

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

Reserved on: 22.02.2023  
Pronounced on: 02.03.2023

CRMC No. 181/2018  
(O&M)

**Nikunj Sharma**

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

Through: - Mr. Abhinav Sharma, Sr. Advocate with  
Mr. Abhirash Sharma, Advocate

Vs.

**State of J&K and another**

**...Respondent(S)**

Through: - Mr. Bhanu Jasrogia, GA  
Mr. Aseem Sawhney, Advocate &  
Mr. Arshad Hussain, Advocate

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

**JUDGMENT**

**1)** In the instant petition, the petitioner has called into question FIR No. 152/2018 for offences under Sections 316/323/109 RPC registered with the Police Station, Rajouri.

**2)** It appears that respondent No. 2/complainant lodged a written report with the SHO, Police Station, Rajouri on 29.03.2018. In the said report, it was alleged that the petitioner happens to be her husband with whom she has entered into wedlock on 05.03.2016. According to the complainant, after about three months of the marriage, the petitioner and his relatives including his parents, brother and sister started harassing and beating her. It was further alleged that the complainant became pregnant and in the month of

January 2017, when she was pregnant, the petitioner and his aforesaid relatives conspired with each other and brother of the petitioner, Anuj Sharma pushed her down the stairs, as a result of which she fell down and experienced pain in her belly. It is further alleged that the petitioner, husband of the complainant, arranged her treatment and she was administered some medicines as a consequence whereof, miscarriage took place. The complainant has further alleged that she was thrown out of her matrimonial home and she started living with her parents.

**3)** On the basis of the aforesaid report, the Police registered impugned FIR for offences under Sections 316/323/109 RPC and started investigation of the case. Vide order dated 17.04.2018 passed by this Court in the instant petition, investigation to the extent of offence under Section 316 RPC was stayed, but it appears that the investigation of the case continued in respect of the other offences.

**4)** The petitioner has challenged the impugned FIR primarily on the ground that all the offences alleged in the impugned FIR are non-cognizable in nature, as such, it was not open to the police to register the FIR and undertake the investigation of the case without permission of the Magistrate. It has been contended that the investigation of the impugned FIR is without jurisdiction and, as such, the same deserves to be quashed. The other ground urged by the petitioner is that as per the medical report, there was no positive evidence with regard to the pregnancy of the complainant, as such, offences under Sections 313 and 316 of RPC are not otherwise made out against the petitioner. It has been contended that once the registration of basic FIR in

respect of non-cognizable offences is without jurisdiction, the Investigating Agency cannot add cognizable offences during the investigation of the case.

5) The respondent-State has filed its objections to the petition and has filed the status report with regard to the investigation. As per the status reports filed by the Investigating Agency, after registration of the impugned FIR, the statements of the witnesses under Section 161 Cr. P.C. were recorded, on the basis of the which, offences under Sections 316 and 498-A RPC were added and offence under Section 316 RPC was dropped. Status reports further indicate that during the course of the investigation, the Investigating Officer called the complainant for recording her statement under Section 161 Cr.P.C. but she has not responded so far.

6) Respondent No. 2/complainant has also filed her response to the petition. In her response, it has been contended that this Court in exercise of its jurisdiction under Section 482 Cr. P.C. cannot embark upon an inquiry to ascertain the veracity of the contention of the petitioner that there was no positive evidence with regard to the pregnancy of the complainant. It has been further submitted that admittedly, the complainant had lodged two more complaints before the police prior to lodging of the impugned FIR, in which specific allegations were made by her regarding demand of dowry by the accused including the petitioner, as also regarding harassment perpetrated upon her by the accused in connection with demands of dowry. According to respondent No. 2, merely because the FIR has been registered with regard to non-cognizable offences, the Investigating Agency is not

precluded from undertaking investigation, if it finds that certain cognizable offences are also made out against the accused.

7) I have heard learned counsel for the parties and perused the record of the case including the case diary.

8) The main ground urged by the learned Senior Counsel for the petitioner impugning the FIR lodged by respondent No. 2 is that the Investigating Agency could not have registered an FIR and undertaken the investigation in respect of non-cognizable offences.

