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

CRIMINAL APPLICATION NO. 268 OF 2016

Sunil s/o Dhudku Sonar,
Age: 38 years, Occu: Agri.,
R/o. Marwad Galli, Shirpur,
Tq. Shirpur, Dist. Dhule

..APPLICANT

VERSUS

1. Jeevanlal s/o Vishram Choudhari,
Age: 62 years, Occu: Agri.,
2. Ushabai Padmakar Choudhari,
Age: 35 years, Occu: Household,
3. Kamalbai Jeevanlal Choudhari,
Age: 59 years, Occu: Household
4. Padmakar Jeevanlal Choudhari,
Age: 40 years, Occu: Agri.

Both are R/o. Tawase Bk.
Tq. Chopda, Dist. Jalgaon

5. Shantabai Daulat Patil,
Age: 65 years, Occu: Household
6. Vijay Daulat Patil,
Age: 44 years, Occu: Agri.
7. Varshabai Vijay Patil,
Age: 38 years, Occu: Household
Both All R/o. Lon Bk.
Tq. Amalner, Dist. Jalgaon

8. The State of Maharashtra,
Through Inspector,
Chopda Rural Police Station,
Chopda, Dist. Jalgaon

..RESPONDENTS

Mr B. R. Warma, Advocate for applicant;
Mr V. P. Patil, Advocate for respondent Nos. 1 to 4;
Mr K. D. Munde, Addl. Public Prosecutor for respondent No. 8

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CORAM : N.W. SAMBRE, J.**DATE : 23rd August, 2016****ORAL ORDER :**

These proceedings are initiated by the applicant under section 482 of the Code of Criminal Procedure, questioning the orders passed by the learned Judicial Magistrate First Class, Chopda, in Criminal Misc. Application No.764 of 2015, a complaint case preferred by the applicant against respondents-accused, alleging commission of offences punishable under sections 406, 120-B, 420, 323, 504, 506 read with section 34 of the Indian Penal Code, under section 156 (3) of the Code of Criminal Procedure (for short "Code") and the order dated 30th October, 2015.

2. Facts, as are necessary for decision of the instant application, are as under :-

Respondents-accused claimed to be owners of three landed properties which are mentioned in the complaint. It is claimed that since the respondents-accused were interested in disposing of the said property, the applicant entered into an agreement on 28th December, 2012, for purchase of the same after paying earnest money of Rs.10,00,000/- in cash and balance amount to be paid on or before 30th June, 2013, on the date of execution of sale deed. It is then claimed that the respondents-accused, instead of executing sale deed in favour of the applicant, had transferred all the three agricultural properties in favour of third persons, who are also named as accused. Forming the same to be the basis for

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alleged offences, it is claimed that by executing sale deed in favour of other persons, though there exists an agreement between applicant and accused no.1 to 4, the respondents-accused have committed offences punishable under sections 406 and 420 of the Indian Penal Code. It is then claimed that the respondents-accused have also committed offences punishable under sections 504, 506 and 323 read with section 34 of the Indian Penal Code, as when the applicant had requested the respondents to execute the sale deed, they abused him and threatened to kill him. It is important to note that, in the said complaint, three prayers are made :-

- “(a) An appropriate inquiry be made in the matter and the respondents-accused be proceeded against and punished;
- (b) The application be forwarded for investigation under section 156 (3) of the Code to police station, Chopda;
- (c) Any other relief deemed just and proper be granted in favour of the complainant.”

3. The learned Magistrate, after having received the complaint, noted that the allegations for constituting offences under sections 406 and 420 of the Indian Penal Code are civil in nature and hence, there is remedy for redressal of the said grievance in a civil suit. However, so far as offences punishable under sections 323, 504, 506 of the Indian Penal Code are concerned, it is noted that an inquiry is required and hence called report of the police under section 202 of the Code of Criminal Procedure. The said order is impugned herein.

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4. Subsequent thereto, pursuant to an order calling report under section 202 of the Code, the Police Station Officer submitted a report dated 24th August, 2015 to the learned Magistrate. After perusal of the report under section 202 of the Code, the learned Magistrate passed another order on 30th October, 2015. In the said order, which is also impugned in the present application, the learned Magistrate has observed that already the said court had dismissed complaint, to the extent of offences under sections 406 and 420 of the Indian Penal Code. The Magistrate further observed that from the contents of the complaint and the report under section 202 of the Code, only an offence punishable under section 504 of the Indian Penal Code is made out against the accused and as such, ordered issuance of process for offence punishable under section 504 of the Indian Penal Code and dismissed the complaint *qua* the offences under other sections.

