HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on 22.03.2024
Pronounced on 28.03.2024

CRMC No. 107/2014
c/w
CRM(M) No. 712/2022

1. Kamal Nain Singh …..Appellant(s)/Petitioner(s)
2. Kamal Nain Singh

Through: Mr. Rahul Pant, Sr. Adv. with
Mr. Dhruv Pant, Adv.

vs

1. State of J&K and others ….. Respondent(s)
2. State of J&K and others

Through: Ms. Monika Kohli, Sr. AAG for Nos. 1 and 2
None for No. 3

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

JUDGMENT

1. The petitioner has invoked jurisdiction of this Court under Section 482 Cr.P.C. by filing two separate petitions. By virtue of CRMC No. 107/2014, the petitioner has challenged order dated 13.03.2014 passed by the Judicial Magistrate 1st Class (Forest Magistrate) Jammu, whereby on a compliant filed by the private respondent, directions have been issued for registration of FIR in light of the guidelines issued by the Supreme Court in **Lalita Kumari vs State of Utter Pradesh, (2014) 2 SCC 1** as also the FIR bearing No. 6/2014 for offences under Sections 420, 465, 467, 468, 471 and 120-B RPC read with Section 5(2) of J&K Prevention of Corruption Act registered pursuant to the aforesaid order. By virtue of CRM(M) No. 712/2022, the petitioner has challenged order dated 11.03.2014 passed by Judicial Magistrate 1st Class (Forest Magistrate), Jammu in the aforesaid

complaint filed by the private respondent, whereby the learned Magistrate has treated the report submitted by the Crime Branch Jammu pursuant to order dated 21.09.2013 of the said Magistrate as one under Section 156(3) of the Code of Criminal Procedure (for short the Code).

2. The facts emanating from the pleadings of the parties are that the private respondent filed a complaint before learned trial Magistrate alleging therein that the petitioner is a non State Subject, originally hailing from Palampur Himachal Pradesh, but he in furtherance of criminal conspiracy with the Revenue Authorities of District Udhampur has managed to obtain a fake State Subject Certificate by deceiving the State Government. It was also alleged in the complaint that on the basis of the said fake State Subject Certificate, the petitioner has accumulated huge property in the erstwhile State of Jammu and Kashmir.

3. Upon presentation of the complaint before the learned the Magistrate, the following order was made by the said Magistrate on 21.09.2013:

> "This complaint was presented before Ld CJM, Jammu who transferred this complaint to this court for disposal under law and here it is presented by complainant. Complaint is found in order. Office is directed to enter the same in the concerned register.
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> It is stated in the complaint that accused who is non-state subject originally hailing from Palampur where all his ancestors were residing having movable and immovable properties which has been inherited by the accused in succession. The accused who was married to a Jammu based girl, namely, Auradha Jamwal after marriage accused purchase immovable property as Benami transaction in the name of his wife, father-in-law and brother-in-law. The accused in connivance with the revenue authority of Tehsil Chenani District Udhampur by fraudulent means procured fake state subject on the basis of which the accused has accommodated huge property.
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> As such SSP Crime Branch Jammu is directed to enquire into the matter and ascertain the truth and falsehood of the complaint in

terms of section 202 Cr.P.C. Copy of this order is forwarded to SSP, Crime Branch, Jammu for compliance of this order.
For further proceedings put up on 20.10.2017."

4. Pursuant to the aforesaid order, the respondent-Crime Branch conducted the enquiry and submitted its report before the trial Magistrate on 21.01.2014 wherein it was stated that the petitioner is basically a resident of Palampur Himachal Pradesh and after getting married in Bernai, Jammu, he shifted to Jammu. It was also reported that in the year, 1994, the petitioner managed entries in the revenue record of Village Chenani and in the year, 1999, he in connivance with revenue official/officers of Tehsil Chenani, procured a permanent resident certificate of J&K State Subject.

