

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2456 OF 2015

Smt. Virmati R. Thaleshwar (Soni) & anr. ... Petitioners.
Versus
Shri Devang Pravinbhai Soni & anr. ... Respondents.

Mr. A.H.H. Ponda a/w. Mr. Bharat Gadhavi i/b. Tejas Dande & Associates, advocate for petitioners.

Mr. Rishi Bhuta, advocate for respondent No. 1.

Mrs. A.A. Mane, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J
DATE : SEPTEMBER 14, 2015

P.C.:

1 Heard the learned Counsel for the Petitioners and the learned Counsel for the respondent No. 1 and the learned APP for State.

2 Rule. Rule made returnable forthwith with the consent of the parties.

3 The Petitioners herein are proposed accused in Case No. 139/SW/2014 pending before the Addl. Chief Metropolitan Magistrate, 13th Court, Bhoiwada, Mumbai. The respondent No. 1 herein is the original complainant. He filed the complaint against the present Petitioners alleging therein that the Petitioners herein had committed offence punishable under Section 406, 420, 465, 467 and 468 read with Section 34, 109 and 120B of the Indian Penal Code. The learned Magistrate had perused the complaint and on 1/4/2015 has passed an order as follows :

“Considering the nature of offence and allegations it is not desirable to send for investigation under Section 156(3), but needs to examine complainant. Hence, the matter be kept for verification on the next date.”

4 The Order passed by the learned Magistrate dated 1/4/2015 was challenged by the original complainant by filing revision application before the Sessions Court. The revision application was registered as Revision Application No. 564 of 2015. The learned Revisional Court has observed that-

“If the applicant's (original complainant) prayer made in the original complainant is taken into consideration in entirety, it appears that his entire emphasis was on issuance of direction under Section 156(3) of the Code to the concerned police station for registration of FIR and investigation. He had no intention to have examined himself on oath.”

5 It is in this circumstance that the Revisional Court was of the opinion that the order directing the complainant to step into witness box for verification of his complaint was bad in law and therefore, said order was quashed and set aside by an order dated 12th May, 2015. Hence, this Writ Petition.

6 At the outset, the learned Counsel for the Petitioners has drawn the attention of this Court to the prayer clause made by the complainant in the original complaint. The prayer clause (b) reads as under -

“in the peculiar facts and circumstances of the case, Rafi Ahmed Kidwai Police Station be directed u/s 156(3) to register FIR and

investigate the present Complaint and take cognizance of the same.”

Prayer clause (c) reads as under -

“in the alternative appropriate process u/s. 204 of Cr.P.C. be issued against the Accused;”

7 In view of the above, the observations of the learned Sessions Judge was against the records and it cannot be said that the complainant had insisted upon a direction under Section 156(3) of the Code of Criminal Procedure, 1973. He has shown his unwillingness to step into the witness box and verify the statement. It is pertinent to note that alongwith the complaint, the complainant had also given list of witnesses, which by itself would indicate that the complainant had not insisted upon prayer clause seeking direction under Section 156(3) of the Code of Criminal Procedure, 1973.

8 In fact, the order passed by the learned Magistrate putting the matter for verification is an interlocutory order and hence, it could

not be challenged under Section 397 or 401 of the Code of Criminal Procedure, 1973.

8 In the case of **V. C. Shukla v. State through C.B.I. reported in AIR 1980 SC 962**, the Hon'ble Apex Court has held that:

“as the non-obstante clause expressly excludes the provisions of the Code of Criminal Procedure, Section 397(2) of the Code cannot be invoked because that would frustrate the very object which Section 11 seeks to sub-serve”. That, "The word "interlocutory", as applied to rulings and orders by the trial court, has been variously defined. It refers to all orders, rulings, and decisions made by the trial court from the inception of an action to its final determination. It means, not that which decides the cause, but that which only settles some intervening matter relating to the cause. An interlocutory order is an order entered pending a cause deciding some point or matter essential to the progress of the suit and collateral to the issues formed by the pleadings and not a final decision or judgment on the matter in issue”.

The Hon'ble Apex Court has further held that:

“unless an order results in a final termination of the proceeding in any way it is decided, the order is of an interlocutory nature”.

9 This Court has taken a view that any order passed by the Magistrate which is not a final order i.e. a direction under section 156(3) or otherwise is not a revisable order. Hence, the Revisional Court has committed error in setting aside the interlocutory order passed by the learned Magistrate.

10 The learned Counsel appearing for the respondent No. 1 submits that the present Writ Petition is not maintainable. Since the order under revision is not a final order and the matter is kept open for verification before the learned Magistrate, this Court is of the view that firstly revision itself is not maintainable and therefore, had proceeded to hear the Writ Petition.

11 The learned Counsel for the respondent No. 1 has placed on record the copy of the roznama alongwith the application filed by the present Petitioner before the learned Magistrate dated 9/9/2015. The accused appeared before the Magistrate suo moto. In fact, the accused has no locus at that stage. The present petition is filed in this

Court on 22/6/2015. On 23/7/2015 the matter was before the incharge Court.

12 On 9/9/2015 the accused appeared before the learned Magistrate through an advocate. The learned Advocate appearing for the accused (suo moto) had impressed upon the Magistrate that a petition has been filed in the High Court and is listed on 14/9/2015 and therefore, had requested the Magistrate not to pass any orders. Perused the application filed by the accused before the learned Magistrate. It was submitted that the matter is listed for hearing before this Court (Coram : Smt. Sadhana S. Jadhav, J) on 14/9/2015. It was demonstrated before the Magistrate that as the matter is subjudice for before this Court for challenging the order dated 12th May, 2015 passed by the Learned Addl. Sessions Judge and this Court is seized with the matter to decide the dispute involved in the above referred matter, the final order in the above referred matter shall not be passed. Filing of the application and intervention of the accused at the stage of passing of an order is deprecated. In fact, the

accused had no locus to appear before the Magistrate and to make such a submission.

