

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

CRIMINAL WRIT PETITION NO. 62 OF 2016

1. Raisuddin S/o Anisuddin Kazi,
Age : 28 years, Occ: Education,
R/o. Bundelpura, Juni Bhaji
Mandai Road, Beed,
Tq. & Dist. Beed.
2. Anisuddin s/o Waziruddin Kazi,
Age: 65 years, Occ: Pensioner,
R/o. Bundelpura, Juni Bhaji
Mandai Road, Beed,
Tq. & Dist. Beed.
3. Rafiuddin @ Azharuddin
s/o Fasiuddin Kazi,
Age: 54 years, Occ: Business,
R/o. Near Ansari Automobiles,
Dharur Road, Majalgaon,
Tq. Majalgaon, Dist. Beed. ...Petitioners

versus

Makbul S/o Nisar Fauqui,
Age: 30 years, Occ: Labourer, ...Respondent

.....

Mr. H. V. Tungar, Advocate for petitioners
Mr. S. J. Salunke, Advocate. for respondent

.....

CORAM : N.W. SAMBRE, J.

DATE : 4th APRIL, 2016

ORAL ORDER :

The petitioners-accused have questioned the proceedings initiated by present respondent-complainant vide Criminal Misc. Application No. 479 of 2015 alongwith the order dated

30/11/2015 passed by the learned Judicial Magistrate, First Class, Majalgaon ordering issuance of process for the offence punishable under Sections 392, 506 read with Section 34 of the Indian Penal Code against the present petitioners.

2. Mr. Tungar, learned Counsel for the petitioners would invite my attention to the report dated 27/09/2011 filed by the Assistant Police Inspector, Police Station, Dindrud, pursuant to the order of the Magistrate calling report from the Investigating Officer. According to him, the said report though speaks of non involvement of the present petitioners in the alleged crime, without considering the said report, the Magistrate has ordered issuance of process as against the present petitioners, which according to him, is not sustainable. In support of his contention, he has relied upon the judgment of the Apex Court in the matter of **Rupan Deol Bajaj vs. State of Punjab** reported in **A.I.R. SCW 1995 4100**. He would then rely upon the judgment of Apex Court in the case of **Abhinandan Jha vs. Dinesh Mishra**, reported in **A.I.R. 1968 SC 117**, in which the Apex Court has taken a view that if the Magistrate calls report and if he disagrees with the same and intend to proceed against the accused, pursuant to the provisions of Section 190(1) of the Code of Criminal Procedure, the Magistrate is required to deal with such report, as to why he was not agreeing with the contents of the said report.

3 He would submit that as a consequence, the order of issuance of process is not sustainable, since lack reasons on the above referred issue.

4. Mr. Salunke, learned Counsel for the respondent would urge that learned Magistrate has rightly disagreed with the report of the Investigating Officer and he has only three options in such case: (1) At very inception of the complaint to satisfy as to sufficient ground for proceeding against the accused are made out and if required may drop action, (2) if he takes cognizance of the offence pursuant to the provisions of Section 190(1) (b) of Code of Criminal Procedure on the basis of police report and issue process, he is required to mention reasons pursuant to the police report and (3) he may take cognizance under Section 190(1) (a) of the Code of Criminal Procedure on the basis of original complaint and proceed to examine on oath the complainant and his witnesses under Section 200. He may also take recourse to the provisions of Section 202 of the Code of Criminal Procedure, in case proposed accused are not residing within jurisdiction of the Magistrate. He can call report from the police officer in the matter and then as deem fit, he may dismiss the complaint or issue process as the case may be. According to him, the Magistrate in the present case, having received report has

proceeded to issue process against the accused persons, to which the Magistrate has every right under the Act. He has placed reliance upon the judgment of Apex Court in the matter of ***Rakesh and another vs. State of U.P. and another*** reported in ***2014 Cr.L.J. 4195***, particularly paragraphs-7 and 8 thereof, which reads thus :

“7. If we are to go back to trace the genesis of the views expressed by this Court in Gopal Vijay Verma (supra), (1982 (3) SCC 510) notice must be had of the decision of this Court in H.S. Bains vs. State (Union Territory of Chandigarh) [1980 Cri. LJ 1308] wherein it was held that after receipt of the police report under Section 173, the Magistrate has three options—

“(1) he may decide that there is no sufficient ground for proceeding further and drop action;

(2) he may take cognizance of the offence under Section 190 (1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report;

(3) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint

or issue process, as the case may be.”

“8. The second and third options available to the Magistrate as laid down in H.S. Bains (supra) has been referred to and relied upon in subsequent decisions of this Court to approve the action of the Magistrate in accepting the final report and at the same time in proceeding to treat either the police report or the initial complaint as the basis for further action/enquiry in the matter of the allegations levelled therein. Reference in this regard may be made to the decision of this Court in Gangadhar Janardan Mhatre vs. State of Maharashtra & Ors. [2004(7) SCC 768] (Para 9) : (AIR 2004 SC 4753). The following view may be specifically noted -

“.....The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. [See India Carat (P) Ltd. v. State of Karnataka]” (AIR 1989 SC 885) (Para 6).”

Counsel for the respondent would urge that no interference is called for and sought dismissal.

