

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 27.08.2024
Pronounced on: 26.09.2024

CRM(M) No.210/2022

UT OF J&K

...PETITIONER(S)

*Through: - Mr. Mohsin Qadiri, Sr. AAG, with
Ms. Nadiya Abdullah, Assisting Counsel.*

Vs.

MOHAMMAD RAMZAN BHAT & ANOTHER

...RESPONDENT(S)

*Through: - Ms. Vrinda Grover, Sr. Advocate (through VC), with
Ms. Tabassum Rasool, Advocate.*

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

JUDGMENT

1) The petitioner Union Territory of J&K, through the medium of present petition, has challenged order dated 30.04.2022, passed by Judicial Magistrate 1st Class(2nd Additional Munsiff), Srinagar, whereby, inter-alia, direction has been issued for registration of FIR and Senior Superintendent of Police, Srinagar, has been directed to replace S.P. North as head of the Special Investigation Team (SIT) by some competent officer.

2) Before coming to the contentions raised in this petition, it would be apt to notice the background facts leading to the filing of this petition.

3) On 01.06.1996, Police Station, Khanyar, Srinagar, received a written information from SHO Police Station, Rainawari that on 31.05.1996 at about 2300 hours an information was received that some terrorists are hiding along with their illegal arms and ammunition at Miskeenbagh Khanyar. Upon this information the area was cordoned-off and during operation, terrorists resorted to indiscriminate firing upon the security forces and police with an intention to kill them. It was further reported that firing was retaliated, as a result of which two terrorists, namely, Mehraj-du-din and Mohammad Ramzan Bhat, Commander and Company Commander of Hizbul Mujahideen, were killed/injured. It was also reported that arms and ammunition were recovered from the spot. The other terrorists were reported to have fled away from the spot. On the basis of this docket, FIR No.88/1996 for offences under Section 307, 121-A RPC, 7/25 Arms Act and 4/5 Exp. Sub. Act was registered with Police Station, Khanyar and investigation was set into motion.

4) It seems that investigation was closed as untraced but on 05.05.2006, certain observations were made by the Zonal Police Headquarter, Srinagar, and the case was re-opened to be investigated by a Special Investigation Team. After conducting investigation, the SIT submitted closure report

before the learned Judicial Magistrate 1st Class (2nd Additional Munsiff), Srinagar, on 15.03.2021.

5) On 1st April, 2021, Jameela Bano, who happens to be the wife of deceased Mohammad Ramzan Bhat, filed a protest petition before the learned Judicial Magistrate. After recording statements of the protest petitioner, Smt. Jameela Bano, and other witnesses, the learned Magistrate passed an order on 28.10.2021, whereby SSP, Srinagar, was directed to constitute a Special Investigation Team headed by an officer not below the rank of Dy. SP, to investigate the case. It was further directed that role of the then Investigating Officer, SHO, P/S Rainawari and other officials in investigation of the case before its reopening in the year 2006 be also gone into. It was also directed that role of the SIT for delaying the investigation for about three years be also gone into. Finally, the SSP was directed to conclude investigation in a time bound manner, preferably within a period of six months.

6) It seems that while the investigation in terms of the directions dated 28.10.2021 passed by the learned Magistrate was going on, the protest petitioner made several applications before the learned Magistrate seeking status report of the investigation. The learned Magistrate passed a number of directions from time to time expressing his

dismay over the pace of investigation and also sought personal appearance of the head of the SIT, SP North, Srinagar.

7) On 02.12.2021, the learned Magistrate, after perusing the status report filed by SSP, Srinagar, observed that it is not clear from the said report whether the identified persons, namely, Mir Hussain, then then SHO P/S Rainawari and Constables Noor-ud-Din, Ali Mohammad, Sub Inspector Mohammad Sabir, Azam Gujar and Abdul Majeed, have been arrested or whether any fresh FIR has been registered against them.

8) Ultimately, vide the impugned order, the learned Magistrate besides expressing his dissatisfaction about the pace and the manner of investigation that was being conducted under the guidance of SP, North, Srinagar, noted that the said officer, despite directions, has not registered an FIR and, accordingly, a direction was issued to the SSP, Srinagar, to replace SP, North, Srinagar, as head of the SIT.

