IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

Criminal Revision No. 252 of 2019

Commercial Toyota Through its General Manager Sales Shri Abhinav Khosla

...Revisionist

Vs.

State of Uttarakhand & Another

...Respondents

Mr. Parikshit Saini, Advocate for the revisionist.

Mr. P.S. Bohra, A.G.A. along with Mr. Siddhartha Bisht, Brief Holder for the State of Uttarakhand/respondent no. 1.

Mr. Sanpreet Singh Ajmani, Advocate for respondent no. 2.

JUDGMENT

Hon'ble Sharad Kumar Sharma, J (Oral)

To start with the question, which is under consideration before this Court is with regards to the exercise of the revisional power by the Sessions Judge while considering the propriety of an order dated 21.07.2018, by virtue of which an application under Section 156 (3) of the Cr.P.C. as preferred by the complainant/respondent no. 2, which was rejected by the order dated 21.07.2018, which ultimately stood allowed by the Revisional Court by its impugned order dated 19.04.2019 and consequently, the Revisional Court while setting aside the order dated 21.07.2018 had remitted the matter back to the Trial Court to reconsider the application under Section 156(3) and pass an appropriate order.

2. This order impugned allowing the application under Section 156(3) by an order dated 19.04.2019 has been challenged by the revisionist on two basic grounds (1) the impugned order of rejection of an application under Section 156(3) has rightly been made by the learned Trial Court, because the application under Section 156(3), which was preferred by the respondent no. 2 herein, was not accompanied with an affidavit, which was mandatorily required in accordance with the ratio as propounded by the Hon'ble Apex Court, by its judgment as reported in **2015(6) SCC 287 'Priyanka Srivastava & Another vs. State of U.P. & Others'**, which has made it mandatory that in order to attach propriety and genuineness to the

application preferred under Section 156(3), it ought to be supported with an affidavit so as to justify the set of allegations, which has been leveled against the person against whom the application has been moved, so that the sanctity in relation to the set of allegations levelled may be tested by the Courts while entertaining the application under Section 156(3) and the responsibilities of its veracity and genuineness of allegations complained of can be harnessed upon the person, who is filing an application for registration of an FIR as against the accused persons.

3. The second argument, which has been raised by the learned counsel for the revisionist is that while giving challenge to the order dated 19.04.2019, it is from the view point that when the Revisional Court is dealing with the order passed by the Subordinate Court rejecting an application under Section 156(3), then at that point of time if the Revisional Court allows the revision, it could have been only a simplicitor setting aside of an order , but once the revisional court order it contains a direction of remand for reconsideration of application under Section 156(3), then the Revisional Court could not have issued any specific positive direction as to the manner in which it was required to be complied with by the Trial Court on revival of the proceedings in pursuance to the order of remand by the revisional courts order.

4. The basic reason, which is being canvassed by the learned counsel for the revisionist, is from the view point that any direction issued or guidelines given by the Revisional Court while setting aside the order of rejection of 156(3) application for its reconsideration based on a certain specified guidelines given in the Revisional Court's order that would be a futile exercise of reconsidering the application because the Trial Court while reconsidering the application under Section 156(3) it would be amounting to sitting with a preconceived mind and Trial Court would be more dominated and influenced by the directions issued by the Revisional Court.

5. Lastly, it has been argued by the learned counsel for the revisionist that so far as the order dated 21.07.2018 is concerned, it is absolutely a justified order for the reason that while rejecting the application under Section 156(3) the Court has very vividly considered the veracity of the application under Section 156(3) as well as the set of allegation leveled in it and finding it to be not viable, it has been rightly rejected by the Trial Court.

6. Learned counsel for the revisionist further submits that the order of Revisional Court cannot be sustained in view of the ratio, which has been laid down by the Coordinate Bench of this Court also in the light of the judgment, which is reported in **2016(3) NCC 68 'Sachin Chamoli vs. State of Uttarakhand & Another'**, wherein, the Coordinate Bench of this Court while placing reliance on the judgment reported in **2015(6) SCC 287 'Priyanka Srivastava & Another vs. State of U.P. & Others'** has held it to be mandatory that an application filed under Section 156(3), as soon as it is preferred before the Court, it could not have been even entertained until and unless it is accompanied with an affidavit in support thereto. Paragraph 5 of the judgment is quoted hereunder:

> "5. Both the applications which have been filed before the Senior Superintendent of Police, Dehradun and learned Chief Judicial Magistrate, Dehradun have been perused. In his applications, the sum and substance of 2 allegation is that the accused who is the Manager or Owner of Bamko India which is situated at Laxmi Road, Dehradun has committed an offence by cheating, etc, as his letter pad belongs to some persons in China on that basis he has procured Visa for persons who are being sent to China. This is the primary allegation of the present applicant. Nothing further has been elaborated on it. This Court finds that admittedly, the application has not been filed along with an affidavit which is now a mandatory requirement as per the law laid down by the Hon'ble Apex Court in the case of Priyanka Srivastava & another Versus State of Uttar Pradesh & others reported in (2015) 6 SCC 287."