6. From the perusal of the proceedings as are brought before this Court, it is required to be noted that the Magistrate has ordered the report from the Police Officer which was submitted on 27/09/2011 stating that the petitioners are not involved in the crime and false case is registered against them. Once the said report is called by the Magistrate and placed before him, least that is expected by the Magistrate is to apply his mind to the said report and may pass order agreeing or disagreeing with the same. In such eventuality, while disagreeing with the report, the Magistrate may record reasons for such disagreement and can proceed ahead with the complaint by calling upon the complainant to produce his witnesses.

7. The Magistrate is duty bound to deal with such report and in case if he disagree with the same, he can proceed ahead against the accused or agree with the same, and drop the proceedings. Appropriate support can be drawn from the judgment of the Apex Court in the matter of **Rupan Deol Bajaj** (supra), particularly relevant portion in paragraph-12 and 13, which reads thus:

"12.....In Abhinandan Jha vs. Dinesh Mishra (AIR 1968 SC 117), the question arose whether a Magistrate to whom a report under Section 173 (1), Cr. P.C. had been submitted to the effect that no case had been made out against the accused, could direct the police to file a charge-sheet on his disagreeing with that report. In answering the question this Court first observed that the use of the words 'may take cognizance of any offence' in sub-section (1) of Section 190, Cr.P.C. imports the exercise of 'judicial discretion' and the Magistrate who receives the report under Section 173, Cr.P.C. will have to consider the said report and judicially take a decision whether or not to take cognizance of the offence. The Court then held, in answering the question posed before it, that the Magistrate had no jurisdiction to direct the police to submit a charge-sheet but it was open to the Magistrate to agree or disagree with the police report. If he agreed with the report that there was no case made out for issuing process to the accused he might accept the report and close the proceedings. If he came to the conclusion that further investigation was necessary he might make an order to that effect under Section 156(3). It was further held that if ultimately the Magistrate was of the opinion that the facts set out in the police report constituted an offence he could take cognizance thereof, notwithstanding contrary opinion of the police expressed in the report.

13. Since at the time of taking cognizance the Court has to exercise its judicial discretion it necessarily follows that if in a given case - as the present one - the

complainant, as the person aggrieved raises objections to the acceptance of a police report which recommends discharge of the accused and seeks to satisfy the Court that a case for taking cognizance was made out but the Court overrules such objections, it is just and desirable that the reasons therefore be recorded. Necessity to give reasons which disclose proper appreciation of the issues before the Court needs no emphasis. Reasons introduce clarity and minimise chances of arbitrariness. That necessarily means that recording of reasons will not be necessary when the Court accepts such police report without any demur from the complainant. As the order of the learned Magistrate in the instant case does not contain any reason whatsoever, even though it was passed after hearing the objections of the complainant it has got to be set aside and we do hereby set it aside. Consequent thereupon two course are left open to us; to direct the learned Magistrate to hear the parties afresh on the question of acceptance of the police report and pass a reasoned order or to decide for ourselves whether it is a fit case for taking cognizance under Section 190 (1)(b) Cr.P.C. Keeping in view the fact that the case is pending for the last seven years only on the threshold question we do not wish to take the former course as that would only delay the matter further. Instead thereof we have carefully looked into the police report and its accompaniments keeping in view the following observations of this Court in H.S. Bains vs. State, AIR 1980 SC 1883, with which we respectfully agree:

"The Magistrate is not bound by the conclusions arrived

at by the police even as he is not bound by the conclusions arrived at by the complainant in a complaint. If a complainant states the relevant facts in his complaint and alleges that the accused is guilty of an offence under Section 307, Indian Penal Code the Magistrate is not bound by the conclusion of the complainant. He may think that the facts disclose an offence under S. 324, I.P.C. only and he may take cognizance of an offence under Section 324 instead of Section 307. Similarly if a police report mentions that half a dozen persons examined by them claim to be eye witnesses to a murder but that for various reasons the witnesses could not be believed, the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses. He may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report." (emphasis supplied)

8. Upon perusal of the above observations, it is clear that the Apex Court was alive of the fact that while disagreeing with the report, the Magistrate does not deal with the said issue independently by recording reasons, then such order is not sustainable in law. The wording as are used by the Apex Court in the order provides that there is necessity to give reasons, which disclose the proper appreciation of issue before the Court. The Apex Court has also observed that so as to introduce clarity, the Magistrate must

record reasons. Having regard to the above observations made by the Apex Court, if the order impugned in the present writ petition is perused, the fact remains that the learned Magistrate while passing the order 30/11/2015 has referred to the report as was called from the Police Station Officer, pursuant to the provisions of Section 156(3) of the Code of Criminal Procedure. After getting the report which speaks of false implication of the accused, learned Magistrate has made reference of it, however has not recorded any disagreement or reasons if any for doing so.

9. The Magistrate, rather has proceeded further by ordering issuance of process based on *prima facie* evidence as is available on record.

10. In view of above observations, in my opinion, the order passed by the Magistrate on 30/11/2015 is not sustainable and as such, is quashed and set aside. The complaint stood restored to the file of learned Judicial Magistrate, First Class, Majalgaon and the complainant agrees that he shall appear before the Magistrate on 18/04/2016. The Magistrate thereafter shall deal with the issue in accordance with law, keeping in mind the observations made herein above.

11. The writ petition, stands partly allowed in above terms.

[N.W. SAMBRE, J.]

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