

HIGH COURT OF ALLAHABAD

Bench: Hon'ble Justice Mohd. Faiz Alam Khan

Date of Decision: 22nd May 2024

MATTERS UNDER ARTICLE 227 No. - 2514 of 2024

Khushnuma Begum ...PETITIONER

VERSUS

State Of U.P. Thru. Prin. Secy. Home And 2 Others ...RESPONDENTS

Legislation:

Section 156(3) of the Criminal Procedure Code (Cr.P.C)

Article 227 of the Constitution of India

Subject: Petition challenging the legality of an order passed by the Magistrate directing a preliminary investigation under Section 156(3) Cr.P.C.

Headnotes:

Criminal Law - Scope of Magistrate's Powers Under Section 156(3) Cr.P.C. - Petition filed under Article 227 challenging the order of the Magistrate directing a preliminary investigation by police. The petitioner argued that the Magistrate misinterpreted the law laid down by the Supreme Court in *Priyanka Srivastava v. State of U.P.* (2015) and *Lalita Kumari v. Government of U.P.* (2014). The court held that the Magistrate has the authority to order a preliminary investigation in appropriate cases as elucidated in *Priyanka Srivastava* and *Kailash Vijayvargiya v. Rajlakshmi Chaudhuri* (2023). The petitioner's application under Section 156(3) Cr.P.C. had not been finally disposed of by the Magistrate, rendering the current petition premature. The High Court directed the Magistrate to dispose of the application under Section 156(3) Cr.P.C. in accordance with the law laid down by the Supreme Court and the High Court, without being influenced by any observations made in this order. [Paras 1-16]

Judicial Vigilance - Filing Affidavit Under Section 156(3) Cr.P.C. - Emphasized the necessity for applicants to support their applications under Section 156(3) Cr.P.C. with affidavits as mandated in *Priyanka Srivastava* to deter frivolous filings. Magistrates are advised to verify the veracity of allegations in such applications to prevent misuse of judicial process. [Para 8]

Decision - Premature Petition - The petition challenging the Magistrate's order for preliminary investigation was dismissed as premature. The Magistrate's authority to direct preliminary investigations in appropriate cases was

affirmed. The Magistrate was directed to decide the pending application under Section 156(3) Cr.P.C. expeditiously and on its own merits. [Paras 15-16]

Referred Cases:

- Priyanka Srivastava v. State of U.P. (2015) 6 SCC 287
- Lalita Kumari v. Government of U.P. (2014) 2 SCC 1
- Kailash Vijayvargiya v. Rajlakshmi Chaudhuri MANU/SC/0527/2023
- Mohd. Yusuf v. Afaq Jahan (Smt.) (2006) 1 SCC 627
- HDFC Securities Ltd. v. State of Maharashtra (2017) 1 SCC 640
- Anju Chaudhary v. State of U.P. (2013) 6 SCC 384

Representing Advocates:

Jyotiresh Pandey, Ashish Kumar Jain, Mohemmed Amir Naqvi for the petitioner

G.A. for the respondents

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Hon'ble Mohd. Faiz Alam Khan,J.

1. Heard Shri Mohemmed Amir Naqvi, learned counsel for the petitioner as well as learned AGA for the State and perused the record.

2. The instant petition has been moved by the petitioner- Khushnuma Begum with the following prayers:-

"(i) to set-aside the order dated 20.04.2024 passed by respondent no.2, annexed with the petition as Annexure No.1,

(ii) to issue the directions to respondent no.2, to ensure the proceedings and orders passed in Misc. Case No. 1191 of 2024 are in accordance with the Ratio and Guidelines decided in the judgements delivered by the Hon'ble Supreme Court and this Hon'ble High Court, expeditiously, and

(iii) to issue any other order this Hon'ble Court deems fit and proper in the interest of justice."

