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

CRIMINAL APPLICATION NO.3248 OF 2005

Bansidhar @ Nandkumar Shivshankar
Shukla,

Age : 43 yrs, Occ. Business,
R/o 1552/12, Agalgaon Road,
Barshi, Tq. Barshi, Dist. Solapur

..APPLICANT

VERSUS

1. The State of Maharashtra
2. Shamrao Bapurao Dikale,
Age : 53 Yrs. Occu.Agr.,
R/o Tandulwadi, Tq. Kallam,
Dist. Osmanabad

RESPONDENTS

Mr Satej S. Jadhav, Advocate for applicant;
Ms R.P. Gaur, Addl. Public Prosecutor for respondent no.1;
Mr S.S. Bhise, Advocate holding for Mr S.B. Bhapkar, Advocate for
respondent no.2

CORAM : N.W. SAMBRE, J.

DATE : 2nd April, 2016

ORAL JUDGMENT :

Heard respective Counsel.

2. The applicant takes an exception to the order passed by the learned Judicial Magistrate First Class, Kallam, in Regular Criminal Case No.70 of 2003 on 25th April, 2003, ordering issuance of process against him for offences punishable under sections 418 and 420 of the Indian Penal Code. The said order is further confirmed by 2nd Ad hoc Additional Sessions Judge, Osmanabad vide order dated 24th August, 2005, passed in Criminal

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Revision Application No.57 of 2003. Thus, the present application.

3. Perusal of the order passed by the learned Magistrate ordering issuance of process against the applicant-accused depicts that he has neither applied his mind to the contents of the complaint, verification, and documentary evidence as is brought on record while dealing with the complaint. The order sans reasons and satisfaction about the ingredients of the offence under sections 418 and 420 of the Indian Penal Code. The reasons are the live link, which speaks the mind of a Judge who passes an order either way.

4. In view thereof, the order of issuance of process, passed by the Judicial Magistrate First Class, Kallam, on 25th April, 2003, in Regular Criminal Case No.70 of 2003 and confirmed in Criminal Revision Application No.57 of 2003 on 24th August, 2005 by 2nd Ad hoc Additional Sessions Judge, Osmanabad, are contrary to the law laid down by this Court, in the matter of **State of Maharashtra vs. Shashikant s/o Eknath Shinde**, reported in **2013 ALL MR (Cri) 3060**. Paragraphs 29, 30, 32 and 35 of the said judgment 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; (1998 ALL MR (CRI.) 144 (S.C.)) 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.

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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. In the light of above, Criminal Application is allowed.

The order passed by the learned Judicial Magistrate First Class, Kallam, in Regular Criminal Case No.70 of 2003 on 25th April, 2003, ordering issuance of process against the applicant for offences punishable under sections 418 and 420 of the Indian Penal Code and the order dated 24th August, 2005, passed by 2nd Ad hoc Additional Sessions Judge, Osmanabad, in Criminal Revision Application No.57 of 2003, are quashed and set aside.

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The matter is remanded back to the learned Judicial Magistrate First Class, Kallam, with a direction to pass fresh order, in accordance with the above referred observations.

Parties agree that they shall appear before Judicial Magistrate First Class, Kallam on 18th April, 2016.

(N.W. SAMBRE, J.)

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