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

CRIMINAL APPLICATION NO. 1106 OF 2015

Dr. Deelip s/o Madhukarrao Patil,
Age: 45 years, Occu: Medical practitioner,
R/o. Janaki Hospital, Bhagyanagar,
Bhokardan, Dist. Jalna

..APPLICANT

VERSUS

1. D. B. Korde,
Appropriate Authority,
Age: 54 years, Occu: Service,
Naib Tahasildar, Bhokardan,
Dist. Jalna

2. The State of Maharashtra,
Through Health Department,
Mantralaya, Mumbai

..RESPONDENTS

Mr B. R. Warma, Advocate for applicant;
Mr A. R. Kale, Addl. Public Prosecutor for respondent No. 2

CORAM : N.W. SAMBRE, J.

DATE : 13th April, 2016

ORAL ORDER :

The applicant holds certificate of registration under the provisions of section 19 of the Prenatal Diagnostic (Regulation and Prevention of Misuse) Act, 1994, particularly in the form B, Rules 6 (2), 6 (5) and 8 (2) of the Rules framed therein. The applicant was granted registration by the Civil Surgeon, Civil Hospital, Jalna to run ultra sound clinic for a period of five years, commencing from 7th March, 2012 and ending on 6th March, 2017 for carrying out prenatal diagnostic procedure approved for (genetic

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clinic) non-invasive/ultra sound invasive, vide registration No.52/CHJ/2007.

It is claimed that the competent authority, pursuant to the provisions of the above referred Act, carried out an inspection of Janaki Ultra Sound Centre of the applicant and noticed following short-falls :-

- (a) Register under form 9 (1) of the Rules not maintained;
- (b) The declaration form of patient Pooja Santosh Devekar does not bear signature of the applicants as regards her sonography on 31st May, 2014;
- (c) The signature of patient Chhaya Mangesh Salve, aged 26 years, was not obtained on consent form of sonography on 8th May, 2014;
- (d) On the declaration form of patient Sou. Manisha Sunil Nikam, in relation to her sonography carried out on 26th July, 2014, her signature was not obtained on the declaration form;
- (e) Six forms on which thumb impressions of the patient were not attested and register thereof was taken into custody;
- (f) In the form F, the age of living child has to be mentioned, which is mandatory, however, the name of Sonologist and the parents of the child are not mentioned. Hence, register in form F taken into possession;
- (g) The monthly report is not produced in its entirety including date and acknowledgment;
- (h) New form F is not filled in.

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2. Sonography machine of the applicant was seized, sealed and then given in his custody.

3. The applicant then was issued show cause notice on 28th August, 2014, calling upon him as to why registration of his Ultra Sound Clinic be not cancelled for the aforesaid short-falls, to which the applicant has tendered his explanation on 5th September, 2014.

4. Respondent no.1 initiated complaint for an offence punishable under sections 23 and 25 of the Pre-conception & Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short "Act") on or about 13th November, 2014.

5. Since the complaint was filed by a public servant, in view of provisions of section 200 (a) of the Code of Criminal Procedure verification thereof was dispensed with and the learned Magistrate, considering the contents of the complaint, notice issued to the applicant and the documents placed on record, was pleased to issue process against the applicant for offences punishable under sections 23 and 25 of the Act.

6. The applicant, feeling aggrieved by the proceedings bearing Regular Criminal Case No.191 of 2014, which is pending on the file of Judicial Magistrate First Class, Bhokardan and order of issuance of process passed on 21st November, 2014, has preferred the present application under section 482 of the Code of Criminal Procedure.

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7. Heard Mr Warma, learned Counsel appearing on behalf of the applicant at length and learned Addl. Public Prosecutor for respondents.

8. Mr Warma would strenuously urge that the order of issuance of process passed by the Magistrate is not sustainable as the said order is passed by him in most casual manner, without verifying truthfulness of the contents of the reply and also the contents of the reply tendered by the applicant to the show cause notice. Mr Warma then would urge that the grounds which are formed to be the basis in the complaint initiated against the applicant are as vague as it could be and there is hardly any material on record to depict that the Magistrate should have taken cognizance of the complaint. He would then invite attention of this Court to the material that was placed before the Magistrate by the complainant and submits that, if the entire papers are scrupulously perused, no offence whatsoever could be noticed against the applicant. According to him, the Magistrate has ordered issuance of process just because a public authority has filed the complaint.

9. Learned Addl. Public Prosecutor, while opposing the prayer, has invited attention of this court to the seizure panchnama dated 13th August, 2014 and the show cause notice issued to the applicant pursuant to the provisions of section 20 of the Act, in the matter of cancellation of registration of sonography centre of the applicant, so as to substantiate that specific short-falls were noticed as against the accused as narrated

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therein, which was formed to be the basis for issuance of process by the Magistrate.