3. Learned counsel for the petitioner while referring to the impugned order dated 20.04.2024 submits that the trial court has completely misinterpreted the law laid down by the Hon'ble Supreme Court in Mrs. Priyanka Srivastava and another v. State of U.P. and others reported in (2015)6 Supreme Court Cases 287 as before taking cognizance of the offence it was not permissible for the Magistrate to have directed any preliminary investigation for the purpose of disposal of application under Section 156(3) Cr.P.C., as the same could only be directed under Section 202 of the Cr.P.C.

4. It is further submitted that preliminary investigation as contemplated under Section 154 of the Cr.P.C. and as has been highlighted by Hon'ble Supreme Court in Lalita Kumari Vs. Government of Uttar Pradesh and others (2014)2 Supreme Court Cases 1 is only for the purpose of lodging an FIR and the same is confined to the exercise taken up by the police and the same was not available for the Magistrate. While citing the law laid down in the case of XYZ v. State of Madhya Pradesh reported in AIR 2022 Supreme Court 3957 and Karnail Singh Vs. State of Haryana and others in Review Petition (Civil) No. 526 of 2023 in Civil Appeal No. 6990 of 2014, decided on 16.5.2024, it is vehemently submitted that the impugned order passed by the Magistrate is illegal and the same is required to be quashed.

5. Learned AGA on the other hand submits that the application moved by the applicant under Section 156(3) Cr.P.C. has still not been finally disposed of and the petitioner has approached this Court prematurely without waiting for the outcome of the application moved under Section 156(3) Cr.P.C. and if at all any adverse order is going to be passed in that application the remedy of revision is also available to the petitioner.

6. Having heard learned counsel for the parties and having perused the record, it is reflected that the petitioner before this Court is the wife of one Siraj Ahmad Khan who is an accused of a double murder case bearing case crime no. 30 of 2024 under Section 302, 504, 506, 34, 216 IPC and 27/30 Arms Act and one Fareed Khan, who is the informant of that case (30 of 2024) has been arrayed as accused person in the application moved by the petitioner before the Magistrate concerned under Section 156(3) Cr.P.C. requesting to lodge an FIR and to do investigation having regard to the allegations levelled therein. Thus, it is reflected that the husband of the applicant is an accused in Case Crime No. 30/2024 (wrongly written in the impugned order as 30/2023), under Section 302 IPC and allegations in the application moved under Section 156 (3)Cr.P.C. are of loot, mischief and other offences committed by the accused persons, who are relative of the deceased including the informant of the case of murder is alleged to have been committed by the husband and son of the petitioner.

7. The Magistrate by passing impugned order of dated 20.4.2024 has directed the ACP concerned to make a preliminary investigation pertaining to the allegations levelled in the application moved by the petitioner under Section 156 (3) Cr.P.C.

8. In Priyanka Srivastava (supra) the Hon'ble Supreme Court in paragraph no. 27 has opined as under:-

"27. In our considered opinion, a stage has come in this country where Section 156(3) CrPC 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 the 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 Sections 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 application under Section 156(3) be supported by an affidavit is 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 [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."

8. Thus the, above observations of the Hon'ble Supreme Court would reflect that a note of caution has been given by the Hon'ble Supreme Court to the Magistrates who are dealing with applications moved under Section 156(3) Cr.P.C. to remain vigilant and after noticing that application under Section 156(3) are being filed on frivolous issues it is observed "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".

9. Thus, observations appears to have been made prima facie in the background of the necessity of filing an affidavit by the applicant/complainant in support of allegations made in the application under Section 156(3) Cr.P.C.