5. Upon receipt of aforesaid report of enquiry, the learned Magistrate passed the following order on 11.03.2014:

"March lI, 2014: Complainant alongwith counsel present. Ld. Counsel for the complainant submitted that pursuant to the enquiry report submitted by SSP Crime Branch, Jammu, FIR should be ordered to be registered against the accused. He further submitted that cognizance has not been taken yet by my Ld. Predecessor as complainant has not been examined on oath yet, and that the enquiry report submitted by SSP Crime Branch, Jammu does not fall under the purview of Sec. 202, instead it is an enquiry report falling under the ambit of Sec. 156(3) Cr.P.C. and hence SSP Crime Branch should be directed to register FIR. Ld. Counsel placed reliance on the following authorities: (i) Dilwar Singh vs State of Delhi (AIR 2007 SC 3234), (ii) Minu Kumari vs State of Bihar (AIR 2006 SC 1437), (iii) K. V. Subbiah v. State of Mysore (1969 CrLJ 754).

Heard the Ld. Counsel and perused the complaint, order dated 21.09.2013, enquiry report pursuant to that and aforementioned authorities. This complaint was sent for enquiry to SSP Crime Branch Jammu u/s 202, Cr.P.C. but without examining the complainant on oath Sec. 202(l), Cr.P.C. provides that a Magistrate on receipt of a complaint of an offence of which he is authorized to take cognizance may direct an enquiry or investigation to be made by a police officer. The proviso to that sub-section requires that (except where the complaint has been made by a Court) no such

> direction shall be made unless the complainant has been examined on oath under Sec. 200. In K. V. Subbiah v. State of Mysore (1969 CrLJ 754), Hon'ble High Court of Karnataka has held that "if the report is called for by the Magistrate without his having cognizance of the offence complained of, then the report submitted by the police consequent upon an enquiry directed by the Magistrate will be one which will fall within Sec. 156(3) Cr.P.C."
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> Thus, the Ld. Predecessor had not examined the complainant on oath, hence the report submitted by SSP Crime Branch, Jammu does not fall within the purview of Sec. 202 Cr.P.C., but instead it falls under Sec. 156(3) Cr.P.C. File shall come up for further proceedings on March 13,2014."

The aforesaid-quoted order is subject matter of challenge in CRM(M) No. 712/2022.

6. After making the aforesaid order, the learned Magistrate on next date of hearing i.e. on 13.03.2014, upon perusal of the complaint and the enquiry report recorded that the same disclose commission of cognizable offences. Accordingly, Senior Superintendent of Police, Crime Branch, Jammu was directed to register FIR in the matter and submit report in accordance with law. The said order is subject matter of challenge in CRMC No. 107/2014. Pursuant to aforesaid order of learned Magistrate, the impugned FIR came to be registered and investigation was set into motion. The investigation was stayed by this Court in terms of order dated 09.04.2014.

7. In its latest status report filed by the respondent-Investigating Agency, it has been submitted that after investigation of the case, offences stand established against the petitioner and certain other revenue officials. The private respondent also submitted her reply to the writ petition in which she has reiterated the allegations made by her in the complaint. After filing her reply, the private respondent stopped appearing in the case.

8. I have heard learned counsel for the parties and perused the record of the case including the record of the trial court.

9. Learned Senior Counsel appearing for the petitioner has submitted that it was not open to the learned Magistrate to direct registration of FIR against the petitioner once a decision was taken by the learned Magistrate to direct enquiry into the allegations made in the complaint in terms of Section 202 of the Code. It has been further contended that the learned Magistrate could not have treated the report submitted by the Investigating Agency under Section 202 of the Code as one under Section 156(3) of the Code and thereafter proceed to direct registration of the FIR. According to the learned Senior Counsel, the learned Magistrate had no jurisdiction to review its own order dated 21.09.2013 whereby it was specifically directed that the Crime Branch shall enquire into the matter in terms of Section 202 of the Code.

