

**(2010) 02 BOM CK 0120****Bombay High Court****Case No:** Criminal Application No. 182 of 2010

Shri Dilip Kanal and Another

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

**Date of Decision:** Feb. 10, 2010**Acts Referred:**

- Constitution of India, 1950 - Article 226, 227
- Criminal Procedure Code, 1973 (CrPC) - Section 154, 154(1), 154(3), 156, 156(3)
- Penal Code, 1860 (IPC) - Section 120B, 406, 409, 411, 416

**Citation:** (2010) 112 BOMLR 1673**Hon'ble Judges:** D.G. Karnik, J**Bench:** Single Bench**Advocate:** Niteen V. Pradhan, Priyam Dhamankar, Abhijit Shinde and Suprabh Jain, instructed by Haresh Jagtiani and Associates, for the Appellant; Amit Desai Chaitanya Pendse, Mayur Bhojwani, Faisal Sayyad, Vikrant Singh, instructed by Manilal Kher, for Ambalal and Co. and M.H. Mhatre, APP for the State, for the Respondent**Judgement**

@JUDGMENTTAG-ORDER

D.G. Karnik, J.

Mr. Desai learned Counsel representing the original complainant appears for the complainant and seeks leave to be heard in the matter. Leave granted.

- Heard Mr. Pradhan for the applicant, Mr. Desai for the complainant and learned APP for the State.
- By this application, applicants seek bail in connection with a crime registered as MECR No. 15 of 2009 for an alleged offence punishable under Sections 411, 406, 409, 416, 418, 420, 464, 467, 468, 471 and 120B of the IPC.
- On 20th August 2009, Nevada Properties Pvt. Ltd through its Director Aparna Verma (hereinafter referred to as "complainant") filed an application before the

Addl. Chief Metropolitan Magistrate, 30th Court, Ballard Pier, Bombay alleging that the applicants had committed an offence of forgery, fabrication and cheating. By that application, the complainant requested the learned Magistrate to pass an order directing investigation u/s 156(3) of the Code of Criminal Procedure (for short "Cr.P.C") On the following day (i.e. 21st August 2009) the learned Addl. Chief Metropolitan Magistrate passed an order u/s 156(3) of Cr.P.C directing the Sr. Inspector, MRA Marg Police Station, Mumbai to carry out investigation into the alleged crime. In pursuance of the order, the police registered a FIR, bearing MECR No. 15 of 2009, and commenced investigation. During the course of investigation, the applicants were arrested on 28th December 2009 by the police. An application for bail made by the applicants before the learned Addl. Chief Metropolitan Magistrate was rejected by him by an order dated 6th January 2010. An application made to the Court of Sessions, Gr. Mumbai met with the same fate. The applicants have therefore approached this Court for bail.

5. Mr. Pradhan, learned Sr. Advocate appearing for the applicants submitted that prior to the filing of the application for an order of investigation u/s 156(3), the complainant had never filed nor attempted to file a FIR as required by Section 154 of the Cr.P.C. The complainant had directly approached the Magistrate for an order u/s 156(3) without first exhausting the normal practise and procedure of lodging of a FIR u/s 154. Relying upon two decision of the Supreme Court in Sakiri Vasu Vs. State of U.P. and Others, and Dharmeshbhai Vasudevbhai and Others Vs. State of Gujarat and Others, and a recent decision of a Full Bench of this Court in Panchalbhai Popatlal Butani v. State of Maharashtra and Ors. connected petitions (Criminal Writ Petition No. 270 of 2009 decided on 10th December 2009) Mr. Pradhan submitted that the order passed by the Learned Magistrate u/s 156(3) itself was illegal. Since the complainant had never approached the police for lodging of an FIR u/s 154, the Magistrate could not, and in any way ought not, to have passed an order directing investigation u/s 156(3) of the Cr.P.C. Since the order of investigation passed u/s 156(3) of the Cr.P.C was illegal/irregular, the registration of the FIR was of no consequence and the applicants could not have been arrested in pursuance of the FIR registered pursuant to an illegal order. If the complainants had first approached the police for registration of a FIR u/s 154 of the Cr.P.C the police could have held the preliminary enquiry as has been held to be permissible by Full Bench of this Court in Sandeep Rammilan Shukla Vs. The State of Maharashtra and Others, in which case the applicants would have had an opportunity to point out to the police the falsity of the complaint and malafides of the complainant. As this was not done the applicants were deprived of an opportunity which existed in them before the FIR was registered against them, which has resulted into a grave prejudice to them. On account of illegality in passing of an order u/s 156(3) of the Cr.P.C and consequent registration of an FIR, without any preliminary enquiry and consequent prejudice caused to the applicants entitles them to be released on bail irrespective of the merits of the matter. By consent of the parties, this point was heard as a preliminary

point.