10. The above mentioned observations of the Hon'ble Supreme Court in Priyanka Srivastav (supra) were also considered by the Hon'ble Supreme Court in Kailash Vijayvargiya Vs. Rajlakshmi Chaudhuri and others reported in MANU/SC/0527/2023 in the following words:-

"27. In this Court in Priyanka Srivastava (supra) referred to the nature of power exercised by the Magistrate Under Section 156(3) of the Code and after referring to several earlier judgments held that the direction for registration of an FIR should not be issued in a routine manner. The Magistrate is required to apply his mind and exercise his discretion

in a judicious manner. If the Magistrate finds that the allegations made before him disclose commission of a cognizable offence, he can forward the complaint to the Police for investigation Under Section 156 and thereby save valuable time of the Magistrate from being wasted in inquiry as it is primarily the duty of the Police to investigate. However, the Magistrate also has the power to take cognizance and take recourse to procedure Under Section 202 of the Code and postpone the issue of process where the Magistrate is yet to determine existence of sufficient ground to proceed. In a third category of cases, the Court may not take cognizance or direct registration of an FIR, but direct preliminary inquiry in terms of the dictum in Lalita Kumari's case (supra).

28. In Priyanka Srivastava (supra), this Court highlighted abuse of the criminal process by the unprincipled and deviant litigants who do knock at the door of the criminal court for malevolent reasons. In the said case criminal action was initiated by those against whom the financial institutions had proceeded under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. This was notwithstanding the protection given to the officers Under Section 32 of the aforesaid Act against action taken in good faith. Reiterating Lalita Kumari (supra), it was observed that an action Under Section 156(3) should not be entertained without the complainant taking recourse to Sub-section (1) and (3) of Section 154 and compliance of these two Sections should be clearly spelt out in the application and necessary documents filed. To check malevolence and false assertions, the Court directed that every petition/application Under Section 156(3) should be supported by an affidavit so that the person making an application should be conscious of it and to see that no false allegation is made. If the affidavit is found to be false, the complainant will be liable for prosecution in accordance with the law. Vigilance is specially required in cases pertaining to fiscal sphere, matrimonial/family disputes, commercial offences, medical negligence cases, corruption cases, or cases where there is abnormal delay/laches. Thus, the Magistrate must be attentive and proceed with perspicacity to examine the allegation made and the nature of those allegations. He should not issue directions without proper application of mind which would be contrary to the object and purpose of the statute.

29. As to the scope of power of the Magistrate to direct an FIR Under Section 156(3), this Court in Mohd. Yusuf v. Afaq Jahan (Smt) and Anr. MANU/SC/8888/2006 : (2006) 1 SCC 627 opined that:

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.

30. In Anju Chaudhary (supra), this Court analysing the power of the Magistrate Under Section 156(3) observed:

41. Thus, the Magistrate exercises a very limited power Under Section 156(3) and so is its discretion. It does not travel into the arena of merit of the case if such case was fit to proceed further. This distinction has to be kept in mind by the court in different kinds of cases....

31. In HDFC Securities Ltd. v. State of Maharashtra, [MANU/SC/1573/2016](#) : (2017) 1 SCC 640, this Court while interpreting the words "may take cognizance" and Section 156(3), held:

24. Per contra, the learned Counsel for Respondent 2 submitted that the complaint has disclosed the commission of an offence which is cognizable in nature and in the light of Lalita Kumari case [Lalita Kumari v. State of U.P., [MANU/SC/1166/2013](#) : (2014) 2 SCC 1: (2014) 1 SCC (Cri) 524], registration of FIR becomes mandatory. We observe that it is clear from the use of the words "may take cognizance" in the context in which they occur, that the same cannot be equated with "must take cognizance". The word "may" give discretion to the Magistrate in the matter. If on a reading of the complaint he finds that the allegations therein disclose a cognizable offence and that the forwarding of the complaint to the police for investigation Under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter, which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence, himself. It is settled that when a Magistrate receives a complaint, he is not bound to take cognizance if the facts alleged in the complaint, do not disclose the commission of an offence.