10. Learned Senior AAG appearing for the official respondents has submitted that in the instant case, the learned Magistrate, while passing order dated 21.09.2013 had not recorded the preliminary statements of the complainant and her witnesses as such, it cannot be stated that the learned Magistrate had taken cognizance of the offences. According to her, the matter was at pre cognizance stage when the impugned order dated 13.03.2014 came to be passed by the learned Magistrate, whereby direction for registration of the FIR was issued. She has contended that this position has been simply clarified by the learned Magistrate vide his order dated 13.03.2014. Ms. Monika Kohli, learned Senior AAG has further contended that in any case

once it has been shown that the offences have been established against the petitioner, mere procedural irregularities cannot be made a ground to scuttle a genuine prosecution against him.

11. The issues that arise in this case for consideration are:

(i) Whether order dated 21.09.2013 passed by the learned Magistrate amounts to taking cognizance of the offences;

(ii) If it is found that the learned Magistrate has taken cognizance of offences whether the learned Magistrate could have reviewed the said order in terms of order 11.03.2014;

(iii) Whether after taking cognizance of the offences, it was open to the learned Magistrate to direct registration of an FIR.

12. So far as the first issue is concerned, we need to understand as to what is meant by taking cognizance. In ordinary language, word 'cognizance' means detailed knowledge about or understating of something, whereas in legal parlance, it means taking of judicial notice of an offence. It is a pre-requisite to initiation of proceedings by a court or by a Magistrate. The Code of Criminal Procedure does not define the term taking of cognizance but in general it means application of judicial mind to the facts mentioned in a complaint or to a Police report and it is different from issuance of process.

13. In **R. R. Chari v State of U.P. AIR 1951 SC 207**, the Supreme Court made it clear that the word cognizance is used by the court to indicate the point when the Magistrate or a Judge first takes judicial notice of an offence. Therefore, primarily cognizance of an offence takes place when a judicial

Magistrate applies his mind and takes judicial notice of the offence, which is statutorily stipulated under Section 190(1) of the Code.

14. In **Darshan Singh Ram Krishan v State of Maharashtra , 1971(2) SCC 654**, it has been held by the Supreme Court that taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as the Magistrate applies his mind to the suspected commission of an offence.

15. In **Prashant Srikant Purohit v State of Maharashtra, (2015) 7 SCC 440**, the Supreme Court has held that taking judicial notice is nothing but perusing the report of the Police Officer, proceeding further on that report by opening the file and thereafter taking further steps to ensure the presence of the accused and all other consequential steps including at a later stage depending upon the nature of the offence alleged, to pass necessary order of committal to court of Session.

16. In **Mona Panwar v High Court of Judicature at Allahabad, (2011) 3 SCC 496**, the Supreme Court held that before the Magistrate can be said to have taken cognizance of an offence under Section 190(1)(b) of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but he must have done so for the purpose of proceeding under Section 200 of the Code and the provisions following that section. It was also held that when a Magistrate has applied his mind only for ordering an investigation under Section 156(3) of the Code, or issued a warrant for the purposes of investigation, he cannot be said to have taken cognizance of an offence.

17. A Coordinate Bench of this Court in the case of **Nasreen Bano vs State of J&K and others, OWP No. 526/2019, decided on 10.05.2019** has after taking note of the various judgments of the Supreme Court on this issue concluded as under:

> "20. On conspectus of the judicial opinion on the issue, it can be safely held that when a Magistrate applies his mind to the suspected commission of offence and applies his mind for the purposes of the proceeding under the subsequent Section of the chapter, the Magistrate can be said to have taken the cognizance. The broadly speaking, when on receiving a complaint the Magistrate applies his mind for the purposes of proceeding under Section 200 Cr.PC and the succeeding Section in Chapter XVI of Cr.PC, he said to have taken cognizance of the offence within the meaning of Section 190(1)(A), but, if instead of proceeding under Chapter XVI, the Magistrate decides, in its judicial exercise of discretion, to take action of some other kind like directing investigation under Section 156(3) Cr.PC or issuing a search warrants for the purposes of investigation, he cannot be said to have taken the cognizance of offence. (See. R R Chari. AIR 1951 SC"

18. From the analysis of the law on the subject, it is clear that when a Magistrate receives a complaint alleging commission of offences and he/she applies his/her judicial mind to the facts alleged in the complaint for the purpose of taking action and proceedings under Chapter XVI of the Code, he/she is stated to have cognizance of the offence, but in a case alleging commission of cognizable offences, the Magistrate has option either to proceed under Chapter XVI or to direct investigation under Section 156(3) of the Code. So the determining factor is the intention of the Magistrate while dealing with the complaint alleging commission of cognizable offences.