6. In *Sakiri Vasu v. State of U.P.* (supra) the Supreme Court considered a situation where a police officer does not register an FIR though a cognizable offence is disclosed. The Supreme Court observed that when a person has a grievance that the FIR has not been registered, his first remedy is to approach the Superintendent of Police u/s 154(3) of the Cr.P.C or other police officer referred to in Section 34(6) of Cr.P.C. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate u/s 156(3) of the Cr.P.C for a grievance that a FIR is not registered or after being registered, proper investigation has not been carried out. His remedy lies u/s 36 and 154(3) before the police officers concerned and if that is no avail u/s 156(3) of the Cr.P.C before the Magistrate or by filing a complaint u/s 200 of Cr.P.C.

7. In *Dharmeshbhai Vasudevbhai v. State of Gujarat* (supra) the Supreme Court reiterated the view expressed in *Sakiri Vasu*'s case and held that when an offence is committed, a FIR can be lodged u/s 154 of the Cr.P.C. However in the event for some reason or the other, the FIR is not recorded in terms of Section 154 of the Cr.P.C the Magistrate is empowered u/s 156 thereof to order an investigation into the allegations contained in the complaint petition. The power to direct investigation may arise in two different situations - (i) when a FIR is refused to be lodged or (ii) when the statutory power of investigation for some reason or the other is not conducted.

8. In *Panchalbhai Popatlal Butani and Ors. v. State of Maharashtra* (supra) a Full Bench formulated two questions of law and answered them as follows:

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). Atleast an intimation to the police of commission of a cognizable offence u/s 154(1) would be a condition precedent for innovation 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 vide 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

strictly construed as a complaint in terms of Section 2(d) of the Code of 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), in so far as it states facts constituting ingredients of a cognizable offence. Such petition would be maintainable before the Magistrate.

9. Strongly relying upon the answer to issue No. 1, Mr. Pradhan submitted that in the present case, the complainant had never approached the police for recording of a FIR u/s 154. This was not a case where the complainant had approached the police for recording of an FIR which was refused and therefore complainant approaching the Court. The complainant had approached the court directly without even making any attempt to file a FIR u/s 154. Mr. Pradhan further submitted that intimation to the police about the commission of a cognizable offence u/s 154(1) is a condition precedent for invoking of the powers of the Magistrate u/s 156(3). The case did not fall within any of the exceptions mentioned in the decision of the Full Bench and consequently, the action of the complainant in approaching the Magistrate directly with a prayer for investigation u/s 156(3) of the Cr.P.C was illegal and the Magistrate could not have passed any order u/s 156(3). The order was illegal and consequently, the applicants were entitled to the bail.

10. This application is not a petition under Article 226/227 of the Constitution of India nor u/s 482 of the Cr.P.C for quashing of the order of the Magistrate passed u/s 156(3) and/or for quashing of the FIR. If such an application is filed it would be considered appropriately by the Court. Ordinarily an order of a Court which is not without jurisdiction must be obeyed and followed even if it is erroneous. This is not a case where the learned Magistrate did not have jurisdiction to pass an order u/s 156(3) of the Cr.P.C. May be that the order was erroneous in view of the decision of the Full Bench but until set aside it was binding on the police officer and the police did not do wrong in registering FIR on the basis of the order passed by the learned Addl. Chief Metropolitan Magistrate. Once a FIR is lawfully registered, whether that is done on the information given by the complainant or in pursuance of an order passed u/s 156(3) becomes insignificant. To repeat, the police were required to register a FIR and have lawfully commenced the investigation. During the course of investigation arrest of an accused, if it is necessary for the purpose of investigation, is a part of the process of investigation. Bail cannot be granted merely on account of the fact that the Magistrate ought not to have passed an order u/s 156(3) of the Cr.P.C in the light of the decision of the Full Bench. Consequently preliminary submission has to be rejected. The application is set down for hearing on merits on

18th February 2010.