

(2014) 02 BOM CK 0140

Bombay High Court (Aurangabad Bench)

Case No: Criminal Writ Petition No. 1166 of 2013

Sachin

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision: Feb. 24, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 154 154(1) 154(3) 156(3) 190
- Penal Code, 1860 (IPC) - Section 120-B 166 167 168 177

Citation: (2014) ALLMR(Cri) 1833 : (2015) 1 BomCR(Cri) 490 : (2015) CriLJ 733

Hon'ble Judges: T.V. Nalawade, J

Bench: Single Bench

Advocate: A.R. Deokate, for the Appellant; B.L. Dhus, Additional Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

T.V. Nalawade, J.

This writ petition is filed to challenge the order made by the learned Judicial Magistrate, First Class, Ardhapur in Misc. Criminal Application No. 63 of 2013. The petitioner had filed an application before the Judicial Magistrate First Class and he had requested the learned Judicial Magistrate First Class to send the matter to police u/s 156(3) of the Code of Criminal Procedure, 1973 ("the Code") for registering crime and for making investigation. After hearing the counsel of the petitioner and after going through the documents, the learned Judicial Magistrate First Class held that it would not be proper to direct investigation u/s 156(3) of the Code. Learned Judicial Magistrate has kept the matter for recording verification and thus has indicated that he will take cognizance of the matter. The petitioner has a grievance that the matter is not sent for investigation u/s 156(3) of the Code. Both the sides are heard. Before the Judicial Magistrate, present petitioner, who is an Advocate, has made allegation

against as many as 11 persons, who include the officers of the Pollution Board of the State. Respondent No. 1 Shri. Garg owns a stone crusher and he is also doing mining activity after taking necessary permission from the Collector and the Pollution Board. Allegations are made that the said permission is given in respect of Gut No. 85 but the activity is being done in Gut No. 86. It is contended that the authority has committed mistake in giving permission to original respondent No. 1 for aforesaid activities. It appears that the petitioner has grievance that due to the activity of said Garg, his house is damaged and cracks are developed in the walls and roof of the house. The petitioner has requested for registering crime for offence punishable under sections 166, 167, 168, 177, 182, 188, 192, 197, 221, 268, 278, 336, 406, 408, 409, 420, 436, 464, 465, 466, 468, 471, 474, 120-B and 34 of the Indian Penal Code.

2. In support of the contention that when a petition is filed with request to direct the police to make investigation u/s 156(3) of the Code, the Magistrate must make the order as prayed for and the Magistrate should not take cognizance of the matter, learned counsel for the petitioner has placed reliance on the following reported cases.

Mr. Panchabhai Popotbhai Butani, Bhanubhai Ravjibhai Talaviya, Jitendra L. Chheda and Jay Enterprises and Others Vs. The State of Maharashtra, Satyam Shelters Pvt. Ltd. and Others, . This case is decided by Full Bench of this Court. Two questions were framed by the Full Bench and they are answered and they are as under:-

64. In view of our above discussion, we record our answers to the questions of law posed before us, as follow:

Question No. (i):

Whether in absence of a complaint to the police, a complaint can be made directly before a Magistrate?

Answer:

Normally a person should invoke the provisions of section 154 of the Code before he takes recourse to the power of the Magistrate competent to take cognizance u/s 190 of the Code, u/s 156(3). At least an intimation to the police of commission of a cognizable offence u/s 154(1) would be a condition precedent for invocation of powers of the Magistrate u/s 156(3) of the Code. We would hasten to add here that this dictum of law is not free from exception. There can be cases where non-compliance to the provisions of section 154(3) would not divest the Magistrate of his jurisdiction in terms of section 156(3). There could be cases where the police fail to act instantly and the facts of the case show that there is possibility of the evidence of commission of the offence being destroyed and/or tampered with or an applicant could approach the Magistrate u/s 156(3) of the Code directly by way of an exception as the Legislature has vested wide discretion in the Magistrate.

Question No. (ii)

Whether without filing a complaint within the meaning of section 2(d) and praying only for an action u/s 156(3), a complaint before a Magistrate was maintainable?

Answer:

A Petition u/s 156(3) cannot be strictly construed as a complaint in terms of section 2 of the Code and absence of a specific or improperly worded prayer or lack of complete and definite details would not prove fatal to a petition u/s 156(3), insofar as it states facts constituting ingredients of a cognizable offence. Such petition would be maintainable before the Magistrate.

The questions framed by the Full Bench and the answers given show that application to the Magistrate praying for action u/s 156(3) is maintainable.