19. Adverting to the facts of the present case, if we have a look at the initial order passed by the learned Magistrate on 21.09.2013, which has been quoted hereinabove, it is clear that the Magistrate has directed the Senior

Superintendent of Police, Crime Branch to enquire into the matter to ascertain the truth or falsehood of the complaint in terms of Section 202 of the Code. There is no ambiguity in the order passed by the trial Magistrate. The expression used is "to ascertain the truth or falsehood of the complaint in terms of Section 202 of the Code" which clearly indicates that the learned Magistrate had intended to proceed in the complaint in accordance with the Chapter XVI of the Code. Expression "to ascertain the truth or falsehood" is not used while issuing direction under Section 156(3) of the Code. The use of these expressions is indicative of intention of the Magistrate to direct investigation/enquiry as contemplated under Section 202 of the Code.

20. It is true that the learned Magistrate before passing an order under Section 202 of the Code, should have recorded the preliminary evidence of the complainant in terms of 200 of the Code which he omitted to do, but the said omission on the part of the learned Magistrate is an irregularity committed by him, which does not in any manner indicate that the learned Magistrate did not intend to proceed under Chapter XVI of the Code keeping in view the expressions used by him in order dated 21.09.2013. He may have faulted in not recording the preliminary evidence of the complainant before resorting to enquiry under Section 202 of the Code but it can by no stretch of imagination be stated that the learned Magistrate had not taken cognizance of the offences and decided to proceed under Chapter XVI of the Code. Issue No. 1 is answered accordingly.

21. The second issue is as to whether the learned trial Magistrate could have reviewed order dated 21.09.2013 in the manner it did in terms of impugned

order dated 11.03.2014. Vide the said order, the learned Magistrate has by relying upon the judgment of the High Court of Mysore in the case of **K. B. Subbiah vs State of Mysore, 1969 CrLJ 754** treated the report of enquiry submitted by the Crime Branch as the report in terms of Section 156(3) of the Code. According to the learned Magistrate, the cognizance was not taken by the said court while passing order dated 21.09.2013 as such, the report of enquiry submitted by the Crime Branch can be treated as one under Section 156(3) of the Code.

22. In view of the finding recorded on issue No. 1, according to which, passing of order dated 21.09.2013 by the learned Magistrate amounts to taking of cognizance, it was not open to the learned Magistrate to review the said order. This is so because a criminal court does not possess jurisdiction to review its own order. In this regard, I am supported by the ratio laid down by the Supreme Court **Adalat Prasad vs Roop Lal Jindal, 2004 7 SCC 338**, wherein it has been held that if a Magistrate has issued process against an accused in contravention of the provisions contained in Section 200 or Section 202 of the Code, the order of the Magistrate may be vitiated but the only option available to the aggrieved accused is to invoke the jurisdiction of the High Court under Section 482 of the Code and not by applying for review of the said order. In the face of this legal position, the impugned order passed by the learned Magistrate on 11.03.2014 is not sustainable in law.

23. That takes us to issue No. 3. The question that arises for determination is whether after taking cognizance of offences, it is open to a Magistrate to

revert back to provisions contained in 156(3) of the Code and direct registration of the FIR.