35. Every criminal case, it is stated, is a voyage of discovery in which truth is the quest. Right from the inception of the judicial system, it has been accepted that discovery, vindication and establishment of truth are the primary purposes underlying the existence of the courts of justice. However, the supremacy of truth is easier to assert than to define. Often this task becomes difficult when contradictory factual positions are asserted duly supported and affirmed on oath. In adversarial systems, the process of ascertaining truth requires compliance of procedures and Rules of evidence, and limit the role of the adjudicator, in acting as an investigator to verify veracity of the allegations and counter-allegations till evidence and material is laid and examined as per codified procedural law. Yet it is believed that clash of adversaries is best calculated to getting out the facts. In a well-

designed system, judicial findings of formal legal truth should coincide with the substantive truth. This can happen when the facts as asserted by the contestants are skillfully explored in accordance with the procedure prescribed by law. Abuse of law must be checked, if possible, at the very threshold, albeit when it is possible and also as per the procedure prescribed by law. V.R. Krishna Iyer, J. aptly summarize the procedure on the quest for truth and justice in *Jasraj Inder Singh v. Hemraj Multanchand*, [◆◆MANU/SC/0016/1977](#) : (1977) 2 SCC 155:

8. To pick out a single true item which had been inextricably got enmeshed in the skein of entries and cross-entries was to tear up the fabric of the whole truth. In a finer sense, harmony is the beautiful totality of a whole sequence of notes and the concord of sweet sounds is ill-tuned into disjointed discord if a note or two is unmusically cut and played. Truth, like song, is whole and half-truth can be noise; Justice is truth, is beauty and the strategy of healing injustice is discovery of the whole truth and harmonising human relations. Law's finest hour is not in meditating on abstractions but in being the delivery agent of full fairness. This divagation is justified by the need to remind ourselves that the grammar of justice according to law is not little litigative solution of isolated problems but resolving the conflict in its wider bearings.





36. The State of West Bengal has drawn our attention to the judgment of this Court in *Gopal Das Sindhi and Ors. v. State of Assam and Another* [◆◆MANU/SC/0413/1961](#) : AIR 1961 SC 986 to the effect that even when a private complaint is filed, the Magistrate is not bound to take cognizance Under Section 190 as the word used therein is 'may', which should not be construed as 'must' for obvious reasons. The Magistrate may well exercise discretion in sending such complaint Under Section 156(3) to the police for investigation. However, when a Magistrate chooses not to proceed Under Section 156(3), he cannot simply dismiss the complaint if he finds that resorting to Section 156(3) is not advisable. Reference in this regard can also be made to *Suresh Chand Jain v. State of M.P. and Anr.* [◆ MANU/SC/0014/2001](#) : (2001) 2 SCC 628 which distinguishes between the power of the police to investigate Under Section 156, the direction of the Magistrate for investigation Under Section 156(3) and post-summoning inquiry and investigation after cognizance Under Section 190 and Section 202 of the Code. When a Magistrate orders investigation Under Section 156(3), he does so before cognizance of the offence. If he takes cognizance, he needs to follow the procedure envisaged in Chapter XV (see *Afaq Jahan* (supra)).

The decision in *Mona Panwar v. High Court of Judicature of Allahabad through its Registrar and Ors.* [◆◆MANU/SC/0087/2011](#) : (2011) 3 SCC 496 is rather succinct. This Court held that when a complaint is presented before a Magistrate, he has two options. One is to pass an order contemplated by Section 156(3). The second one is to direct examination of the complainant on oath and the witness present, and proceed further in the manner provided by Section 202. An order Under

Section 156(3) is in the nature of a peremptory reminder or intimation to the police to exercise its plenary power of investigation Under Section 156(1). However, once the Magistrate has taken cognizance Under Section 190 of the Code, he cannot ask for an investigation by the Police. After cognizance has been taken, if the Magistrate wants any investigation, it will be Under Section 202, whose purpose is to ascertain whether there is prima facie case against the person Accused of the offence and to prevent issue of process in a false or vexatious complaint intended to harass the person named. Such examination is provided, therefore, to find out whether there is or not sufficient ground for proceeding further.