7. In order to answer the questions, which has been raised by the learned counsel for the revisionist, it becomes necessary to consider as to what was the basic spirit, which has been specified to be postulated by the Hon'ble Apex Court in its judgment of Priyanka Srivastava's case (supra), it was with the view point that it should

create an impediment and check in filing of frivolous application under Section 156(3), and the same being invariably entertained by the Magistrate without even testing the genuineness of the allegations leveled in it and that is why in order to maintain check and balances over frivolous and vexatious application the Hon'ble Apex Court has laid down the criteria as provided from paragraph 27 to 32 in the aforesaid judgment as to what was the wider spirit it aimed to be achieved, which was enunciated by the Hon'ble Apex Court to make it mandatory that every application filed under Section 156(3), is bound to be supported with an affidavit, it has been more spirited on the grounds, which has been laid by the judgment by the Hon'ble Apex Court in paragraph 27 of the judgment so as to provide more authenticity to the proceedings drawn under Section 156(3). The spirit and the purpose with which the said judgment is rendered it never intends or aims at any point of time that it should create an impediment in entertainment of an application under Section 156(3), which has been otherwise genuinely filed by the complainant by invoking the provisions contained under Section 156(3). Paragraph 27 to 32 are quoted hereinbelow:

> "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 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) Cr.P.C. 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.
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> 28. Issuing a direction stating "as per the application" to lodge an FIR creates a very unhealthy situation in the society and also reflects the erroneous approach of the learned Magistrate. It also encourages the unscrupulous and unprincipled litigants, like the respondent no.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, he 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 the appellant No.1, who is presently occupying the position of Vice-President, neither the loan was taken, nor the default was made, nor any action under the SARFAESI Act was taken. However, the action under the SARFAESI Act was taken on the second time at the instance of the present appellant No.1. We are only stating about the devilish design of the respondent No.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) Cr.P.C. 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 of Section 154(3), indicating it has been sent to the Superintendent of police concerned.

29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellows citizens, efforts are to be made to scuttle and curb the same.

30. In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

31. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application under Section 156(3) be supported by an affidavit so that the person making the

> application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.
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> 32. The present lis can be perceived from another angle. We are slightly surprised that the financial institution has been compelled to settle the dispute and we are also disposed to think that it has so happened because the complaint cases were filed. Such a situation should not happen."

8. Factually so far this case is concerned the grievance, which is more harped upon by the learned counsel for the revisionist is that when the revisional court is exercising its powers under Section 397, in such an eventuality, when the Court considers an order passed by Subordinate Court to be not in consonance to the provision of law and it decides to set aside the same and remit the matter back for its fresh consideration. In such an eventuality, the revisional court ought not to have issued any specific direction or the manner in which the application, which is being directed to be reconsidered is to be decided. Meaning thereby, as per the argument of the learned counsel for the revisionist is that the revisional court's order cannot be preceded with by any specific mode of taking a decision. In the case at hand as against the rejection of an application under Section 156(3) by the order dated 21.07.2018 the revisional court while setting aside the said order has passed the following directions:

> "**आदेश**
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> निगरानीकर्ता द्वारा प्रस्तुत फौजदारी निगरानी स्वीकार की जाती है एवं प्रश्नगत आदेश दिनांकित 21.07.2018 को निरस्त किया जाता है।
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> पत्रावली इस निर्देश के साथ विद्वान अवर न्यायालय को प्रतिप्रेषित की जाती है कि उपरोक्त बिन्दुओं के परिप्रेक्ष्य में पुनः सुनवाई कर उचित आदेश पारित किया जाये। पत्रावली वास्ते अग्रिम कार्यवाही हेतु दिनांक 07.05.2019 को विद्वान अवर न्याायलय के समक्ष पेश हो।

मूल पत्रावली, इस निर्णय की प्रति के साथ, विद्वान अवर न्यायालय को अग्रेतर कार्यवाही हेतु अविलम्ब वापस प्रेषित की जाये। निगरानी की पत्रावली दाखिल अभिलेखागार हो।"

