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

CRIMINAL WRIT PETITION NO. 889 OF 2015

1. Bhavika D/o Harish Pawani @
Bhavika W/o Sameer Rajani,
Age: 27 years, Occu: Household,
R/o. 9, Ekta Society, Kera,
Taluka Bhuj, - Kutch
Dist. Bhuj (State of Gujrat)
 2. Harish S/o Hansraj Pawani,
Age: 56 years, Occu: Business,
R/o As above
 3. Sunita W/o Harish Pawani,
Age: 46 years, Occu: Housewife,
R/o As above
- ..PETITIONERS

VERSUS

1. State of Maharashtra,
Through Kranti Chowk P.S.,
Aurangabad
 2. Manoj S/o Dinesh Rajani,
Age: 45 years, Occu: Business,
R/o Plot No. 66, Gandhinagar,
Behind Fire Brigade Office,
Railway Station Road, Aurangabad
- ..RESPONDENTS

Mr A. N. Sabnis, Advocate hoding for Mr S. B. Rajebhosale, Advocate for
petitioners;
Ms R. P. Gaur, Addl. Public Prosecutor for respondent No. 1;
Mr R. G. Joshi, Advocate for respondent No. 2

CORAM : N.W. SAMBRE, J.

DATE : 4th April, 2016

ORDER :

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The order dated 8th December, 2014, passed by Chief Judicial Magistrate, Aurangabad, in Regular Criminal Case No.1146 of 2013 as also the order passed by learned Additional Sessions Judge, Aurangabad, in Criminal Revision No.80 of 2015, are challenged in the present petition, on the ground that the same does not depict application of mind by the Magistrate.

2. Learned Counsel appearing on behalf of the respondent no.2-complainant would urge that in the complaint and verification, there is sufficient material on record to depict that the ingredients of offences punishable under sections 406 and 420 read with section 34 of the Indian Penal Code, were established.

3. Upon consideration of the submissions, it is noted that the order impugned dated 8th December, 2014, passed by the learned Magistrate does not reflect application of mind much less the ingredients of the offences for which process came to be issued.

4. The law laid down by this Court, in the matter of ***State of Maharashtra vs. Shashikant Eknath Shinde*** reported in ***2013 ALL MR (Cri) 3060***, is worth referring. Paragraphs 30, 32 and 35 of the said judgment read thus :-

“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)

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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

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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. Perusal of the order passed by the revisional court, it appears that even the revisional court has lost sight of the said proposition of law laid down by the Division Bench of this Court. Thus, the petition succeeds.

6. In the result, the order dated 8th December, 2014, passed by Chief Judicial Magistrate, Aurangabad, in Regular Criminal Case No.1146 of 2013 and the order dated 1st July, 2015, in Criminal Revision No.80 of 2015, passed by Additional Sessions Judge-5, Aurangabad, are quashed and set aside.

Learned Chief Judicial Magistrate, Aurangabad, is directed to consider issuance of process in the matter, having regard to the law laid down by the Division Bench of this Court, in the case of State of Maharashtra vs. Shashikant Eknath Shinde (supra).

Respondent no.2 – complainant undertakes that he shall appear before the learned Chief Judicial Magistrate, Aurangabad, on 16th April, 2016.

(N.W. SAMBRE, J.)

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