39. We would refrain and not comment on the allegations made as this may affect the case put up by either side. The Accused do not have any right to appear before the Magistrate before summons are issued. However, the law gives them a right to appear before the revisionary court in proceedings, when the complainant challenges the order rejecting an application Under Section 156(3) of the Code. The Appellants, therefore, had appeared before the High Court and contested the proceedings. They have filed several papers and documents before the High Court and this Court. To be fair to them, the copies of the papers and documents filed before the High Court and this Court would also be forwarded and kept on record of the Magistrate who would, thereupon, examine and consider the matter. However, the complainant/informant would be entitled to question the genuineness and the contents of the said documents.

40. In view of the above and for the reasons stated above, while affirming the impugned judgment and order passed by the High Court remanding the matter back to the learned Magistrate, we set aside the subsequent order passed by the Magistrate on remand, pursuant to the impugned judgment and order passed by the High Court and remit the matter back to the learned Magistrate to examine and apply his judicial mind and then exercise discretion whether or not to issue directions Under Section 156(3) or whether he can take cognizance and follow the procedure Under Section 202. He can also direct the preliminary enquiry by the police in terms of the law laid down by this Court in the case of Lalita Kumari (supra). Copies of the papers and documents filed before the High Court and this Court could also be forwarded and brought on record of the Magistrate, who would thereupon examine and consider the matter. As observed herein above, the complainant/informant would be entitled to question the genuineness of the contents of the said documents." (Emphasis mine)

11. Thus the Magistrate having regard to the observations made by the Hon'ble Supreme Court in  Priyanka Srivastava (supra) as clarified in Kailash Vijayvargiya (supra) was certainly having an authority  to order for a preliminary enquiry by the police and thus if any preliminary enquiry has been directed by the trial court in pursuance of the law propounded by the Hon'ble Supreme Court in the above mentioned two cases  the same may not be  termed as either illegal or irregular.

12. Thus, I do not find any illegality or to say any irregularity in the impugned order passed by the Magistrate whereby the preliminary enquiry has been directed in the matter.◆◆ Thus the order of the trial court whereby the preliminary investigation has been directed is not suffering from any illegality and the same is hereby affirmed.

13. It appears to be an admitted situation that the application moved by the petitioner under Section 156(3) Cr.P.C.◆ has still not been finally disposed of by the trial court (Magistrate) and in the considered opinion of this Court the petitioner should have waited for the final outcome of his application moved under Section 156(3) Cr.P.C., thus prima facie he appears to have approached this Court prematurely.

14. At this juncture, it is also worthwhile to recall◆ that◆ law as to in what manner the applications moved under Section 156(3) Cr.P.C. are to be dealt with◆ has been set at rest by this Court as well as◆ by the Hon'ble Supreme Court in Priyanka Srivastava (supra), Aleque Padamsee & others Vs. Union of India (UOI) (2007)6 SCC 171: MANU/SC/2975/2007, Mohd. Yousuf Vs. Afaq Jahan (Smt.) and another; MANU/SC/8888/2006: (2006)1 SCC 627 and in Division Bench judgment of this Court in◆ Sukhwasi Vs. State of U.P. & others; MANU/UP/1115/2007; ACC 2007 (59) 739 as well as in the Full Bench Division of this Court in Ram Babu Gupta Vs. State of U.P.; MANU/UP/0861/2001 and in Devrapalli Lakshminarayana Reddy and others Vs. V. Narayana Reddy and others; (1976)3 Supreme Court Cases 252, Ramdev Food Products Private Limited Vs. State of Gujarat ; MANU/SC/0286/2015.

15. Thus, the instant petition is finally disposed of with a direction to the Magistrate/ trial court to dispose of the application moved by the petitioner under Section 156(3) Cr.P.C.◆ having regard to the law laid down by the Hon'ble Supreme Court◆ as well as by this Court in the above mentioned cases.

16. It is clarified that this Court has not opined anything on the merits of the case and the◆ trial court would be free to dispose of the application moved by the petitioner under Section 156(3) Cr.P.C. on its own merits by passing a reasoned order, without begin influenced by any factual observation of this Court.

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