9) The petitioner Union Territory of J&K has challenged the impugned order on the grounds that there was no need to register a fresh FIR when in respect of the occurrence, FIR No.88/1996 stands already registered with P/S Khanyar. It has been contended that investigation in the case is being

conducted in a fair and transparent manner which is being monitored by the learned Magistrate and, as such, there was no occasion for the learned Magistrate to seek replacement of head of the SIT and to pass strictures against him. It has been further submitted that head of the SIT has to perform other official duties as well, as such, it is not expected that he would appear in person on each date of hearing before the learned Magistrate. It has been further contended that the impugned order suffers from procedural and substantive infirmities and, as such, the same is void.

10) The protest petitioner has filed her objections to the petition. The version of occurrence given by the protest petitioner in her objections and her protest petition, which is available in the record of the trial court as well as in the Case Diary, is that on 31st May, 1996, deceased Mohammad Ramzan Bhat, who happened to be her husband, was lifted from his shop, whereafter he was ruthlessly beaten by the police personnel who were posted at Miskeenbagh Centre. These police personnel have been identified as Abdul Majid and Azam Gujroo. As per case of the protest petitioner, these two persons had arrived in the shop of the deceased person in a white gypsy along with other personnel and he was beaten up, whereafter he was taken to Police Station, Rainawari. It has been alleged that when the family members

of the deceased reached Police Station, Rainawari, the police resorted to aerial firing. It has been submitted that the deceased was taken inside the police station and was beaten to death. It has been alleged that the then SHO, P/S Rainawari, Mir Hussain, was also involved in the occurrence. It has been further submitted that a false report was lodged by SHO, Mir Hussain, on the basis of which FIR No.88 of 1996 was registered with P/S, Khanyar, to make it a case of encounter. It has been submitted that an application was made before the Chief Judicial Magistrate, Srinagar, on 18.06.1996, for registration of FIR and the same was forwarded to the Police with a direction to diarize a case in accordance with law but no FIR was registered at the instance of the protest petitioner.

11) It has been submitted in the protest petition that as per postmortem report of the deceased, he was not found to have received any firearm injuries and that cause of his death was due to penetrating wound on his right peripheral region and fracture underlying ribs leading to internal and external haemorrhage. It has been submitted that it was also reported by the CID that the deceased was not involved in any militant activity. According to the protest petitioner, two armed personnel, namely, Majid and Azam Gujroo had borrowed essential commodities worth Rs.7500/ from the deceased

and when he demanded money from them, they, with the help of SOG Rainawari, arrested him along with deceased Mehraj-ud-din, whereafter he was tortured to death. It has been submitted that on account of legal opinion and in view of the CID report and postmortem report, the investigation in the case was re-opened in the year 2006, whereafter a SIT was constituted under the orders of the higher authorities of the police. After conducting the investigation, the SIT again closed the case and filed a closure report before the learned Magistrate on 15.03.2021.

12) The protest petitioner has contended that the impugned order passed by the learned Magistrate is perfectly in accordance with law as there is no bar to register a second FIR in respect of an occurrence for investigating the counter version of such occurrence. It has been contended that an innocent person has been done to death on account of brutalities of police and, as such, it is the duty of the police to bring the culprits to book and in this regard, registration of fresh FIR for investigating the version of occurrence given by the protest petitioner is a legal imperative. It has also been submitted that the occurrence has taken place about three decades back but till date justice has eluded the protest petitioner, which exhibits the non-seriousness and complicity of the investigating agency.

13) I have heard learned counsel for the parties and I have also gone through the trial court record and the Case Diary.

14) While the learned Senior AAG, appearing for the petitioner, has vehemently contended that in view of the law laid down by the Supreme Court in **T. T. Anthony vs. State of Kerala**, (2001) 6 SCC 181, a second FIR in regard to the same incident is prohibited under the Criminal Procedure Code, as such, it was not open to the learned Magistrate to direct registration of another FIR in respect of an incident relating to death of the deceased Mohammad Ramzan Bhat when FIR No.88/1996 was already registered and under investigation, on the other hand, learned Senior Counsel appearing for the protest petitioner has contended that while a second FIR relating to an occurrence is definitely barred under law but a counter FIR relating to the same occurrence is not prohibited under law. In this regard, the learned Senior Counsel has relied upon the judgment of the Supreme Court in the case of **Upkar Singh vs. Ved Prakash**, (2004) 13 SCC 292.

