

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

Criminal Application No.797 of 2011

* Kamleshkumar S/o Jayantibhai Patel. **Applicant.**

Versus

1) The State of Maharashtra.

2) Ashok Hanumantrao Patil. **.. Respondents.**

Shri. R.R. Mantri, Advocate, for applicant.

Shri. V.D. Godbharle, Additional Public Prosecutor, for
respondent No.1.

Shri. S.S. Panale, Advocate, for respondent No.2.

**CORAM: T.V. NALAWADE &
Smt. I.K. JAIN, JJ.**

DATE : 18th MARCH 2015

ORDER:

1) The proceeding is filed under sections 482 and 483 of the Code of Criminal Procedure for the relief of setting aside and quashing of the order dated 28-11-2007 made in RCC No.1058 of 2007 by the learned Judicial Magistrate, First Class, Nanded by which the learned Judicial Magistrate has directed police to make

investigation under section 156(3) of the Code of Criminal Procedure. Relief of quashing of the FIR of CR No.122 of 2008 which came to be registered on the basis of the order made by the Judicial Magistrate is also claimed. Both the sides are heard. Learned Additional Public Prosecutor is also heard.

2) Respondent No.2 of the present proceeding has contended that he deals in pesticides and seeds and he is doing business in Nanded. Accused No.2 Anil Kulkarni is the manager of accused No.1 and they are doing business of supply of hybrid seeds. Accused No.1 is the Director of Global Hybrid Seeds Company Ltd, the office of which is situated in Gujarat. The complainant had agreed to become the Distributor of this company after negotiations with accused Nos.1 and 2.

3) It is the case of the complainant that in the month of June 2005 accused No.1 visited Nanded and he proposed package for seed of wheat. Representation was made to the complainant the seed worth Rs.15 lakh will be supplied but the complainant will be required to pay in

advance Rs.9.58 lakh prior to 14-12-2005. As there was possibility of making huge profit, the complainant got attracted to the scheme and he made payments by cash and by giving bank Drafts and upto 10-12-2005 he made payment of R.9.58 lakh. The accused No.1 had promised to reach the seeds on or before 15-12-2005.

4) When the seeds were not reached, the complainant gave notice through Advocate. Accused No.1 on phone requested for time and promised to settle the matter amicably and so immediate action was not taken by the complainant. As the promise was not fulfilled and even the amount was not returned, private complaint came to be filed in the year 2007. Learned Judicial Magistrate made order of investigation on 28-11-2007.

5) The learned counsel for the applicant submitted that the challenge to the order is two fold. He submitted that when in the complaint no prayer was made to refer the matter for investigation and when prayer was made for issue process, learned Judicial Magistrate committed error in making the order of investigation under section

156(3) of the Code of Criminal Procedure. The second submission is in respect of nature of dispute. Learned counsel submitted that on the face of the record it can be said that the dispute is of civil nature and so the Magistrate ought not to have made such order.

6) In support of the first contention, the learned counsel for the applicant placed reliance on the case reported as **2010 (1) Mh.L.J. 411 (Panchabhai v. State of Maharashtra)** (Full Bench). In this case the Full Bench of this Court has discussed various provisions like sections 2(d), 156(3), 154, 190 etc. of the Code of Criminal Procedure. The power of the Magistrate is discussed. There cannot be any dispute over the proposition that the Magistrate is expected to apply mind even before making the order of investigation under section 156(3) of the Code of Criminal Procedure, as it is a judicial order. The order made by the learned Judicial Magistrate in the present case shows that the learned Magistrate formed opinion that the allegations require detail investigation. In view of nature of allegations made against the present applicant which are already quoted it can be said that the

Magistrate has not committed any error. The accused are from different State, they came to Maharashtra and by giving promise they collected money and they did not supply the goods. These allegations need to be considered as mentioned in the complaint and at this stage the probable defence cannot be considered. It is upto the Magistrate to decide as to whether he needs to record verification and then consider the matter of issue process or he needs to postpone issue of process and make order under section 202 of Code of Criminal Procedure or there is need of investigation under section 156(3) of Code of Criminal Procedure. Only because prayer is made to take cognizance of offence, the Magistrate is not bound to do so.

7) The learned counsel for the applicant submitted that the applicant-accused has filed case under section 138 of the Negotiable Instruments Act against the present complainant as cheques given by the complainant bounced. Copy of complaint is produced and it shows that the complaint was filed on 4-11-2006 and the order of issue process was made on the same date by the Chief

Judicial Magistrate, Himayatnagar. He has contended that in respect of the amount due from present complainant the cheques were given and the goods like seeds were supplied during the period from 1-4-2006 to 31-7-2006 and the seeds were of sunflower, millet and cotton. It is contended that the seeds were worth Rs.27,43,850/- and the amount of Rs.26,02,000/- was due. It is the case of the applicant that during cross-examination of the complainant in the case filed under section 138 of the Negotiable Instruments Act, by the present applicant, he realised that such proceeding was filed against him in the Court of the Judicial Magistrate Nanded and such order was made. Present proceeding came to be filed on 22-2-2011.

8) The learned counsel for the applicant cited some reported cases in respect of the power given to the Court under section 482 of the Code of Criminal Procedure and he submitted that as the dispute is purely of civil nature, this power needs to be used. The cases are as under :-

- (1) **AIR 2006 SC 2035 (Ram Biraji Devi v. Umesh Kumar Singh).**
- (2) **AIR 2009 SC 3191 (Dalip Kaur v. Jagnar Singh).**
- (3) **AIR 2008 SC 251 (Inder Mohan Goswami v. State of Uttaranchal).**
- (4) **2007 AIR SCW 4816 (Veer Prakash Sharma v. Anil Kumar Agarwal).**

9) On the other hand, learned counsel for the respondent No.2 placed reliance on the case reported as **AIR 1999 SC 1216 (Rajesh Bajaj v. State NCT of Delhi).** Facts and circumstances of each and every case are always different. Even if the proceeding filed by the present applicant under section 138 of the Negotiable Instruments Act is compared with the allegations made in the present matter it can be said that the allegations in the present matter are altogether different. Some record is produced to show that in the legal notice given by the present complainant he had asked the present applicant to return blank cheques which were given by way of security and it is contended that such cheques are generally obtained from the dealers by the company of the applicant. From the law discussed by the Apex Court in

the cases cited supra by both the sides, it can be said that only due to circumstance that there was promise in respect of commercial transaction, which was not fulfilled inference cannot be drawn that the dispute is purely of civil nature. The intention of the party needs to be ascertained. It is the case of the present applicant that in respect of the transaction mentioned by the present complainant no attempt was made to fulfill the promise, to supply the wheat seeds. This payment was allegedly made up to 10-12-2005. Some record is produced by the applicant to show that there were transactions of commercial nature but that record cannot help at this stage for preventing the investigation. That record is not at all in respect of wheat seeds. The record is in respect of cotton seed, Bhendi seed, Bajra seed and Sunflower seed.

10) In view of the facts and circumstances of the case this Court holds that it is not possible to quash the FIR and the order of investigation made by the learned Judicial Magistrate.

11) In the result, the application stands dismissed. Learned counsel for the applicant requested for stay to the further investigation for some time. This prayer is also not granted.

Sd/-
(Smt. I.K. Jain, J.)

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

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