9) On the other hand, learned counsel for respondent No. 2 has submitted that technicalities cannot be allowed to defeat the ends of justice when during the investigation of the case it has come to fore that the cognizable offences have also been committed by the petitioner and co-accused.

10) Before determining the merits of the rival contentions of the parties, it would be apt to mention here that although offences under Sections 313 and 316 IPC have been categorized as cognizable offences under the Code of Criminal Procedure, 1973, yet corresponding offences under the Ranbir Penal Code i.e. Section 313 and Section 316 of RPC, as per the Jammu and Kashmir Code of Criminal Procedure Svt. 1989, are non-cognizable in nature. The offence under Section 323 RPC is also non-cognizable in nature. Thus, there is no dispute with regard to the legal position that offences under Sections 316 and 323 RPC as also offence under Section 313 RPC are non-cognizable in nature.

**11)** Since the offences alleged to have been committed relate to a period when the Jammu and Kashmir Code of Criminal Procedure was in force, therefore, in the matter of registration of information and undertaking of investigation, the instant case is to be governed by the provisions contained in Chapter XIV of the Jammu and Kashmir Code of Criminal Procedure.

**12)** Section 154 is the first provision in the aforesaid Chapter, which provides that every information relating to the cognizable offences has to be reduced to writing by the officer incharge of the Police Station or under his direction. Section 155 of Cr. P.C. relates to information in non-cognizable cases, it reads as under:

“155. Information as to non- cognizable cases and investigation of such cases.

**(1)** When information is given to an officer in charge of a police station of the commission within the limits of such station of a non- cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

**(2)** No police officer shall investigate a non- cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

**(3)** Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

**(4)** Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

**13)** From a perusal of the aforesaid provision, it is clear that when information regarding commission of a non-cognizable offence is given to an officer of the Police Station, he has to enter it in a book to be maintained for the said purpose and thereafter, refer the informant to the Magistrate

having the jurisdiction. Sub Section (2) quoted above provides that the Police Officer is debarred from investigating a non-cognizable offence without the order of the Magistrate concerned. Once such an order is received by the Police Officer, he can exercise the same powers as he may exercise in a cognizable offence, except that he cannot exercise the power of arrest without warrant.

**14)** From the above, it becomes clear that an officer of the Police Station has to record the information with regard to non-cognizable offences in a separate book to be kept for that purpose, whereas information with regard to cognizable offences has to be recorded in a different book. It is also clear that investigation into a non-cognizable case cannot be undertaken without order of a Magistrate, whereas there is no such requirement in case of cognizable offences.

**15)** In the instant case, Investigating Agency has registered an FIR and undertaken the investigation in respect of non-cognizable offences. The contents of the impugned FIR also do not disclose commission of any cognizable offence. It talks about harassment and beating of the complainant by the accused. It also talks about administration of medicines and treatment to her resulting in miscarriage. The contents of the FIR do not relate to an act of harassment in connection with demand of any dowry. There is not even a whisper in the impugned FIR that respondent No. 2 has been subjected to demands of dowry by the accused. Therefore, the impugned FIR discloses only commission of non-cognizable offences but still then the SHO

concerned registered an FIR and undertook investigation of the case as if it was a cognizable case.

**16)** The question arises as to what would be the effect of such an action on the part of the Investigating Agency. Learned counsel for the respondent No. 2 has vehemently argued that such an illegality is curable and the same should not be allowed to defeat the ends of justice so as to permit the petitioner and co-accused escape the clutches of law. In support of his contentions, the learned counsel has placed heavy reliance on the judgment of the Supreme Court in the case of **N. H. Rishbud and Inder Singh vs. State of Delhi, AIR 1955 SC 196**, wherein the Supreme Court 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. The Court while examining the order of a Magistrate contemplated Section 5A(1) of the Prevention of Corruption Act, 1947, observed as under:

“When a Magistrate is approached for granting such permission, he is expected to satisfy himself that there are good and sufficient reason for authorizing an officer of a lower rank to conduct the investigation. The granting of such permission is not be treated by a Magistrate as a mere matter of routine but it is an exercise of his judicial discretion having regard to the policy underlying it. In our opinion, therefore, when such a breach is brought to the notice of the court at an early stage of the trial the court will have to consider the nature and extent of the violation

and pass appropriate order for such re-investigation as may be called for, wholly or partly....”

