant, Saleem Banday came to rescue him from the clutches of the petitioners, his vehicle was also attacked with weapons by the petitioners and in the process, the petitioners also received injuries.

3) It appears that the complainant had presented an application containing the aforesaid allegations before the Special Mobile Magistrate (Sub Judge), Udhampur with a prayer to direct registration of the FIR. The learned Magistrate, it seems, passed an order dated 05.05.2021, whereby SHO, Police Station, Udhampur was directed to verify the allegations made in the application and send the report by the next date of hearing i.e.17.05.2021. The Police of Police Station, Udhampur instead of sending the report to the learned Magistrate proceeded to register the impugned FIR.

4) The petitioners have challenged the impugned FIR on the grounds that the said FIR is a counterblast to the FIR bearing No. 146/2021 lodged

by Talib Hussain (petitioner No. 8) against the complainant party in respect of the same occurrence. It has been further submitted that the impugned FIR has been lodged with a view to wreck vengeance upon the petitioners as the complainant has long standing enmity with them. The petitioners have further contended that the Police instead of submitting a report to the learned Magistrate, on its own registered the impugned FIR, thereby circumventing the process of law initiated by the Magistrate.

5) I have heard learned counsel for the parties and perused the record including the case diaries of the two FIRs.

6) A perusal of the record shows that in order to get the FIR registered with the Police, the complainant/respondent No. 4 initially approached the Police Station and thereafter, the SSP concerned. It has been stated that when the complainant failed to get the desired result of registration of FIR, he filed an application under Section 156(3) Cr.P.C. before learned Judicial Magistrate 1st Class (Sub Judge) Udhampur. The learned Magistrate vide order dated 05.05.2021 directed the SHO, Udhampur to verify the allegations and submit his report by the next date of hearing i.e. 17.05.2021. A perusal of the minutes of the proceedings of the learned Magistrate would reveal that on 17.05.2021, an application was made by the SHO, Police Station, Udhampur before the learned Magistrate seeking extension of 15 days time in submitting his report. While these proceedings were going on, the impugned FIR came to be registered by SHO, Police Station, Udhampur on 18.05.2021.

7) The question that arises for consideration is as to whether the action of the Police to register the impugned FIR when there was no direction from the learned Magistrate to register the case is in accordance with law, particularly when the learned Magistrate had specifically directed the SHO concerned to submit his report after verifying the allegations made in the application.

8) Learned counsel for the petitioners has submitted that the course adopted by the Police in registering the impugned FIR, without waiting for the direction of the learned Magistrate amounts to usurping the jurisdiction of the learned Magistrate and the same cannot be countenanced in law.

9) Per contra, learned counsel for the respondents has submitted that the Police have otherwise got power to register an FIR once it comes to its notice that a cognizable offence has been committed. It has been submitted that an order under Section 156(3) Cr.P.C. is only a preemptory reminder to the SHO of a Police Station to perform its statutory duty of registration of FIR and that no particular form of order is needed for such purpose.

10) It is true that the incharge of a Police Station is vested with the power to register an FIR once information with regard to cognizable offence is given to him. It is also not in dispute that a Magistrate while passing a direction under Section 156(3) Cr.P.C. is only reminding the officer incharge of a Police Station about his statutory duty to register an FIR in respect of a cognizable offence. However, in the instant case, when the complainant had approached the Police for registration of FIR, they did not deem it

appropriate to register the FIR presumably because already an FIR had been registered by the Police relating to the same occurrence on the basis of the version given to the Police by the petitioners herein.

11) When the application was made by the complainant before the learned Magistrate, options available to the learned Magistrate were, either to direct the officer incharge of a Police Station to straightway register an FIR and undertake the investigation or to direct preliminary verification of the allegations made in the application. The third course that was open to the Magistrate was to treat the application as a private complaint and take cognizance of the offence and proceed in accordance with the provisions contained in Chapter XV of the Cr. P.C.

