

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Criminal Writ Petition No.59 of 2015

Yasin Kasim Pinjari
And Others.

.. Petitioners.

Versus

The State of Maharashtra
And Another.

.. Respondents.

Shri. Sanjay A. Wakure, Advocate, for petitioners.

Shri. S.A. Ambad, Additional Public Prosecutor, for
respondent No.1.

Shri. C.V. Dharurkar, Advocate, for respondent No.2.

CORAM: T.V. NALAWADE, J.

DATE : 1st JULY 2015

ORDER:

1) The petition is filed to challenge the order made by the learned Judicial Magistrate First Class, Washi, on Exhibit 68 of R.C.C. No.43/2012. The learned Judicial Magistrate has given direction of further investigation under section 173(8) of the Code of Criminal Procedure on the application filed by the original complainant, respondent No.2. Both the sides are heard.

2) The case is filed against the petitioners for offences punishable under sections 143, 146, 147, 148, 326 read with 149 of the Indian Penal Code and it is part heard. It appears that one witness was examined when the order was made. Allegations are made that during incident one Kasim Pinjari assaulted Noorzahan by using axe on her head and Ashfaq was assaulted by Maheboob Allawali Pinjari by using axe on his head.

3) In the application at Exhibit 68 the complainant contended that the investigation was not made properly and the axe used by accused Kasim Pinjari was not recovered. It is also contended that blood stained clothes of the injured persons were not taken over by police and the vehicle, tractor, in which accused had come to the spot was also not seized by police. On these three points further investigation was requested and the learned Judicial Magistrate has made order of further investigation.

4) The learned counsel for respondent No.2 has placed reliance on the case reported as **AIR 2012 SC 2326**

(Samaj Parivartan Samudaya v. State of Karnataka). The Apex Court has laid down in this case that the Court has the power to direct investigation under section 173(8) of the Criminal Procedure Code. In view of the observations made by the Apex Court it can be said that the Magistrate could have made such order but when order of further investigation is to be made, the Court needs to consider the necessity. The present case is of the year 2012 and the crime was registered on 7-6-2010. The order of further investigation was made on 29-12-2014.

5) Admittedly one accused from whom the axe was not recovered is now dead. In any case the evidence collected under section 27 of the Evidence Act cannot be used against co-accused. This circumstance is not considered by the Judicial Magistrate. If at all there were blood stained clothes of the injured and the complainant, it is not their case that they have preserved the clothes for these many years. In any case if they had sustained injuries and they are able to prove that the injuries were caused by the accused persons, absence of such material cannot come in the way of the prosecution to prove the

offence. Similarly, absence of the axe used in the offence as *muddemal* in the case will not come in the way of the prosecution to prove the case. In view of nature of evidence, the seizure of the tractor was not necessary.

6) In view of the aforesaid circumstances this Court holds that the Magistrate did not apply his mind while giving the order under challenge. Such order would necessarily protract the decision of the matter. The case is filed for offence under section 326 IPC. The case is of 5 years old now so the Magistrate ought not to have made such order.

7) In the result, the petition is allowed. The order under challenge is set aside and the application at Exhibit 68 is hereby rejected.

Sd/-
(T.V. NALAWADE, J.)

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