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Neutral Citation No. - 2023:AHC-LKO:49575

Court No. - 28

Case :- APPLICATION U/S 482 No. - 7244 of 2023
Applicant :- Dr. Shail Kumar Jain
Opposite Party :- State Of U.P. Thru. Prin. Secy. Home, Lko. And Another
Counsel for Applicant :- Shiv P. Shukla
Counsel for Opposite Party :- G.A.
Hon'ble Shree Prakash Singh,J.

1. Heard Sri Shiv P. Shukla, learned counsel for the applicant and Sri Aniruddh Kumar Singh, learned AGA-I and Mrs. Nusrat Jahan learned AGA for the State.

2. By means of the instant application a prayer is made to quash the criminal proceedings of criminal case no 1437 of 2022 (state of U.P. versus Shail Kumar Jain) under section 17B/17A(e)/18A/27 Drugs & Cosmetics Act, 1940 against the applicant registered for an offence punishable under Section 27 (d) of the Drugs and Cosmetics Act, 1940 ('the Act' for short) as well as summoning order dated 19-07-2023.

3. The learned counsel appearing for the applicant submits that in fact, the present applicant is a lawful degree holder of BAMS course from Lucknow University and it is not disputed even by the complainant, but a complaint has been instituted under section 17B /17A(e)/18A/27 Drugs & Cosmetics Act 1940 (Hereinafter referred as 'the Act 1940') before the Additional District and Sessions, Judge NDPS Act, Lucknow. He submits that once the samples were taken and notice was issued, the present applicant has replied though the same was kept for a long period of time for deciding, i.e., for about four years and thereafter again a notice was served which was immediately replied by the present applicant but ignoring all this, complaint has been filed against the applicant on nonest grounds. Adding his arguments, he submits that so far as the provision of Section 33M of the 'Act 1940' is concerned, it says that no prosecution under this chapter shall be instituted except by an Inspector (with the

previous sanction of the authority specified under sub-section (4) of Section 33G which is missing in the instant matter and this fact has been ignored by the learned trial Court while summoning the applicant.

4. He next contended that the Rule 123 of the Drug Rules, 1945 (hereinafter referred to as 'Rules 1945') is with respect to exemption clause and the same is quoted hereinunder:-

> *"123. The drugs specified in Schedule K shall be exempted from the provisions of Chapter IV of the Act and the rules made thereunder to the extent and subject to the conditions specified in that Schedule."*

5. Referring to aforesaid, he submits that it provides that the drugs specified in 'Schedule K' shall be exempted from the provisions of Chapter IV of the Act and rules made thereunder to the extent of subject and condition specified in the Schedule. He submits that the drug for which the sample was taken, comes under the purview of the scheduled drugs which is in 'Schedule K' of the 'Rules, 1945' and the same comes under the exemption clause and therefore no complaint can be lodged for the said offence.

6. Further contention of the learned counsel for the applicant is that the summoning order, which is impugned in this complaint itself is erroneous and is against the settled proposition of law, as no reason has been recorded while summoning the accused/present applicant. He submits that the Hon. Apex Court in catena of judgements, has held that once the Magistrate summons an accused, while passing the summoning order, the detailed reason is to be recorded but so far as the present matter is concerned, the reasons have not been recorded by the trial court.

7. In support of his contentions, he has placed reliance on the Judgment of the Apex Court rendered in the case of **Anil Kumar and Others Versus M.K.Aiyappa and Another, reported in (2013)10 Supreme Court Cases,705** and has placed reliance on paragraph no. 11 of the said Judgment, which is quoted hereinunder :-

> *"11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed case 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".*

8. Referring the aforesaid, he submits that the Apex Court while dealing with the matter in terms of section 156(3) of Cr.P.C. or Section 200 Cr.P.C. has held that the Magistrate is required to apply it's mind and the application of mind by the Magistrate must be reflected in the order and the mere statement that he has gone through the complaint,documents and heard the complainant, will not be sufficient.

9. He has further placed reliance on the Judgment of the Apex Court in the case of **Maksud Saiyed Versus State of Gujarat and Others, reported in (2008)5 Supreme Court Cases 668** and has referred paragraph no. 13 of the said Judgment, which is quoted hereinunder :-

> *"13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in*

that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

10. Placing reliance on the abovesaid Judgement, he submits that the Apex Court has also reiterated the analogy that the application of mind is essential while dealing with the application under section 156(3) of Cr.P.C.

