

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

CRIMINAL WRIT PETITION NO. 279 OF 2016

Sanjay s/o Vyankatrao Patare,
Age: 48 years, Occ: Agri.,
R/o. Indiranagar Shrirampur,
Tq. Shrirampur, Dist. Ahmednagar.

...Petitioner

versus

1. The State of Maharashtra
Through Police Inspector Newasa
Police Station, Newasa,
Tq. Newasa, Dist. Ahmednagar.
2. Mahemood s/o Karim Shaikh,
Age: 53 years, Occ: Agri.,
3. Babasaheb s/o Mansukh Patare,
Age: 37 years, Occ: Agri.,
4. Bashir s/o Sardar Shaikh,
Age: 63 years, Occ: Agri.,

All R/o. Ghogargaon, Tq. Newasa,
District Ahmednagar.

...Respondents

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Mr. S.N. Gaikwad, Advocate for petitioner
Mr. A.R. Kale, A.P.P. for respondent/State
Mr. R. R. Karpe, Advocate for respondent Nos. 2 to 4

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CORAM : N.W. SAMBRE, J.

DATE : 20th APRIL, 2016

ORAL ORDER :

Heard learned Counsel for the parties.

2. Learned Judicial Magistrate, First Class, Newasa in Criminal Misc. Application No. 218 of 2014 below Exhibit-1 passed an order dated 29/05/2014, forwarding the complaint to the police station for investigation which was set aside by learned Sessions Judge, Newasa, by an order dated 24/11/2015 in Criminal Revision No. 87 of 2014.

3. What is noticed *prima facie* is, while passing the order under Section 156(3) of Code of Criminal Procedure for referring the matter for investigation to the police, learned Magistrate has not recorded any reason or applied his mind qua *prima facie* satisfying about ingredients under which the respondents-accused claimed to have committed an offence.

4. In view thereof, it will be appropriate, in my opinion to set aside both the orders i.e. 29/05/2014 passed by learned Judicial Magistrate, First Class, Newasa in Criminal Misc. Application No. 218 of 2014 and order dated 24/11/2015 passed by Learned Sessions Judge, Newasa in Criminal Revision No. 87 of 2014, in view of law laid down by the Division Bench of this Court in the matter of ***State of Maharashtra vs. Shashikant s/o Eknath Shinde*** reported in ***2013 ALL MR (Cri) 3060***, particularly paragraphs- 29, 30, 31, 32 and 35, which reads thus :

"29. The Apex Court in the said case has referred to its earlier observations made in the case of Pepsi Foods Ltd. and another vs. Special Judicial Magistrate and others, reported in (1998) 5 SCC 749, Criminal Application No.258.13 (APL) which reads thus:

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

36 Criminal Application No.258.13 (APL)

"30. In view of the aforesaid Judgments of the Apex Court, it can, thus, clearly be seen that when the Magistrate passes order directing investigation under Section 156 (3) of Cr.P.C., it

is necessary that, prior to doing so, he should apply his mind to the case before him. Least that is expected of the Magistrate, is to verify from the averments of the complaint as to whether the ingredients to constitute the offence/s complained of have been made out or not. As such the order under Section 156(3) of Cr.P.C., should depict the application of mind. No doubt the Magistrate is not expected to give elaborate Judgment at that stage. However, the least expected is that the order should depict application of mind and as to how the complaint discloses the ingredients to constitute the offence complained of.

31. It would also be appropriate to refer to the observations of the Division Bench of this Court in the case of Yogiraj Surve (supra) in para no.13, which reads thus:-

"No doubt, in view of the clear ratio laid down by the Apex Court in the aforesaid cases, at the stage of passing an order under Section 156(3) of the Criminal Application No.258.13 (APL) Code of Criminal Procedure, the learned Magistrate does not take cognizance. However, it is axiomatic that before ordering investigation under Section 156(3), the petition filed simplicitor under Section 156(3) or the complaint filed under Section 190 read with Section 200 of the Code of Criminal Procedure must disclose cognizable offence/s. If the petition or complaint does not disclose commission of cognizable offence/s, it is difficult to hold that the learned Magistrate can still pass the order under Section 156(3) of the Code of Criminal Procedure inasmuch as such an order can be passed only if at least one cognizable offence is made out either in the petition or complaint. In other words, the disclosure of commission of cognizable offence/s is a sine qua non for issuing the order under Section 156(3). In the present case, a bare reading of the petition (styled as complaint) filed under Section 156(3) of

Cr.P.C. discloses that no offence even prima facie has been made out against the applicant."

(emphasis supplied) Criminal Application No.258.13 (APL)

32. It can, thus, be seen that the Division Bench of this Court has clearly held that if the petition or complaint does not disclose commission of cognizable offence, the learned Magistrate cannot pass the order under Section 156(3) of Cr.P.C.. It is also held that disclosure of commission of the offence is sine quo non for issuing the order under Section 156 (3) of Cr.P.C..

35. It will, thus, have to be held that it is mandatory for the Magistrate to apply his mind to the allegations made in the complaint and only when the allegations made in the complaint make out the ingredients to constitute an offence, the learned Magistrate can pass an order of investigation under Section 156(3) of Cr.P.C. Equally, when the ingredients to constitute the offence are not made out in the complaint, the learned Magistrate cannot direct investigation under Section 156(3) of Cr.P.C. Such an order is without jurisdiction. If the contention of the learned counsel for respondent complainant that once the complaint is filed under Section 156(3) of Cr.P.C., the learned Magistrate has no option but to pass an order under Section 156(3) of Cr.P.C., is accepted, it would amount to reducing the learned Magistrate to nothing else but the postman. As such, we have no other option but to reject the said contention."

5. Learned Magistrate is directed to consider the issue as regards issuance of process afresh, in the light of observations made by Division Bench of this Court in the above referred matter and pass

reasoned order by applying his mind. The petitioner undertakes to appear before learned Magistrate on 03/05/2016.

6. The criminal writ petition stand allowed in above terms.

[N.W. SAMBRE, J.]