5. Mr Warma, learned Counsel appearing on behalf of the applicant-complainant submits that the learned Magistrate ought not to have dismissed the complaint on 25th June, 2015, to the extent of offences punishable under sections 406 and 420 of the Indian Penal Code, as according to him, the only reason furnished for dismissal of the complaint to the said extent, is the existence of a civil dispute *qua* the allegations made in the complaint.

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6. The next limb of submission by Mr Warma is that the learned Magistrate committed an error by not recording the verification under section 200 of the Code and straight away called report under section 202 of the Code. He would then urge that the report under section 202, as was submitted by the police officer, discloses offences punishable under sections 504 and 506 of the Indian Penal Code and as such, the order of issuance of process, only to the extent of offence punishable under section 504 of the Indian Penal Code, is required to be set aside with a direction to the learned Magistrate to record the verification of the applicant afresh, on the entire complaint. He would then urge that the law is well settled on the above referred issue and would rely upon the judgment dated 23rd October, 2013, rendered by this Court, in the matter of Chiman Asaram Zope vs. Bipin Dinkar Zope & ors, in Criminal Application No.1297 of 2012.

7. Mr Warma would also rely upon the judgment of the Division Bench of this Court, in the matter of **Hasan Mohammad Issak Maniyar & ors. vs. Harun Gulab Maniyar & anr.**, reported in **2014 ALL MR (Cri) 888**, so as to submit that once a complaint under section 156 (3) of the Code is preferred, the option left with the Magistrate before taking cognizance of the offence is either to inquire into the case himself or to direct an inquiry by such other person or police officer. According to him, since the complaint disclosed commission of a cognizable offence, the Magistrate should have ordered an inquiry under section 156 (3) or should have conducted the inquiry himself in the matter.

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8. Learned Addl. Public Prosecutor appearing on behalf of respondent no.8 – State supports the claim of the applicant, whereas Mr V.P. Patil, learned Counsel appearing on behalf of respondents no.1 to 4, would submit that the order of the learned Magistrate is just and proper and according to him, the present application is liable to be dismissed. Mr Patil then would urge that the applicant has taken his chance initially after the order dated 25th June, 2015, when the complaint for offences punishable under sections 406 and 420 of the Indian Penal Code came to be dismissed and rather waited for the report under section 202 of the Code, as ordered by the Magistrate. Not only this, but the applicant, in fact, has argued the matter thereafter, based on the police report under section 202 and having noticed that he suffered rejection of the complaint, but for an offence punishable under section 504 of the Indian Penal Code, has preferred present application by way of an afterthought. He would then submit that taking cognizance under sections 200, 202 and 204 of the Code is pursuant to prayer clause (a) made in the complaint. According to him, even the offence punishable under section 504 of the Indian Penal Code is not made out, as neither in the complaint nor in the report, insulting words as claimed to have been uttered by the accused intentionally, so as to provoke the breach of peace, are mentioned and the allegations therein, as such, are too vague to consider.

9. Mr Patil then would rely upon the judgment of this Court, in the matter of **Subhash Kanade vs. State of Maharashtra & ors.**, reported in **2015 ALL MR (Cri) 2374**, so as to submit that the inquiry under section

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202 of the Code, ordered only for the purpose of deciding whether or not, there is sufficient ground for proceeding against the accused persons, based on the contents of the complaint and the report. He would then rely upon the judgment of the Apex Court, in the matter of **Ramdev Food Products Private Limited vs. State of Gujarat**, reported in **(2015) 6 SCC 439**, so as to submit that the power of arrest or investigation is not mechanical and has to be preceded with application of mind by the police authorities and as such, the directions to investigate to be issued by the Magistrate cannot be in a mechanical way, but only after application of mind. He would then rely upon the judgment of the Apex Court, in the matter of **Lalita Kumari vs. State of U.P. (2014) 2 SCC 1** and Division Bench judgment of this Court, in the matter of **State of Maharashtra vs. Shashikant s/o Eknath Shinde**, reported in **2013 ALL MR (Cri) 3060** and sought dismissal of the application.