11. Again, he has placed reliance on the Judgment of the Apex Court in the Case of **Priyanka Srivastava And Another Vs State of Uttar Pradesh and Others, reported in (2015) 6 Supreme Court Cases 287** and has referred paragraph nos. 20,21,22,26,27 & 28, which are quoted hereinunder :-

"20. The learned Magistrate, as we find, while exercising the power under Section 156(3) CrPC has narrated the allegations and, thereafter, without any application of mind, has passed an order to register an FIR for the offences mentioned in the application. The duty cast on the learned Magistrate, while exercising power under Section 156(3) CrPC, cannot be marginalised. To understand the real purport of the same, we think it apt to reproduce the said provision:

"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 abovementioned."

21. Dealing with the nature of power exercised by the Magistrate under Section 156(3) CrPC, a three-Judge Bench in Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy [(1976) 3 SCC 252 : 1976 SCC (Cri) 380] , had to express thus : (SCC p. 258, para 17)

"17. ... It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173."

22. In Anil Kumar v. M.K. Aiyappa , the two-Judge Bench had to say this : (SCC p. 711, para 11)

"11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed [Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692] 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."

26. At this stage, we may usefully refer to what the Constitution Bench has to say in Lalita Kumari v. State of U.P. [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] in this regard. The larger Bench had posed the following two questions : (SCC p. 28, para 30)

"(i) Whether the immediate non-registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have a complaint immediately investigated upon allegations being made; and

(ii) Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused."

Answering the questions posed, the larger Bench opined thus : (Lalita Kumari case [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524]

Lalita Kumari v. State of U.P., SCC pp. 35-36, 41 & 58-59, paras 49, 72, 111 & 115)

"49. Consequently, the condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.

72. It is thus unequivocally clear that registration of FIR is mandatory and also that it is to be recorded in the FIR book by giving a unique annual number to each FIR to enable strict tracking of each and every registered FIR by the superior police officers as well as by the competent court to which copies of each FIR are required to be sent.

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111. ... the Code gives power to the police to close a matter both before and after investigation. A police officer can foreclose an FIR before an investigation under Section 157 of the Code, if it appears to him that there is no sufficient ground to investigate the same. The section itself states that a police officer can start investigation when he has 'reason to suspect the commission of an offence'. Therefore, the requirements of launching an investigation under Section 157 of the Code are higher than the requirement under Section 154 of the Code. The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.

115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint."

emphasis in original)

After so stating the Constitution Bench [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] proceeded to state that where a preliminary enquiry is necessary, it is not for the purpose for verification or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence. After laying down so, the larger Bench proceeded to state : (Lalita Kumari case [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] , SCC p. 61, para 120)

"120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the general diary entry."

We have referred to the aforesaid pronouncement for the purpose that in certain circumstances the police is also required to hold a preliminary enquiry whether any cognizable offence is made out or not.

27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the Bank. We are absolutely conscious that the position does not matter, for nobody is above the law. But, the

learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the Sarfaesi Act, invokes the jurisdiction under Section 156(3) CrPC and also there is a separate procedure under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to.

28. Issuing a direction stating "as per the application" to lodge an FIR creates a very unhealthy situation in society and also reflects the erroneous approach of the learned Magistrate. It also encourages unscrupulous and unprincipled litigants, like Respondent 3, namely, Prakash Kumar Bajaj, to take adventurous steps with courts to bring the financial institutions on their knees. As the factual exposition would reveal, Respondent 3 had prosecuted the earlier authorities and after the matter is dealt with by the High Court in a writ petition recording a settlement, he does not withdraw the criminal case and waits for some kind of situation where he can take vengeance as if he is the emperor of all he surveys. It is interesting to note that during the tenure of Appellant 1, who is presently occupying the position of Vice-President, neither was the loan taken, nor was the default made, nor was any action under the Sarfaesi Act taken. However, the action under the Sarfaesi Act was taken on the second time at the instance of the present Appellant 1. We are only stating about the devilish design of Respondent 3 to harass the appellants with the sole intent to avoid the payment of loan. When a citizen avails a loan from a financial institution, it is his obligation to pay back and not play truant or for that matter play possum. As we have noticed, he has been able to do such adventurous acts as he has the embedded conviction that he will not be taken to task because an application under Section 156(3) CrPC is a simple application to the court for issue of a direction to the investigating agency. We have been apprised that a carbon copy of a document is filed to show the compliance with Section 154(3), indicating it has been sent to the Superintendent of Police concerned."