12) In the instant case, the learned Magistrate appears to have chosen the second option of directing the preliminary verification with regard to the allegations made in the complaint. The power to direct preliminary verification of the allegations made in an application under Section 156(3) Cr.P.C. has been recognized by the Supreme Court in **Lalita Kumari v. Govt. of U.P, (2014) 2 SCC 1** as also in the case of **Mrs. Priyanka Srivastava and Anr. Vs. State of UP and ors., 2015 2 Crimes (SC) 179**. In this regard paragraph 27 of the **Priyanka Srivastava's** case (supra) is relevant to the context, the same is reproduced as under:

“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 Article 226 of the Constitution of India. 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 Section 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.”

(Emphasis supplied)

13) In Ramdev Food Products Pvt. Ltd vs. State of Gujarat, 2015 3 Crimes (SC) 354, the Supreme Court has again emphasized the fact that prompt registration of FIR is mandatory but checks and balances on power of police are equally important. The Court further went on to observe that power of investigation is not mechanical. It requires application of mind in the manner provided. The Court further observed that existence of power and its exercise are different. According to the Supreme Court delicate balance has to be maintained between the interest of society and liberty of an individual.

14) Again, the Supreme Court in the case of Anil Kumar vs. M. K. Aiyappa, (2013) 10 SCC 705 has observed as under:

“11. The scope of Section 156(3) CrPC 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 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.”

15) For the foregoing analysis of law on the subject, it is clear that a Magistrate does have power to direct preliminary verification into the allegations made in an application under Section 156(3) Cr.P.C. so as to ascertain whether any cognizable offence is made out. Such course has to be adopted by a Magistrate in appropriate cases, if the Magistrate feels that it not a clear-cut case where FIR should be straightway registered. The order of the learned Magistrate passed on 05.05.2021 directing preliminary verification into allegations made in the application filed by the complainant is, therefore, in accordance with law. Even otherwise, discretion of a Magistrate in directing preliminary verification in a particular case cannot be gone into by a superior court, unless it is shown that there is perversity in the exercise of discretion by the Magistrate.

16) In the instant case, a lawful direction passed by the learned Magistrate, it seems, has been circumvented by the Police by registering the FIR, inasmuch as, the Police in spite of getting a direction regarding

preliminary verification of the allegations, registered the FIR straightway. It seems that the Police in the instant case at the initial stage did not thought it appropriate to straightway register an FIR, keeping in view the fact that an FIR relating to the occurrence had already been registered, but when the learned Magistrate was seized of the matter, the Police did not allow the learned Magistrate to apply her mind to the material prior to passing an appropriate direction. It is to be noted that a direction regarding registration of an FIR has to be passed only after application of the mind. In the present case before the learned Magistrate could apply her mind to the application of the complainant and the report the Police, the proceedings pending before her were rendered redundant by the action of the Police. This amounts to an illegality which is writ large on the face of the record.

17) Another question that arises for consideration is as to what should be the future course of action in these circumstances. One option would be to allow the investigation to go on, on the basis of the impugned FIR already registered and thereby perpetuate the illegality committed by the Police and the other option would be to find a way-out so as to cure this illegality.

18) In the case of **N. H. Rishbud and Inder Singh vs. State of Delhi, AIR 1955 SC 196**, the Supreme Court has ruled that Section 5A of the Prevention of Corruption Act, 1947 is mandatory and not directory and went on to hold that the illegality committed in the course of an investigation does not affect the competence and jurisdiction of the Court for trial. The Court further held that where cognizance of the case has been taken and the case

has proceeded to termination the validity of the preceding investigation does not vitiate the result unless miscarriage of justice has been caused thereby.

19) In **State of Harayana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335**, the Supreme Court after noticing the ratio laid down in **N. H. Rishbud and Inder Singh's** case (supra) explained that in the case before it the question relating to legal authority of SHO was raised at the initial stage, therefore, it would be proper and desirable that the investigation should proceed only on the basis of the valid order in strict compliance of the mandatory provision of Section 5A(1) of the Prevention of Corruption Act,1947.

