

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 511 OF 2005

Mohan S/o Appa Ghongade,
Age : 57 years, Occu: Agril. & Service,
R/o. Ghongade Wadi U/V. Wahira,
Tq. Ashti, Dist. Beed.

Petitioner

VERSUS

1. The State of Maharashtra
Through Police Station Ambhora,
Tq. Ashti, Dist. Beed.
2. Thaka s/o Appa Ghongade,
Age : 63 years, Occu : Agril.
R/o. Ghongade Wadi U/V. Wahira,
Tq. Ashti, Dist. Beed.
3. Pankhabai w/o Mohan Ghongade,
Age : 50 years, Occu : Household,
R/o As above.
4. Rajendra s/o Mohan Ghongade,
Age : 33 years, Occu : Agril.
R/o As above,
5. Vasant s/o Mohan Ghongade,
Age : 28 years, Occ : Agril.
R/o As above.

Respondents

Mr. S. G. Chapalgaonkar , Advocate for the Petitioner.
Mr. N. T. Bhagat, APP for Respondent No.1/State.
Mr. D. R. Korde, Advocate for Respondent No.2 (absent)
Respondent No.3 to 5 served.

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(CORAM : RAVINDRA V. GHUGE, J.)**DATE : 13/06/2016****ORAL JUDGMENT :**

1. The petitioner is aggrieved by the order dated 27.08.2005 passed by the learned Judicial Magistrate First Class, Aashti by which process has been issued with regard to the offences punishable under Section 323 r/w 34 of the Indian Penal Code. The petitioner is also aggrieved by the order dated 31.08.2005 passed by the learned 2nd Ad-hoc Additional Sessions Judge, Beed, by which his Revision Petition has been dismissed.

2. The petition was Admitted by this Court vide order dated 21.03.2006 and interim relief in terms of prayer clause "D" was granted. Prayer clause "D" reads as under :-

"Pending hearing and final disposal of this writ petition, further proceedings in S.C.C. No. 334/2004 pending before Hon'ble J.M.F.C. Aashti, may kindly be stayed".

3. Shri Chapalgaonkar, learned Advocate for the petitioner submits that on the complaint filed by respondent No.2 Shri. Thaka

Appa Ghongade, the learned Magistrate directed the concerned Police Station to cause an inquiry under section 202 of the Code of Criminal Procedure. After receipt of the report dated 27.08.2004, the learned Magistrate has issued process against the petitioner. Grievance is that the report of the concerned Police Station under Section 202 would indicate that no offence was made out and the complainant had lodged a complaint only to harass the petitioner considering the animosity between the parties and the pending cases interse.

4. He therefore submits that the learned Magistrate was expected to apply his mind to the complaint, report under Section 202 and available material and pass a reasoned order. The impugned order does not reflect an application of mind since no reasons have been assigned by the learned Magistrate while issuing process. He adds that the Revisional Court should have considered these aspects.

5. He places reliance upon the judgment of the Supreme Court in the matter of **M/s. Pepsi Foods Ltd. and another Vs. Special**

Judicial Magistrate and others, 1998 AIR SC 128, to support his contention that the order of the Magistrate setting the Criminal law in motion can not be as a matter of course and should be supported with proper reasons indicating that a prima facie case has been made out against the accused. He further relies upon the order of this Court dated 10.03.2016 delivered in the matter of **Punam D/o Vijay Pandhare and another Vs. The State of Maharashtra and another In Criminal Writ Petition No. 1470 of 2015**, wherein this Court has held that the order of issuance of process should be reasoned and should consider the material available before the Court while passing the said order.

6. The learned APP has supported the impugned orders and prays that this petition be dismissed. It is submitted that there is no error committed by the Magistrate or the Revisional Court in passing the impugned order.

7. None appears for respondent No.2. Though respondent Nos. 3

to 5 have been served with court notice, they have not chosen to cause an appearance either in person or through an Advocate. This petition has been lodged in the year 2005 and is shown on the final hearing board.

8. I have considered the submissions of the learned Advocates for the petitioner and the learned APP.

9. It is trite law that if the learned Magistrate is not convinced to issue process on the basis of the complaint filed under Section 156 (3) of the Code of Criminal Procedure, he can order investigation. After investigation of the offence, the report is to be submitted by the Police Station. As such, on the basis of such report and the complaint, the learned Magistrate has to be convinced that prima facie, a case for the offences allegedly committed by the accused, is made out. In the instant case, the report of the Police Station dated 27.08.2004 in fact indicates that the complainant has a habit of harassing the accused by filing several cases in the Court. The learned Magistrate should have gone into this aspect before issuing

process.

10. The impugned order dated 27.08.2004 is apparently a cryptic order of two sentences. There is no whisper as to what was the material that convinced the learned magistrate to issue process. The learned Revisional Court also seems to have lost sight of this fact.

11. The Supreme Court in the case of **M/s. Pepsi Foods Ltd. and another Vs. Special Judicial Magistrate and others** has observed in paragraph No.28 reads as under :-

“28. 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 in to 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 or recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise 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 *prima facie* committed by all or any of the accused.”

12. In the un-reported order of this Court dated 10.03.2016 in the matter of **Punam D/o Vijay Pandhare** (supra), it has been observed in paragraph Nos. 6 to 10 as under :-

“6. Perusal of the order passed by learned Magistrate ordering issuance of process depicts that same suffers from non-application of mind, as there are hardly any considerations reflected in the order, ordering issuance of process against present petitioners. The said down by the Nagpur Bench of Bombay High Court in the matter of **State of Maharashtra vs Shashikant s/o Eknath Shinde** reported in **2013 All MR (Cri) 3060**. Relevant Paragraph-32 of the said judgment reads thus :

“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) or Cr.P.C.”

7. Upon perusal of the order of learned Sessions Court, before whom, the order of learned Magistrate was in question, it is noted that learned Sessions Judge has lost sight of above referred legal proposition, which could have been considered before examining legality and validity of the order passed by the Magistrate ordering issuance of process.

8. In this background, in my opinion, both the orders i.e. One passed by learned Judicial Magistrate, Firsts Class, Parli-Vaijinath in Regular Criminal Case No. 144 of 2011 on 01/03/2012, ordering issuance of process and another order dated 26/05/2015 passed by learned Additional Session Judge, Ambajogai in Criminal Revision No. 16 of 2013 are hereby quashed and set aside.

9. It is directed that learned Judicial Magistrate, First Class, Parli-Vaijinath shall pass fresh order considering the law laid down by this Court in the matter of State of Maharashtra vs Shashikant s/o Eknath Shinde (supra), before passing any order on the complaint preferred by respondent No.2-complainant.

10. In view of the fact that the proceedings are pending since last two years, it will be appropriate, in my opinion, to direct learned Magistrate to pass appropriate orders on the complaint, as observed herein above, expeditiously.”

13. Considering the above, this petition succeeds. The impugned order dated 27.08.2004 passed by the learned Magistrate and the impugned judgment dated 31.08.2005 are quashed and set aside.

The learned Judicial Magistrate First Class, Aashti, shall consider the law laid down by this Court in the matter of **The State of**

Maharashtra Vs. Shashikant Eknath Shinde, 2013 All MR

(Criminal) 3060 and shall re-consider Case No.334 of 2004 before

passing an order on the complaint filed by the complainant. Needless to state, the order of the learned Magistrate shall be a reasoned order and shall reflect application of mind.

14. Rule is made absolute in the above terms.

(RAVINDRA V. GHUGE, J.)