12. During the course of his argument he has further placed reliance on the judgement reported in **2023 SCC OnLine SC 269, S. Athilakshmi Vs. State Rep. by the Drugs Inspector** and has referred paragraph 21 of the above said judgement. Paragraph 21 of the aforesaid judgement is quoted hereinunder:-

"21. The sanctioning authority had not examined at all whether a practising doctor could be prosecuted under the facts of the case,

> *considering the small quantity of the drugs and the exception created in favour of medical practitioner under Rule 123, read with the Schedule "K". All these factors ought to have been considered by the sanctioning authority. Under these circumstances we allow this appeal and set aside the order of the learned Single Judge of the Madras High Court and quash the criminal proceedings in Criminal Case No. 7315 of 2018 on the file of X Metropolitan Magistrate, Egmore, Chennai."*

13. Placing reliance on the abovesaid Judgment, he submits that the factual matrix of the present case is identical to the case of S. Athilakshmi (supra) as in that case also, the prosecution was initiated against a practising doctor considering the small quantity of drugs and the same was held by the Apex Court as exempted under Rule 123 read with the Schedule 'K' of the Rules 1945. Likewise, in the present case also, the sanctioning authority has not taken care of provisions of exemption clause and the Schedule 'K' of the Rules 1945, which is a clear cut violation of mandate of law and, therefore, the whole criminal proceedings initiated against the present applicant vitiates in the eyes of law.

14. Concluding his arguments, learned counsel for the applicant submits that the summoning order dated 19.7.2023 is not only erroneous and unlawful but it is against the settled proposition of law rendered in plethora of Judgements of the Apex Court and, therefore, the same is not sustainable.

15. On the other hand, the learned counsel appearing for the State has opposed the contention aforesaid and submits that the complaint is in very detailed and after giving opportunity to the applicant, when the authorities came to the conclusion that there is a case, the complaint was lodged. He added that the complaint is appended with the material evidences, which reveals that the present applicant has committed an offence under Section 17B/17A(e)/18A/27 of 'the Act 1940', therefore the learned trial Court has rightly passed the order, whereby the present applicant has been summoned and thus no interference is warranted.

16. Considering the submissions of the learned counsels for the parties and after perusal of the material placed on record, it transpires that the present applicant is an Ayurvedic Doctor, having degree of BAMS from Lucknow University and is a registered medical practitioner, which is an admitted fact between the parties. After taking sample of medicine, the same was sent to Lab and was examined and once it is said to be found against the norms, the notice was issued and after receiving the reply and reaching to the conclusion, the complaint was filed by departmental authorities but it seems that for taking decision, the authorities have taken four years that is an inordinate delay. Further it seems that for justifying the delay, again a notice was served upon the applicant, though, prima facie, the same is insufficient to fill up or explain the inordinate delay.

17. This court has noticed the fact that there is an exemption clause in Rule 123 of 'the Rules 1945', which clearly says that the drugs which are specified in the Schedule 'K' shall be exempted from the provision of Chapter IV of the Act. So far as the sample which was taken, admittedly, comes under the Schedule 'K' of the Rules, 1945' but the authorities has ignored the provisions of exemption clause.

18. I have also considered the contentions of the learned counsel for the applicant that no reason has been recorded while passing the order dated 19.07.2022, whereby the present applicant has been summoned. From bare perusal of the impugned order, it transpires that the reasons has not been recorded and it has only been mentioned that the Court has looked into the complaint as well as the record available before the same.

19. Time and again, the Hon'ble Apex Court has heldthat in the cases arising out of complaint case, the trial court while issuing summons, shall record detailed reasons, which should apparently show the application of mind and this duty of Magistrate cannot be marginalized.

20. The plea has also been taken that provision of Section 33M of the Act, 1940 clearly provides that any prosecution under the Chapter IV of

the Act, can be instituted except by an Inspector with a previous sanction of the authority specified under Sub Section (4) of Section 33 (g) and while examining aforesaid, this Court finds that the compliance of the abovesaid provisions has not been done by the authorities and the mandate of due procedure has been violated.

21. In view of the abovesaid submissions and discussions, there is merit in this case, consequently, the order dated 19.07.2022 passed in Complaint Case No. 1437 of 2022, is hereby set-aside.

22. Matter is remitted back to the trial Court concerned to pass a fresh order within a period of 60 days from the date of this order, considering the observations made herein above.

23. The instant application is hereby **allowed**.

Order Date :- 27.7.2023
Anurag