3. The case reported as [Suresh Chand Vs. State of Rajasthan and Others](#), was cited. One private complaint was returned by the Judicial Magistrate. After considering the nature of dispute this order was held to be improper. The point involved in the present matter was not squarely involved in this case also.

4. In the case of [Shyam Lal Jaiswal Vs. State of U.P.](#), direction was given by the Chief Judicial Magistrate to register application filed u/s 156(3) of the Code as complaint. The High Court held that such direction was not proper. Thus the point involved therein was not squarely the point which is involved in the present matter.

5. Copy of order made by a learned Single Judge of this Court in Criminal Writ Petition No. 471 of 2013 was produced. The facts were that the Magistrate had examined the complainant u/s 200 of the Code and then passed order u/s 156(3) of the Code. This order was set aside by the Additional Sessions Judge and the decision of the learned Additional Sessions Judge given in the revision was challenged in this Criminal Writ Petition No. 471/2013. This Court refused to interfere in the order as the complainant had opted for going for recording verification before the Judicial Magistrate First Class u/s 200 of the Code. Thus, the point involved in this matter was not involved in the said Writ petition No. 471 of 2013.

6. In the case of 2011 All Mr (Cri.) 2648 (Bhavrabai v. Sanjay) Nagpur Bench of the Bombay High Court it is observed that, the petition filed u/s 156(3) of the Code cannot be strictly construed as complaint in terms of Section 2(d) of the Code and even in the absence of a specific prayer such petition is maintainable before the Judicial Magistrate First Class. The order made u/s 156(3) of the Code was not interfered with by this Court. The proceeding was however filed as private complaint. Thus the facts were different and the point involved in the present matter was not at all involved in the said proceeding also.

7. In the case reported as [Mohd. Yousuf Vs. Smt. Afaq Jahan and Another](#), the Apex Court has made observations in paragraphs 15 and 16 as under:-

15. A faint plea was made by learned counsel for Respondent 1 that the petition filed by the appellant was not a complaint in the strict sense of the term. The plea is clearly untenable. The nomenclature of a petition is inconsequential. Section 2(d) of the Code defines "complaint" as follows:

2. (d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.--A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;

16. There is no particular format of a complaint. A petition addressed to the Magistrate containing an allegation that an offence has been committed, and ending with a prayer that the culprits be suitably dealt with, as in the instant case, is a complaint.

8. In view of the wording of Section 2(d) of the Code whenever a prayer is made in a petition to the Magistrate for taking action under the Code, that petition can be treated as a complaint by the Judicial Magistrate.

9. When a petition or complaint is presented before the Magistrate, in which a request is made for taking action as mentioned in section 2(d) of the Code, the Magistrate is expected to apply his mind. The Magistrate has to ascertain as to whether the contentions made in the petition/complaint constitute any offence. If they constitute some offence then the Magistrate is expected to take decision as to whether the matter needs to be referred to police for investigation as provided in section 156(3) of the Code or he needs to proceed further as provided in section 200 and subsequent sections of Chapter XV of the Code. There is a discretion with the Magistrate in this regard. Though police officer is duty bound to register case on receiving information of cognizable offence, the Magistrate is not bound to refer the matter to police u/s 156(3) of the Code. Reliance is placed in this regard in 2013 All MR (Cri.) 3060 (State of Maharashtra v. Shashikant Shinde) Nagpur Bench of the Bombay High Court. The Division Bench of this Court has made observation in this regard at para 35 and they are as under:-

35. It will, thus, have to be held that it is mandatory for the Magistrate to apply his mind to the allegations made in the complaint and only when the allegations made in the complaint make out the ingredients to constitute an offence, the learned Magistrate can pass an order of investigation u/s 156(3) of Cr.P.C. Equally, when the ingredients to constitute the offence are not made out in the complaint, the learned Magistrate cannot direct investigation u/s 156(3) of Cr.P.C. Such an order is without jurisdiction. If the contention of the learned counsel for respondent complainant that once the complaint is filed u/s 156(3) of Cr.P.C., the learned Magistrate has no

option but to pass an order u/s 156(3) of Cr.P.C., is accepted, it would amount to reducing the learned Magistrate to nothing else but the postman. As such, we have no other option but to reject the said contention.

This position of law is made clear by the Supreme Court in the case reported as [Gopal Das Sindhi and Others Vs. The State of Assam and Another](#) .

10. In view of the discussion made above, this Court holds that the learned Judicial Magistrate has not committed error in making the order by which it is indicated that the Magistrate wants to proceed further as provided in Chapter XV of the Code. As the Magistrate has jurisdiction to pass such order, no interference is warranted in the order made by the learned Judicial Magistrate First Class. In the result, the petition stands dismissed.