**17)** On the basis of the aforesaid observations of the Supreme Court, Mr. Aseem Sawhney, learned counsel appearing for respondent No. 2 has submitted that even if, it is assumed that the action of the Police in registering the impugned FIR was not in accordance with law, the same would not vitiate the whole investigation, particularly when during investigation of the case, cognizable offence viz. offence under Section 498-A RPC has been found established against the accused. He has also placed reliance upon the judgment of Andhra Pradesh High Court in the case of **Vadlamudi Kutumba Rao vs. State of Andhra Pradesh, AIR 1961 AP 448.**

**18)** At first blush, the contention raised by Mr. Aseem Sawhney appears to be attractive but when the same is deeply analyzed in the light of legal position on the subject, the same appears to be without any merit because the ratio laid down by the Supreme Court in **N. H. Rishbud's** case, on which heavy reliance has been placed by the learned counsel Mr. Sawhney, cannot be made applicable to the instant case for the reason that investigation of the impugned FIR is still at its inception.

**19)** The Supreme Court has in the case of **State of Harayana and others vs. Bhajan Lal and others, 1992 supp (1) SCC 335** after noticing 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. The relevant observations of the Supreme Court in this regard are reproduced as under:

“130. There is also one more legal hurdle which the prosecution has to overcome in entrusting this investigation with the SHO. As has been repeatedly mentioned the case under consideration is not only registered under Section 5(2) but also under Sections 161 and 165 IPC. The Government order authorizes the Inspector of Police of Haryana State to investigate only the offences falling under Section 5 of the Act. Therefore, the SHO who has taken up the investigation of the offences inclusive of those under Sections 161 and 165 IPC is not at all clothed with any authority to investigate these two offences, registered under the IPC, apart from the offence under Section 5(2) of the Act. When Mr. Sachar was confronted with this legal issue, he tried to extricate himself from this situation saying that the prosecution would approach the Magistrate of the first Class for obtaining an order under section 5A(1) authorizing SHO to investigate the offences under the provisions of the IPC. However, as the question relating to the legal authority of the SHO is raised even at this initial stage, we feel that it would be proper and also desirable that the investigation, if at all to be proceeded with the opinion of the State Government, should proceed only on the basis of a valid order in strict compliance with the mandatory provision of Section 5A(1).

131. From the above discussion, we hold that (1) as the salutary legal requirement of disclosing the reasons for according the permission is not complied with; (2) as the prosecution is not satisfactorily explaining the circumstances which impelled the S. P. to pass the order directing the SHO to investigate the case; (3) as the said direction manifestly seems to have been granted mechanically and in a very casual manner, regardless of the principles of law enunciated by this Court, probable due blissful ignorance of the legal mandate, and (4) as, above all, the SHO has got neither any order from the Magistrate to investigate the offences under Section 161 and 165 IPC nor any order from the S. P. for investigation of the offence under Section 5(1)(e) of the Prevention of Corruption Act in the manner known to law, we have no other option, save to quash that order of direction reading “investigate” which direction suffers from legal infirmity and also the investigation, if any, so far carried out. Nevertheless, our order of quashing the direction of the S. P. and the investigation thereupon will not in any way deter the first appellant, the State of Haryana to pursue the matter and direct an investigation afresh in pursuance of the FIR, the quashing of which we have set aside, if the State so desires, through a competent police officer, clothed with the legal authority in strict compliance with Section 5A(1) of the Act.”

20) From the aforesaid enunciation of law on the subject, it is 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. In the case of **N. H. Rishbud and Inder Singh** (supra), the investigation had culminated in filing of charge sheet and cognizance had also been taken by the competent Court. It was in the aforesaid situation that the Supreme Court held that unless it is found that prejudice would be caused to any party by quashing the investigation, an order setting aside the investigation would not be desirable.

21) In the instant case, legality and validity of the impugned FIR has been immediately challenged by the petitioner by filing this petition in the year 2018 itself. In fact, the FIR was registered on 29.03.2018 and the instant petition has been filed on 17.04.2018 i.e. within one month of lodging of the FIR. In such a situation, the illegality committed by the Investigating Agency in registering and undertaking the investigation cannot be brushed aside and if the same is quashed, no prejudice would be caused to respondent No. 2/complainant, who has the option of filing a private complaint under Section 200 of Cr.P.C. against the petitioner and co-accused. The ratio laid down by the Supreme Court in **N. H. Rishbud and Inder Singh** (supra) is, therefore, not applicable to the instant case.

