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

CRIMINAL WRIT PETITION NO. 1245 OF 2015

Namdeo Bhagwan Konge,
Age: 55 years, Occu: Agri.,
R/o, Shirsathwadi, Tq. Pathardi,
Dist. Ahmednagar

..PETITIONER

VERSUS

1. Nitin Maruti Konge,
Age: Major, Occu: Agri.,
R/o. Shirsathwadi, Tq. Pathardi,
Dist. Ahmednagar

2. The State of Maharashtra

..RESPONDENT

Mr D. K. Dagadkhair, Advocate for petitioner;
Mr A. G. Ambetkar, Advocate for respondent No. 1;
Mr R. V. Dasalkar, Addl. Public Prosecutor for respondent No. 2

CORAM : N.W. SAMBRE, J.

DATE : 15th April, 2016

ORAL ORDER :

Pursuant to the application under Section 239 of the Code of Criminal Procedure filed by respondent No. 1-accused, the learned Judicial Magistrate First Class, Pathardi has discharged the him in Regular Criminal Case No. 344 of 2014 for offences punishable under Sections 324, 143, 147, 148, 323, 504, 506 of the Indian Penal Code and under Section 37(1)(3)/135 of the Bombay Police Act.

2. The learned Counsel appearing on behalf of the petitioner-complainant submits that the above referred order is not sustainable as the

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discharge order passed by the learned Judicial Magistrate First Class, Pathardi, is without issuing notice and without granting hearing to him. He relies on the judgment of the Hon'ble Apex Court in the matter **Bhagwat Singh Vs. Commissioner of Police & anr.** reported in **AIR 1985 Supreme Court 1285.**

3. The learned Counsel appearing on behalf of respondent No. 1-accused submits that such right of the complainant is not identified in the statute and according to him, the prosecution was very much heard in the matter before the order of discharge was passed. According to him, the learned Magistrate has passed well reasoned order, which does not call for any interference.

4. Perused paragraph Nos. 4 and 5 of the judgment in the matter of **Bhagwat Singh** (cited supra), which reads thus :-

“4. Now, when the report forwarded by the officer-in charge of a police station to the Magistrate under sub-section (2)(i) of [Section 173](#) comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things: (1) he may accept the report and take cognizance of the offence and issue process or (2) he may disagree with the report and drop the proceeding or (3) he may direct further investigation under sub-section (3) of [Section 156](#) and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a

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report has been made, the Magistrate again has an option to adopt one of three courses: (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under sub-section (3) of [Section 156](#). Where, in either of these two situations, the Magistrate decides to take cognizance of the offence and to issue process, the informant is not prejudicially affected nor is the injured or in case of death, any relative of the deceased aggrieved, because cognizance of the offence is taken by the Magistrate and it is decided by the Magistrate that the case shall proceed. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the First Information Report, the informant would certainly be prejudiced because the First Information Report lodged by him would have failed of its purpose, wholly or in part. Moreover, when the interest of the informant in prompt and effective action being taken on the First Information Report lodged by him is clearly recognised by the provisions contained in sub-section(2) of [Section 154](#), sub-section (2) of [Section 157](#) and sub-section (2)(ii) of [Section 173](#), it must be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the First Information Report lodged by him. There can, therefore, be no doubt that when, on a consideration of the report made by the officer in charge of a police station under sub-section (2)(i) of [Section 173](#), the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his

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submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the magistrate to whom a report is forwarded under sub-section (2)(i) of [Section 173](#) decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. It was urged before us on behalf of the respondents that if in such a case notice is required to be given to the informant, it might result in unnecessary delay on account of the difficulty of effecting service of the notice on the informant. But we do not think this can be regarded as a valid objection against the view we are taking, because in any case the action taken by the police on the First Information Report has to be communicated to the informant and a copy of the report has to be supplied to him under sub-section (2) (i) of [Section 173](#) if that be so, we do not see any reason why it should be difficult to serve notice of the consideration of the report on the informant. Moreover, in any event, the difficulty of service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of being heard at the time when the report is considered by the Magistrate.

5. The position may however, be a little different when we consider the question whether the injured person or a relative of the deceased, who is not the informant, is entitled to notice when the report comes up for consideration by the Magistrate. We cannot spell out either from the provisions [of the Code](#) of Criminal procedure, 1973 or from the principles of natural justice, any obligation on the Magistrate to issue notice to the injured person or to a relative of the deceased for providing such person

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an opportunity to be heard at the time of consideration of the report, unless such person is the informant who has lodged the First Information Report. But even if such person is not entitled to notice from the Magistrate, he can appear before the Magistrate and make his submissions when the report is considered by the Magistrate for the purpose of deciding what action he should take on the report. The injured person or any relative of the deceased, though not entitled to notice from the Magistrate, has locus to appear before the Magistrate at that time of consideration of the report, if he otherwise comes to know that the report is going to be considered by the Magistrate and if he wants to make his submissions in regard to the report, the Magistrate is bound to hear him. We may also observe that even though the Magistrate is not bound to give notice of the hearing fixed for consideration of the report to the injured person or to any relative of the deceased, he may, in the exercise of his discretion, if he so thinks fit, give such notice to the injured person or to any particular relative or relatives the deceased, but not giving of such notice will not have any invalidating effect on the order which may be made by the Magistrate on a consideration of the report.”

5. The Hon'ble Apex Court, in the background of the above referred matter, has already referred before ordering discharge that the learned Court must issue notice to the concerned complainant and if he appears, he should be given opportunity to hear in the matter.

6. Admittedly, in the present case, upon perusal of the order impugned, it is noticed that the learned Magistrate had heard the accused and the prosecution, but has not caused any notice on the complainant.

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7. In the above background, in my opinion, the order impugned is not sustainable. I, therefore, pass following order :-

The order passed below Exh. 30 in Regular Criminal Case No. 344 of 2014, on 2nd September, 2015, by the learned Judicial Magistrate First Class, Pathardi, is hereby set aside.

9. The application Exh. 30 stands restored to the file of the learned Judicial Magistrate First Class, Pathardi, who shall hear the petitioner-complainant on the said application and shall pass fresh orders in the matter.

10. The complainant undertakes to appear before the learned Magistrate on 25th April, 2016. Hence, no fresh notice is necessary to be issued to the complainant-petitioner.

11. Criminal Writ Petition is allowed in above terms.

(N.W. SAMBRE, J.)

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