15) The legal position as regards the maintainability of a second FIR with regard to a single occurrence is settled. While a second FIR relating to same occurrence is prohibited under law but a counter complaint in respect of the same occurrence is permissible in law. This has been clearly laid

down by the Supreme Court in **Upkar Singh's** case (supra) while explaining the ratio laid down in **T. T. Anthony's** case (supra). So far as FIR No.88/1996 is concerned, in the said FIR the version of occurrence given by the police is subject matter of investigation whereas the version of occurrence given by the protest petitioner is not subject matter of said FIR. The version of occurrence given by the protest petitioner runs contrary to the version given by the police. To this extent, the contention of learned Senior Counsel appearing for the protest petitioner appears to be well-founded.

16) However, there is yet another aspect of the matter which is required to be noticed. If we have a look at the record, when the closure report in respect of the FIR No.88/1996 was filed by the investigating agency before the learned Magistrate on 15.03.2021, the protest petitioner filed her protest petition before the said Magistrate on 1st April, 2021. In the said protest petition, her version of occurrence has been pleaded and it has been prayed that cognizance be taken and proceedings be initiated against Mir Hussain, Majid and Azam Gujjar under Section 302 RPC and against all those involved in the said offence for abduction, murder and misleading the investigating agency and misusing the powers under law. The learned Magistrate recorded the statements of protest petitioner and her

witnesses on oath on 03.06.2021, whereafter a detailed order came to be passed by the learned Magistrate on 28.10.2021, whereby the following directions were issued:

- I. SSP Srinagar is directed to constitute a Special Investigation Team headed by the officer not below the rank of DYSP to investigate the instant case.
- II. SSP Srinagar is further directed to investigate into the role of the then, investigating officer, SHO Rainawari and other officials who played key role in the investigation of the case, before the case was reopened in the year 2006, in accordance with law and fix the responsibilities.
- III. SSP Srinagar is also directed to investigate into the role of SIT (In-charge SIT and Members of SIT) for sitting over the investigation for almost three years and not investigating the case.
- IV. SSP Srinagar is directed to conclude the investigation referred (supra) I, II, III in a time bound manner preferably within a period of six months.

17) From the manner in which the learned Magistrate has proceeded in the instant case, it is manifestly clear that he has taken cognizance of the offences on the basis of the protest petition by treating it as a complaint, whereafter he has recorded the preliminary evidence and proceeded to direct investigation of the case in accordance with the provisions of Section 202 of J&K Cr. P. C. It is pertinent to mention here that in view of the ratio laid down by a Division Bench of this Court in the case of **Sunil Kumar Rai vs. UT of J&K & anr.** (Cr1A(D) No.12/2020 decided on 21.08.2020),

the provisions of J&K Cr. P. C are applicable to the present case because the alleged occurrence has taken place prior to applicability of Central Cr.P.C to the Union Territory of Jammu and Kashmir. The question that arises for determination is “as to whether a Magistrate, after having taken cognizance of an offence on the basis of a complaint, would be legally justified in issuing a direction for registration of FIR”.

18) So far as the direction relating to registration of an FIR is concerned, such a direction can be issued by a Magistrate in exercise of his powers under Section 156(3) of the J&K Cr. P. C, which finds mention in Chapter XIV. Section 156 of the Code reads as under:

156. Investigation into cognizable cases.—(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 local limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

(2) No proceeding of 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 above-mentioned.

A perusal of the aforesaid provision reveals that there is no scope for the Magistrate to record preliminary statement of the complainant at the time of issuing a

direction to the police to investigate a cognizable case. In fact, a direction under Section 156(3) J&K Cr. P. C is issued at a pre-cognizance stage. So far as recording of preliminary statement of complainant and his witnesses is concerned, the same is provided in Section 200 of the Code of Criminal Procedure, which finds place in Chapter XVI of the Code. Section 200 reads as under:

200. Examination of complainant.—

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided as follows--

(a) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under Section 192;

(b) when the complaint is made in writing, nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties;

(c) when the case has been transferred under Section 192 and Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.