20) It is thus clear that if the illegality in undertaking the investigation is pointed out at the earliest when the investigation is at its inception, it cannot be brushed aside as the Investigating Agency as well as the complainant would be free to take appropriate steps for proceeding in accordance with law but if the investigation has culminated in filing of charge sheet before the competent Court then unless it is shown that prejudice would be caused to any party by quashing the investigation, an order setting aside the investigation would not be desirable.

21) Coming to the facts of the instant case, the petitioners approached the Court immediately after the registration of the impugned FIR. In fact, the impugned FIR, as already noted, has been lodged on 18.05.2021 and instant petition has been filed on 13.12.2021 i.e. within a few months of lodging of the impugned FIR. The case diary shows that the investigation in the instant

case has not proceeded substantially because of the stay order passed by this Court on 15.12.2021. Thus, the investigation of the case is still at its inception and as such, illegality committed by the Police in registering the impugned FIR, can be cured at this stage by passing appropriate directions.

22) In view of what has been discussed herein before, interests of justice would be served by quashing the impugned FIR and passing appropriate directions to the Investigating Agency to place its report before the learned Judicial Magistrate 1st Class (Sub Judge), Udhampur, who after considering the report of the Police would be at liberty to pass orders in accordance with law. Needless to mention here that the learned Magistrate may either direct the Police to register the FIR afresh and proceed to conduct the investigation in the case or he can proceed in terms of Chapter XIV of the Cr.P.C and take cognizance of the offences on the basis of the police report together with the preliminary evidence.

23) Accordingly, the impugned FIR is quashed and the respondent, SHO, Police Station, Udhampur is directed to place the material collected by him during investigation of the impugned FIR before the learned Special Mobile Magistrate (Sub Judge), Udhampur, who shall, after reviving the application of the complainant under Section 156(3) Cr. P.C., pass appropriate directions in accordance with law, of course, upon application of his mind to the material that may be placed before him.

24) The petition stands disposed of in above terms.

CRM(M) No. 208/2022

25) The petitioners have challenged FIR No. 146/2021 for offences under Sections 382, 323, 34 of IPC and 4/25 of Arms Act registered with Police Station Udampur.

26) As per FIR No. 146/2021, on 29.04.2021 at about 6.30 p.m. the petitioners/accused Mohd Saleem Banday, Mohd Rafi and Mohd Najeem Din launched an attack upon Mohd Farooq, petitioner No. 1 in CRM(M) No. 827/2021 with a sharp edged weapon and when the complainant/Talib Hussain came to know it, he rushed to the spot but the above named petitioners hit him as well as his wife with the car and inflicted injuries upon them. It is further alleged that Mohd Din, who was armed with stick and his grandson also came on spot and they gave a beating to Mohd Farooq, who has suffered grievous injuries. A gold chain, one watch and cash amounting to Rs. 20,000/- are also alleged to have been snatched by the accused from Mohd Farooq.

27) The petitioners, Mohd Saleem Banday etc. have challenged the aforesaid FIR on the grounds that the same has been lodged by the complainant party in order to wreck vengeance upon them. It has been submitted that the complainant party has long standing enmity with the petitioners, therefore, they want to involve them in the false and frivolous litigation.

28) A perusal of the allegations made in the two impugned FIRs *prima facie* shows that the rival parties have given two contrary versions of the same occurrence. It appears that time and place of occurrence in both the FIRs is the same. It is a settled law that counter FIR in respect of an occurrence giving a version contrary to the version given by the other party, is permissible in law. However, it would be appropriate if the final reports in the two cases are examined by the same Court together.

29) In view the above, the decision in this petition is deferred till the outcome of the proceedings before the learned Special Mobile Magistrate (Sub Judge), Udhampur, which relate to the allegations in FIR No. 162/2021. Accordingly, this petition is directed to be listed on 20.04.2023 for awaiting the directions that may be passed by learned Special Mobile Magistrate 1st Class (Sub Judge), Udhampur, as indicated herein before.

30) Case diaries in both the cases be returned to the learned counsel appearing for the State.

(SANJAY DHAR)
JUDGE

Jammu

10.03.2023

Karam Chand/Secy.

*Whether the order is speaking:
Whether the order is reportable:*

*Yes/No
Yes/No*