10. Having dwelt upon the rival submissions of the parties, it is required to be noted that the order of issuance of process is revisable one and it is open for the applicant to question the same before the learned Sessions Court in a revision and as such, the said claim of the applicant in the present case, *qua* legality and validity of order of issuance of process, in my opinion, need not be gone into at this stage of the matter. It is then noted that in case if such revision is preferred by the applicant before the revisional court, it is expected of the revisional court to decide the claim of the applicant *qua* maintainability of the order of the learned Magistrate of issuance of process, in the background of the law laid down by the Apex Court, in the matter of **Priyanka Srivastava & anr. vs. State of Uttar Pradesh & ors.**, reported in **(2015) 6 SCC 287**. Appropriate reliance can be placed upon observations made in paragraphs 28 and 31 to 35 of the said judgment, which read thus :-

"28. Issuing a direction stating "as per the application" to lodge an FIR creates a very unhealthy situation in society and also reflects the erroneous approach of the learned Magistrate. It also encourages the unscrupulous and unprincipled litigants, like Respondent 3, namely, Prakash Kumar Bajaj, to take adventurous steps with courts to bring the financial institutions on their knees. As the factual exposition would reveal, Respondent 3 had prosecuted the earlier authorities and after the matter is dealt with by the High Court in a writ petition recording a settlement, he does not withdraw the criminal case

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and waits for some kind of situation where he can take vengeance as if he is the emperor of all he surveys. It is interesting to note that during the tenure of Appellant 1, who is presently occupying the position of Vice-President, neither was the loan taken, nor was the default made, nor was any action under the SARFAESI Act taken. However, the action under the SARFAESI Act was taken on the second time at the instance of the present Appellant 1. We are only stating about the devilish design of the Respondent 3 to harass the Appellants with the sole intent to avoid the payment of loan. When a citizen avails a loan from a financial institution, it is his obligation to pay back and not play truant or for that matter play possum. As we have noticed, he has been able to do such adventurous acts as he has the embedded conviction that he will not be taken to task because an application under Section 156(3) CrPC is a simple application to the court for issue of a direction to the investigating agency. We have been apprised that a carbon copy of a document is filed to show the compliance with Section 154(3), indicating it has been sent to the Superintendent of police concerned.

31. *We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application under Section 156(3) be supported by an affidavit is so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that*

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the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.

32. *The present lis can be perceived from another angle. We are slightly surprised that the financial institution has been compelled to settle the dispute and we are also disposed to think that it has so happened because the complaint cases were filed. Such a situation should not happen.*

33. *At this juncture, we may fruitfully refer to Section [32](#) of the SARFAESI Act, which reads as follows:*

“32. Protection of action taken in good faith.- No suit, prosecution or other legal proceedings shall lie against any secured creditor or any of his officers or manager exercising any of the rights of the secured creditor or borrower for anything done or omitted to be done in good faith under this Act.”

In the present case, we are obligated to say that learned Magistrate should have kept himself alive to the aforesaid provision before venturing into directing registration of the FIR under Section [156\(3\)](#) CrPC. It is because Parliament in its wisdom has made such a provision to protect the secured creditors or any of its officers, and needles to emphasize, the

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legislative mandate has to be kept in mind.

34. In view of the aforesaid analysis, we allow the appeal, set aside the order passed by the High Court and quash the registration of the FIR in case Crime No. 298 of 2011, registered with Police Station, Bhelupur, District Varanasi, U.P.

35. A copy of the order passed by us be sent to the learned Chief Justices of all the High Courts by the Registry of this Court so that the High Courts would circulate the same amongst the learned Sessions Judges who, in turn, shall circulate it among the learned Magistrates so that they can remain more vigilant and diligent while exercising the power under Section [156\(3\)_CrPC.](#)"

11. Appropriate reliance can also be placed upon the judgment of the Apex Court, in the matter of **Maksud Saiyed vs. State of Gujarat & ors.**, reported in **(2008) 5 SCC 668** and the judgment rendered by the Division Bench of this Court, in the matter of **State of Maharashtra vs. Shashikant Eknath Shinde** reported in **2013 ALL MR (Cri) 3060**. Paragraphs 29, 30, 32 and 35 of the judgment of the Division Bench of this Court are worth referring, which read 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), 35 Criminal Application No.258.13 (APL) which reads thus:

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"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."

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.

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."*

12. It is also required to be noted that the compliances as were reported in the reply, were also not taken into account by the Magistrate, which in my opinion, will be necessary while dealing with an issue of sustainability of the order of issuance of process, if questioned in a revision.

13. With the above observations and liberty to the applicant to prefer revision before the learned Sessions Judge questioning the order of issuance of process, in my opinion, no case for interference at this stage

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before this Court under section 482 of the Code of Criminal Procedure is made out. In the result, Criminal Application fails and stands rejected.

(N.W. SAMBRE, J.)

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