9. On perusal of the directions given by the revisional court in the operative portion of the order its a simplicitor direction, which has been issued is that an application under Section 156(3) is to be reconsidered afresh. In such a circumstances the effect of the revisional court's order impugned in the present revision would be that the Trial Court will have to consider the application under Section 156(3) of Cr.P.C., de novo as if it has been filed as afresh. In other words, it means to say that on the revival of the proceedings as the consequence of the order dated 19.04.2019 impugned in the present revision the Trial Court would decide the application independently without being influenced or taking cognizance of any specific direction issued by the revisional court and will not be influenced with regards to any modalities or directions, which is provided by the revisonal court's order dated 19.04.2019. Thus, this Court while declining to entertain the revision and affirming the order dated 19.04.2019, directs that the revisional court would be deciding the application under Section 156(3) independently without being affected by any of the directions or guidelines if any given by the revisional court.

10. The main controversy, which is being raised by the learned counsel for the revisionist. was the necessity to file an application under Section 156(3), which has had to be supported by an affidavit as it has been provided by the judgment of the Hon'ble Apex Court in Priyanka Srivastava's matter (supra). The said judgment had a very laudable purpose and object to be achieved that the invocation of Section 156(3), should not be made by the applicant to adopt it as a matter of drawing a farce proceeding against the accused person or for vengeance of personal grievances. The intention and purpose which the judgment wanted to postulate to be adhere to by the Magistrates before whom the applications are filed for taking cognizance of the offence complained of invoking Section 156(3) has had to have an assurance that the factual narration of fact given in the application attaches a sanctity to it and is not based on a frivolous set of

allegations. That is why the Hon'ble Apex Court has held that when the application under Section 156(3) is considered by the Court that its the Magistrate concerned, it also castes a duty on the Magistrate himself to ensure that the application preferred under Section 156(3) is authentic and genuine and in order to attach that authenticity, it has been laid down that the application has to be supported with an affidavit.

11. If the direction as given by the Hon'ble Apex Court as mandated by paragraph 27 to 32, which has been quoted above, it rather also castes a responsibility on the Magistrate concerned also before whom the application is filed has to ensure that an application filed under Section 156(3) is supported by a duly sworn affidavit filed by the applicant, who is seeking invocation of the jurisdiction under Section 156(3). The motive behind the aforesaid direction was to harness upon the responsibilities on the applicant as well with Court where the proceedings are initiated and to restrict filing of frivolous applications. Once it is a responsibility, which has been laid to be discharged by the Magistrate concerned and it aims at to achieve a certain social reformative object, this Court is of the view that the test of entertainment of an application under Section 156(3) with regards to it being supported by an affidavit has to be judged at the stage when the proceedings itself is entertained by the Magistrate, i.e. at the stage of inception of the proceedings. The said responsibility as enunciated in the judgment of the Hon'ble Apex Court has shouldered the responsibilities on the Magistrate also, who is supposed to discharge a duty casted by law to ensure that every application filed under Section 156(3) is entertained only when it is supported by an affidavit.

12. The very observation made in paragraph 30 (as quoted above) of the judgment of the Priyanka Srivastava's case (supra) where a responsibility has been shouldered on the Magistrate with regards to the propriety of the application to be supported by an affidavit, i.e. the stage when the proceedings are initiated that in itself makes the defect of the application being supported by an affidavit as to be curable in nature because if an application is not supported by an affidavit and is rejected, it may in a particular circumstance result into

depriving of a right of a citizen to invoke the proceedings of Section 156(3) and in these circumstances the Court or the Magistrate can always direct the applicant to file an affidavit in support of his application under Section 156(3) so as to make it maintainable before the Court. If that defect of application under Section 156(3) not being supported with affidavit, is made as an uncurable, it may at times in some cases be giving superior hard to the Magistrate to deprive the applicant of filing application under Section 156(3) by rejecting the same on this procedural ground itself.

13. In the present case a very peculiar circumstance has emerged the peculiarity is that the revisional court has remitted the matter back to the Trial Court to decide the application afresh. Deciding afresh would mean its at an stage of inception and consideration of the proceedings right from its initial stage, as if it is being entertained for the first time. On revival of the proceedings the Court can always in the light and the spirit enunciated in paragraph 30 of the judgment can direct the applicant (revisionist herein) to support his application along with an affidavit to make it entertainable before the Magistrate concerned. Hence, this Court is of the view that filing of an affidavit in support of Section 156(3) application is curable, in the light and spirit of the observation made in paragraph 30 of the Judgment of Priyanka Srivastava's case (supra).