10. Having dwelt upon the entire controversy as is brought to the notice of this Court, it is required to be observed, that the first order that was passed by the Magistrate on 25th June, 2015 is in two parts. The first part speaks that after perusal of the complaint and upon hearing advocate for the complainant, the Magistrate has recorded satisfaction *qua* the allegations for offences punishable under sections 406 and 420 of the Indian Penal Code, the dispute appears to be civil in nature and the remedy lies in a civil suit. As such, the complaint to that extent, is dismissed by the Magistrate. In my opinion, while dismissing the complaint for offences punishable under sections 406 and 420 of the Indian Penal

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Code, the contents of the complaint, for disclosing a *prima facie* offence and the ingredients of sections 406 and 420 are very much appreciated. As such, the Magistrate formed an opinion that the dispute, to that extent, appears to be civil in nature. The background for forming such an opinion appears to be the agreement of sale of agricultural property and refusal/execution of sale deed in favour of third party than that of the complainant. The Magistrate, in my opinion, as observed herein above, has two options once the complaint is preferred before him, if satisfied, under section 156 (3) of the Code may cause an inquiry himself or direct an investigation to be made by a police officer or such other person. The Magistrate, as such, in my opinion has rightly rejected the claim for offences punishable under sections 406 and 420 of the Indian Penal Code, as this Court has also perused the contents of the complaint to that effect and tried to evaluate the ingredients therefrom, for making out a *prima facie* case for offences punishable under sections 406 and 420 of the Indian Penal Code. As such, in my opinion, no interference is called for, to that extent, in the impugned order.

11. The later part of the order is in relation to the allegations in the complaint *qua* commission of offences punishable under sections 323, 504 and 506 of the Indian Penal Code and having noted the contents thereof, has ordered an inquiry under section 202 of the Code. No doubt, it is true that Magistrate has every power to order an inquiry under section 202 of the Code, however, for completing the said procedure as provided under Chapter XV, what is required is to first record verification of the

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complainant and then only to take recourse to section 202, upon satisfying the requirement of calling of a report. In the present case, without recording the verification, the Magistrate has called report under section 202 of the Code. Not only this, by observing that upon *prima facie* perusal of the complaint and the report under section 202 of the Code, offence is made out under section 504 of the Indian Penal Code and as such, ordered issuance of process vide second order dated 30th October, 2015.

12. Upon perusal of the scheme of section 200 of the Code, what is required to be noted is, first the Magistrate should have recorded verification on the complaint and upon satisfaction thereof, may order postponement of issue of process and call report under section 202. As such, what could be noticed from the order dated 25th June, 2015, is that the learned Magistrate has put cart before horse, i.e. without recording the verification has straight away called the report under section 202 and upon perusal thereof, ordered issuance of process for offence punishable under section 504 of the Indian Penal Code.

13. To that extent, in my opinion, the order dated 30th October, 2015, is required to be interfered with. In my opinion, appropriate support can be drawn from the judgment of this Court, in the matter of Subhash Kanade (*supra*), which mandates that the report under section 202 of the Code can be called only after the examination of the complainant on oath, as contemplated under section 200.

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14. In view thereof, the order of issuance of process, to the extent of offence punishable under section 504 of the Indian Penal Code, passed on 30th October, 2015, deserves to be set aside. I, therefore, pass following order :-

The order of issuance of process for an offence punishable under section 504 of the Indian Penal Code, passed by Judicial Magistrate First Class, Chopda, including that of calling for report under section 202 of the Code, is hereby set aside.

The order of the Magistrate, to the extent of dismissing the complaint for offences punishable under sections 406 and 420 of the Indian Penal Code, stands confirmed.

The matter stands restored on the file of the learned Magistrate, who shall first record verification of the complaint, to the extent of offences punishable under sections 323, 504 and 506 of the Indian Penal Code and if then required, may call for a fresh report under section 202 of the Code and then shall pass appropriate order, if so desired, after having satisfied about making out of ingredients of the relevant sections from the contents of the complaint and the report so received.

Criminal Application stands allowed in above terms.

(N.W. SAMBRE, J.)

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