22) So far as the judgment of Andhra Pradesh High Court in **Vadlamudi Kutumba Rao** (supra) is concerned, the same is also not applicable to the facts of the instant case, inasmuch as in the said case the FIR was registered

under Section 409 IPC, which is a cognizable offence and after investigation, charge sheet was laid in respect of the said offence as well as in respect of certain other offences which were non-cognizable in nature.

**23)** It is a settled law that if during the investigation of the cognizable offence, certain non-cognizable offences are also made out, the Investigating Agency is not required to seek permission of the Magistrate for undertaking investigation in respect of those offences. In fact, in the Code of Criminal Procedure, 1973 there is specific provision in the shape of Section 155(4) CrPC, which provides that where a case relates to two or more offences of which, at least one is cognizable, the case should be deemed a cognizable case notwithstanding that other offences are non-cognizable. Even in the context of Jammu and Kashmir Cr. P.C. where there is no akin to Section 155(4) of Central Cr.P.C. the Supreme Court in the case of **State of J&K vs. Dr. Saleem ur Rehman, 2021 SCC Online SC 1014**, has made it clear that while investigating cognizable offences, the investigating agency is well within its jurisdiction to investigate the offences of non-cognizable nature together with the cognizable offences.

**24)** In the instant case, the basic FIR has been registered in respect of non-cognizable offences and as per the Investigation Agency, now cognizable offence under Section 498-A Cr.P.C. has also been found established against the petitioner. Such a situation is not contemplated by law. The basic foundation of the investigation which is registration of impugned FIR, is itself without sanction of law. Therefore, any investigation undertaken on its strength is bound to crumble. The same cannot be legalized once its very

basis is illegal. I am supported in my aforesaid view with the judgment of High Court of Kerala in **Haneefa vs. State of Kerala, 2022 LiveLaw (Ker) 638**. In the said case, Kerala High Court while relying upon the judgment of Supreme Court in **Keshav Lal Thakur vs. State of Bihar, (1996) 11 SCC 557** held that when only non-cognizable offences are alleged initially, investigation cannot be commenced without orders from the Magistrate. It has been further held that incorporation of a cognizable offence at the time of filing a final report cannot be utilized as a method or as a device to circumvent the mandate of Section 155(2) Cr.P.C. by the officer incharge of the police station or any investigating officer.

25) Even otherwise, a perusal of the case diary reveals that statements of the witnesses recorded under Section 161 Cr.P.C. during the investigation of the case do not disclose commission of offence under Section 498-A of RPC. The witnesses examined by the Investigating Agency have only corroborated what has been stated in the impugned FIR which, as already discussed, does not disclose commission of offence under Section 498-A RPC. So far as the earlier applications of the complainant/ respondent No. 2 to the Police, wherein she has alleged demands of dowry by the accused, are concerned, the same are not part of the case diary. Therefore, contention of the learned counsel for respondent No. 2 that these applications disclose commission of offence under section 498-A RPC, cannot be looked into as the same do not form part of material collected by the Investigating Agency. In these circumstances, I fail to understand on what basis the Investigating

Agency has in its status report concluded that offence under section 498-A RPC is also made out against the accused.

**26)** For all what has been analyzed herein above, the impugned FIR deserves to be quashed as this case is squarely covered by illustration No. (2), laid down by the Supreme Court in **Bajan Lal's case**, (supra), which reads as under:

“2. Where the allegations in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate with the purview of Section 155(2) of the Code.”

**27)** For the foregoing discussions, the petition is allowed and the impugned FIR is quashed. However, respondent No. 2 is at liberty to take resort to appropriate remedy as may be available to her under law.

**28)** Case diary be returned to the learned counsel appearing for the State.

(SANJAY DHAR)  
JUDGE

**Jammu**

02.03.2023

*Karam Chand/Secy.*

*Whether the order is speaking:*

*Yes/No*

*Whether the order is reportable:*

*Yes/No*