A perusal of the aforesaid provision clearly shows that when a complainant and his witnesses are examined by a

Magistrate, it means that he has taken cognizance of an offence on complaint.

19) From the above, it is clear that when a person approaches a Magistrate with a complaint containing the allegations with regard to commission of a cognizable offence, the Magistrate has two options, he may either proceed under Section 156(3) of the J&K Cr. P. C and direct the officer in charge of a police station to register the FIR and investigate the case or he may proceed to record preliminary statement of the complainant and his witnesses after taking cognizance of an offence and thereafter proceed in the manner as provided under Sections 202, 203 and 204 of the Code. If the Magistrate, after examining the complainant and his witnesses, is not sure about the truth or falsehood of the contents of the complaint, he may proceed under Section 202 of the J&K Cr. P. C and postpone the issue of process and direct an enquiry or investigation to be made by a Magistrate subordinate to him or by any police officer or by such other person. This is clear from the provisions contained in Section 202 of the J&K Cr. P. C, which reads as under:

202. Postponement for issue of process.—(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been transferred to him under section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for

compelling the attendance of the person complained against, and either inquire into the case himself, or, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint :

Provided that, save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of section 200.

(2) If any inquiry or investigation under this section is made by a person not being a Magistrate or a police officer, such person shall exercise all the powers conferred by this Code on an officer-in-charge of a police station, except that he shall not have power to arrest without warrant.

(3) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.

20) Even while having resort to the afore quoted provision, a Magistrate has option of directing an investigation in order to ascertain the truth or falsehood of the complaint. However, the scope and nature of investigation or inquiry contemplated under this provision is not the same as contemplated in Section 156 of J&K Cr. P. C. Under Section 202 of J&K Cr. P. C, the scope of investigation is limited to assist the Magistrate in ascertaining truth or falsehood of the contents of the complaint so that the Magistrate is in a position to make up his mind whether to pass an order of dismissal of the complaint in terms of Section 203 of the J&K Cr. P. C or to issue a process against the accused in terms of Section 204 of Cr. P. C. The investigation contemplated in Section 156 Cr. P. C involves registration of an FIR, arrest of

accused, if need be, and laying of charge sheet or closure report before the Magistrate in terms of Section 173 of the Cr. P. C. So, the scope and area of investigation under Section 156 and 202 of the J&K Cr. P. C is entirely different and distinct from each other.

21) In the instant case, the learned Magistrate, while making direction dated 02.12.2021, has asked the respondents to register an FIR, which means that he has exercised jurisdiction under Section 156(3) of the Cr. P. C. When a Magistrate chooses to record preliminary statement of the complainant and his witnesses and proceeds under Chapter XVI of the J&K Code, which presupposes that he has taken cognizance of the complaint, it is not open to him to go back to the provisions contained in Chapter XIV of the J&K Code and issue a direction for registration of FIR in terms of Section 156 of the J&K Cr. P. C.

22) As already stated, in the instant case the protest petition filed by wife of the deceased Mohammad Ramzan Bhat has been treated as a private complaint by the learned Magistrate. It was certainly open to the learned Magistrate to direct registration of FIR on the basis of the said private complaint because a counter version of the occurrence was presented by the protest petitioner before the learned Magistrate and registration of FIR No.88/1996 with regard

to the same occurrence would not have come in the way of the learned Magistrate in directing registration of a fresh FIR but the learned Magistrate, instead of choosing such a course, has proceeded to record statements of the protest petitioner and her witnesses, meaning thereby that the learned Magistrate has proceeded under Chapter XVI of the J&K Cr. P. C. Thus, the learned Magistrate has taken cognizance of the offences, whereafter, in terms of order dated 28.10.2021, he has directed the petitioner herein to constitute a SIT to investigate the case. The SIT was to investigate the version of occurrence given by the protest petitioner. Order dated 28.12.2021 has been passed by the learned Magistrate in exercise of his power under Section 202 of the J&K Cr. P. C and once that is done, the subsequent orders passed by the learned Magistrate on 02.12.2021 and 30.04.2022, directing the police to register a fresh FIR, are not legally sustainable. In my aforesaid view, I am supported by the judgments of this Court in **Sami-ullah Naqashbandi vs. Sadaf Niyaz Shah**, 2020 SCC Online J&K 439, and **Mohd Aijaz vs. Sajad Ahmad Dar & another (CRMC No.285/2017)** decided on 18.02.2021.