13 The learned Counsel for the respondent No. 1 submits that oral submission was also made that the High Court has directed not to proceed with the matter. The said submission is denied by the advocate appearing for the accused before the trial Court. It is pertinent to note that the matter was listed before this Court (Coram : M.L. Tahaliyani, J) on 7/7/2015 and the matter was adjourned to 21/7/2015 at the request of the learned Counsel for the Petitioners. On 28/7/2015 the matter was listed before another single Bench (Coram : S.B. Shukre, J) and none appeared for the Petitioners. Hence, the matter was adjourned to 4/8/2015. Thereafter, the matter is listed today upon a praecipe, which was moved on 1/9/2015. At the time of seeking circulation, this Court was informed that the matter was scheduled on 14/9/2015 and therefore, this Court was pleased to grant circulation of today. The steps adopted by the accused and the learned Advocate for accused appearing before

the learned Magistrate are against the provisions of Statute and administration of justice.

14 It is further pertinent to note that the arguing Counsel Mr. A.H.H. Ponda was also not informed by the instructing counsel that such an application was made before the learned Magistrate. It is further pertinent to note that not only an application, but the accused had also tendered documents in their defence before the learned Magistrate. This practice is unknown to the Criminal Procedure Code, under which the Court has to conduct criminal matters.

15 The learned Counsel appearing for the accused in the trial Court has tendered his apology and has assured the Court that he would not take such steps in future. The apology is accepted.

16 Reverting back to the facts of the case, it is settled position of law that it is the sole discretion of the Magistrate as to whether he should send the matter for investigation under Section 156(3) or 202

of the Code of Criminal Procedure, 1973 or whether he should put up the matter for verification.

17 The learned Counsel for the applicant has placed reliance upon the Judgment of the Hon'ble Apex Court in the case of **Smt. Mona Panwar v/s. The Hon'ble High Court of Judicature at Allahabad through its Registrar and ors.** The Hon'ble Apex Court has observed as follows :

“Under the circumstances the appellant had exercised judicial discretion available to a Magistrate and directed that the application, which was submitted by the respondent No. 3 under [Section 156\(3\)](#) of the Code, be registered as complaint and directed the Registry to present the said complaint before her on August 28, 2009 for recording the statement of the respondent No.3 under [Section 200](#) of the Code. The judicial discretion exercised by the appellant was in consonance with the scheme postulated by the Code. There is no material on the record to indicate that the judicial discretion exercised by the appellant was either arbitrary or perverse.”

The appellant therein was a magistrate who had refused to pass direction under Section 156(3) of the Code of Criminal Procedure, 1973 and put up his complaint for verification. The action of the learned Magistrate was upheld by the Hon'ble Apex Court.

18 This Court has also taken the view in various matters that it is the sole judicial discretion of the Magistrate as to whether the complaint deserves to be sent for investigation or the Magistrate shall enquire into the complaint of himself or herself.

19 The learned Counsel for the respondent No. 1 has placed reliance upon the Judgment of the Full Bench of the High Court of Judicature at Allahabad in the case of Jagannath Verma & ors. v/s. State of U.P. & anr reported in CDJ 2014 All HC 066, wherein the issue which was fallen for consideration as follows :

“(1) Whether an order made under Section 156(3) of the Code rejecting an application for a direction to the police to register and investigate, is revisable under Section 397; and (2) If the answer to Question (1) is in the affirmative, then, whether in a

revision filed against an order rejecting an application under Section 156(3), the prospective accused is also a necessary party and is required to be heard before a final order is passed.”

The Hon'ble Bench has held that an order by the Magistrate rejecting an application under Section 156 (3) of the Code for the registration of a case by the police and for investigation is not an interlocutory order. Such an order is amenable to the remedy of criminal revision under section 397 and any proceedings in revision prospective accused or as the case may be, the person who is offender is entitled to an opportunity of being heard before a decision is taken in the criminal revision.

20 In view of the catena of decisions of the Hon'ble Apex Court and the view taken by this Court in the case of **Datta s/o. Manikrao Bhadekar (Writ Petition No. 1184/2014 & anr)**, this Court is of the opinion that at the stage of 156(3) of the Code or at the stage of issuance of process the accused has no locus standi and it is the sole discretion of the Magistrate unless cognizance is taken or some final

order is passed against the accused, the accused would not have any locus.

21 It is abundantly clear from the above said observations that the learned Magistrate shall not take into consideration the documents filed by the accused and shall not take into consideration submissions made by the accused before passing of an appropriate order in accordance with law.

22 Hence, following order passed.

ORDER

(i) Writ Petition is allowed.

(ii) The order dated 12/5/2015 passed by the learned Additional Sessions Judge, City Civil & Sessions Court, Mumbai in Revision Application No. 564 of 2015 is quashed and set aside.

(iii) The learned Magistrate shall proceed with the matter in accordance with law pursuant to the order passed on 1st April, 2015.

23 Rule is made absolute in the above terms. Writ Petition is disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)

CERTIFICATE

**Certified to be true and correct copy of the original signed
Judgment/order.**