14. The controversy is being argued by the learned counsel for the respondent from another view point that once the principles laid down by the Hon'ble Apex Court in the aforesaid judgment of Priyanak Srivastava case (supra), where it castes the responsibility on the Magistrate entertaining the application to ensure a vigil on entertaining of an application under Section 156(3). In that eventuality, some responsibilities in entertaining appropriate application has to be shouldered by the Magistrate also. Under these circumstances he has made reference to a judgment of **'Jang Singh vs. Brij Lal & Others'** as reported in **AIR 1966 SC 1631**, particularly a reference has been made to paragraph 6 of the said judgment, which is quoted hereunder:

> "6. The facts of the case almost speak for themselves. A search was made for the application on which the order of the Court directing a deposit of Rs. 4950 was said to be passed. That application remained untraced though the District Judge adjourned the case more than once. It is, however, quite clear that the challan was prepared under the Court's direction and the duplicate challan prepared by the Court as well as the one presented to the Bank have been produced in this case and they show the lesser amount. This challan is admittedly prepared by the Execution Clerk and it is also an admitted fact that Jang Singh is an illiterate person. The Execution Clerk has deposed to the procedure which is usually followed and he has pointed out that first there is a report by the Ahmed about the amount in deposit and then an order is made by the Court on the application before the challan is prepared. It is, therefore, quite clear that if there was an error the Court and its officers largely contributed to it. It is no doubt true that a litigant must be vigilant and take care but where a litigant goes to Court and asks for the assistance of the Court so that his obligation-, under a decree might be fulfilled by him strictly, it is incumbent on the Court, if it does not leave the litigant to his own devices, to ensure that the correct information is furnished. If the Court in supplying the information makes a mistake the responsibility of the litigant, though it does not altogether cease, is at least shared by the Court. If the litigant acts on the faith of that information the Courts cannot hold him responsible for a mistake which it itself caused. There is no higher principle for the guidance of the Court than the one that no act of Courts should harm a litigant and it is the bounden duty of Courts to see that if a person is harmed by a mistake of the Court he should be restored to the position he would have occupied but for that mistake. This is aptly summed up in the maxim: "Actus curiae neminem gravabit"."

16. It is based upon a legal idiom to the effect that is "Actus curiae neminem gravabit", which basically postulates that a litigant in a proceedings is not to be affected adversely because of the mistake of the Court. He has drawn the attention of this Court in the light of the aforesaid ratio from the background that if the judgment of Priyanka Srivastava case (supra) castes a responsibility on the Magistrate to ensure that an application under Section 156(3) is supported by an affidavit when it is entertained then in such an eventuality, in accordance with the ratio laid down in paragraph 6 of the judgment reported in **AIR 1966 SC 1631**, it is also a responsibility which is also to be discharged by the court while entertaining the application. In such a circumstances where the Hon'ble Apex Court has held the Courts to be responsible to ensure that an appropriate application has been filed strictly in accordance with the guidelines of the Priyanaka

Srivastava's case (supra) then the Magistrate too is to be held responsible if the conditions laid down therein is not complied with and in such a circumstances the implications of paragraph 6 of the judgment of **AIR 1966 SC 1631** would come into play, because if there is an inaction on part of the Magistrate in asking the applicant concerned to file an application under Section 156(3) along with an affidavit, in such an eventuality, the applicant cannot be made to suffer where the Magistrate has not instructed or observed that the applicant has to support his application with an affidavit as contemplated by the judgment of Priyanka Srivastava (supra).

17. Here in the instant case in accordance with the direction issued by the revisional court by the order dated 19.04.2019 it is absolutely a de novo proceedings, which is to be revived before the Magistrate as a fresh and taking the spirit as contemplated under paragraph 30 of the said judgment when the responsibility is casted on the Magistrate it would make the defect of not filing of an affidavit with an application under Section 156(3), as to be rectifiable and hence, it is directed that the Magistrate when takes cognizance to the matter after the revival of the proceedings in pursuance to today's order would ensure that the defect of not filing of the affidavit by the applicant is rectified and he is permitted to file an affidavit in support of his application under Section 156(3).

18. In these circumstances since the revisional court has resulted into a revival of the proceedings de novo, and since this Court having held that it is absolutely a curable defect in the light of the Hon'ble Apex Court's judgment, which had altogether a different laudable purpose to be achieved, this Court does not find any merit in the revision and accordingly the revision is dismissed . However, it is made clear by way of a repetition that the finding recorded in the revisional court's order issuing a specific direction will not be taken into consideration while deciding the application on its revival of the proceedings afresh, which has to be decided independently.

(Sharad Kumar Sharma, J.)
31.07.2019

Pooja