23) The learned Senior Counsel for the protest petitioner has submitted that the petitioner was under a legal obligation to register an FIR in respect of the version of the

occurrence given by her in view of the law laid down by the Supreme Court in **People's Union for Civil Liberties and another vs. State of Maharashtra**, (2014) 10 SCC 635. It is being contended that by omitting to do so, the petitioner State has failed to discharge its legal obligations.

24) There cannot be any quarrel with the proposition of law propounded by the learned Senior Counsel for the protest petitioner but in the instant case, this Court is not considering the said aspect of the matter. What is under discussion before this Court in the present petition is the legality and validity of the impugned order dated 30.04.2022 passed by the learned Magistrate, which has been challenged by the State. So, while it may be correct that the State was under an obligation to register an FIR relating to death of the deceased on the basis of the version of occurrence given by the protest petitioner, yet in the instant case, as already indicated, the learned Magistrate has taken recourse to the provisions contained in Chapter XVI of the J&K Cr. P. C and instead of directing registration of FIR, he has taken it upon himself to treat the protest petition as a private complaint and proceeded to take cognizance of the offences. Therefore, it is not a case where the version of occurrence given by the protest petitioner is not being investigated but it is a case where the learned Magistrate has

chosen the option of investigating the version of occurrence given by the protest petitioner in the manner as provided under Chapter XVI of the J&K Cr. P. C and not in the manner as provided under Chapter XIV of the J&K Criminal Procedure Code. It was, therefore, not open to the learned Magistrate to revert back to Chapter XIV of the Code and direct registration of FIR.

25) So far as the impugned direction of the learned Magistrate with regard to substitution of head of the SIT by a competent officer, is concerned, this Court does not find any ground to interfere with this direction. The protest petitioner has been running from pillar to post for the last about three decades but her version of occurrence is not being investigated or enquired into for the last so many years. A perusal of the Case Diary reveals that the investigation directed by the learned Magistrate in terms of Section 202 of the J&K Cr. P. C is going on at a snail's pace. While law and order and other official duties may be important for the members of the investigating agency but that does not give any justification for the SIT to drag its feet in the matter for the last more than three years when the same was constituted in terms of the directions dated 28.10.2021 passed by the learned Magistrate. This Court shares the concern and anxiety of the learned Magistrate so

far as the same relates to the manner in which the investigation is being conducted by the SIT.

26) Although the Case Diary does show that the SIT has sought response to certain queries from Mir Hussain, the then SHO P/S Rainawari and has received the response, yet there is hardly any substantial progress in the investigation of the case. The same needs to be expedited and the report in terms of Section 202 of the J&K Cr. P. C is required to be submitted before the learned Magistrate with reasonable dispatch.

27) For what has been discussed hereinbefore, the petition is disposed of with the following directions:

- (I) The impugned direction with regard to registration of a fresh FIR is set aside.
- (II) The petitioner Union Territory of Jammu and Kashmir shall replace the head of the Special Investigation Team with an officer of impeccable integrity of the rank of Superintendent of Police or above with a mandate to complete the investigation and file the report before the learned Magistrate under Section 202 of the J&K Cr. P. C most expeditiously, preferably within a period of two months from the date of this order.

(III) The Special Investigation Team shall furnish periodical reports relating to progress of investigation with the learned Magistrate after every two weeks.

(IV) The learned Magistrate shall, upon receipt of report of investigation under Section 202 of J&K Cr. P. C proceed further in the matter in accordance with law and it shall be open to the learned Magistrate to record further preliminary evidence and summon records relating to the case from relevant individuals/authorities.

28) The petition stands disposed of accordingly.

29) The Case Diary be returned to learned counsel for the petitioner.

30) A copy of this order be sent to the learned Judicial Magistrate 1st Class (2nd Additional Munsiff), Srinagar, for information and compliance.

(Sanjay Dhar)
Judge

Srinagar
26.09.2024
"Bhat Altaf-Secy"

<i>Whether the order is speaking:</i>	Yes/No
<i>Whether the order is reportable:</i>	Yes/No