24. It is a settled law that a Magistrate after taking cognizance of the offences has no jurisdiction to direct registration of the FIR by reverting back to the pre cognizance stage. A Magistrate on a complaint regarding commission of a cognizable offence is vested with power to direct investigation into the offences by taking resort to Section 156(3) of the Code, but if he takes cognizance of offences under Section 190-(1)(b) of the Code and embarks on a procedure embodied under Chapter XVI of the Code, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3) of the Code. In my aforesaid view, I am supported by the judgments of this Court in Samiullah Naqshbandi vs Sadaq Niyaz Shah, CRM(M) 113/2020 decided on 31.08.2020, Mohd Aijaz vs Sajjad Dar and anr, CRMC No. 285/2017 decided on 18.02.2021, Dalip Singh vs State of J&K, CRMC No. 139/2016 decided on 22.02.2022 and the judgment of Nasreen Bano (supra).

25. In view of the aforesaid position of the law, the learned Magistrate has committed a grave illegality by issuing a direction to the Crime Branch, Jammu to register an FIR on the basis of the complaint made by private respondent after having already taken cognizance of the offences. The impugned order dated 13.03.2014 whereby direction for registration of the FIR has been issued is, therefore, not sustainable in law.

26. The question that arises for consideration is as to what should be the fate of the investigation that has been conducted by the Crime Branch in the instant case. It has been vehemently contended by the learned Sr. AAG that in the

instant case it has been found that the crime has been committed by the petitioner, therefore, the same should not go unpunished just because of some procedural illegality committed by the learned Magistrate.

27. There can be no quarrel with the proposition propounded by the learned Sr. AAG appearing for the respondents. However, it has to be borne in mind that in the instant case the legality and validity of the impugned FIR was immediately challenged by the petitioner by filing the petition on 25.03.2014 itself. The impugned FIR was registered on 22.03.2014 barely a few days before the filing of the petition, whereafter, stay of the investigation was also granted by this Court. Thus, within a few days of lodging of the impugned FIR, the petitioner approached this Court without losing any time. It is not a case where pursuant to the registration of the impugned FIR, charge sheet has been filed and the trial against the petitioner has proceeded but it is a case where the petitioner has approached the Court immediately upon registration of the FIR and the investigation was stayed immediately thereafter. Even if it is found that the petitioner has committed any offence, he can be prosecuted in the manner as provided under Chapter XVI of the J&K Cr.P.C. but no charge sheet can be laid against him as the learned Magistrate has already taken cognizance of the offences. There is no scope of taking of cognizance of the offences more than once. If the Investigating Agency is allowed to produce challan against the petitioner, it would amount to taking of cognizance of offences by the learned Magistrate a second time, which is impermissible in law. The illegality in this case has been pointed

out at the initial stage itself, therefore, if the same is cured at this stage, it will not cause any prejudice to either of the parties.

28. In view of the above, the ends of justice would be served by directing the Investigating Agency to submit its report before the learned Magistrate, which shall be treated as report in terms of Section 202 of the Code, whereafter, the learned Magistrate shall record preliminary evidence of the private respondent and her witnesses and proceed in the matter in accordance with the law.

29. One important factor relating to final report of State Subject Commission has not been considered by the respondent-Investigating Agency while investigating the case as is clear from the status report submitted by it. This petitioner has placed on record a copy of the final report submitted by the State Subject Commission, according to which after conducting thorough enquiry into the matter, it was found that the State Subject of the petitioner is genuine. This aspect of the matter needs to be looked into by the respondent-Crime Branch before submitting its report with the learned Magistrate.

30. In view of the above, both the petitions are allowed with the following directions:

(i) Impugned orders dated 11.03.2014 and 13.03.2014 passed by the learned Magistrate shall stand quashed.

(ii) Respondent-Crime Branch shall, after considering the matter regarding validity of the State Subject Certificate of the petitioner in light of the report of the State Subject Commission, file the enquiry report based on the investigation conducted by it before the learned Magistrate.

(iii) The learned Magistrate after recording the preliminary evidence of the complainant and after taking into consideration the said evidence along with the report of the investigation that may be placed on record by the respondent-Crime Branch, Jammu before him, proceed further in the matter in accordance with the procedure prescribed under Chapter XVI of the J&K CrPC.

(SANJAY DHAR)
JUDGE

Jammu
28.03.2024
Rakesh PS

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No