

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.685 OF 2006

WITH

WRIT PETITION NO.327 OF 2006

Devdas Loku Amin.

....Petitioner.

Vs.

Pravin R.Salian and ors.

....Respondents.

Mr. Subodh Desai for the Petitioner in both the matters.

Smt. Anamijka Malhotra, APP. for the State.

CORAM : A.S.GADKARI, J.

DATE : 17th March, 2016

P.C.

Leave to amend the prayer clause. Amendment to be carried out forthwith.

2) By the Writ Petition No.685 of 2006 the petitioner has challenged the order dated 1.12.2004 passed by the learned Metropolitan Magistrate, 34th Court, Vikhroli, Mumbai below Exh.6 in CC No.12/MISC./2004, allowing the application of respondent Nos. 1 to 3 for intervention and the order dated 16.3.2006 passed in Criminal Revision Application No.22/2005 dismissing the revision of the petitioner and confirming the order dated 1.12.2014 passed by the learned Magistrate.

3) In Writ Petition No.327/2006 the petitioner has challenged the order dated 12/12/2003 passed by the same Metropolitan Magistrate thereby accepting the report submitted by

the Investigating officer under Section-169 of the Cr. P. C.

4) Heard Mr. Subodh Desai, learned counsel for the petitioner in both the petitions and the learned APP for the State. The record discloses that the respondent Nos. 1 and 2 are absent though duly served. The note put up by the registry discloses that respondent No.3 is reported to be dead and therefore, the said respondent No.3 has been deleted from the proceeding of the present petitions.

5) The petitioner is the original complainant in CC No.36/I&R/2002 filed in the Court of Metropolitan Magistrate, 34th Court, Vikhroli, Mumbai under Section 420,452, 506(ii) read with Section 34 of the Indian Penal Code. The learned Magistrate by its order dated 26/9/2002 passed under Section 156(3) of the Cr.P.C. directed the Sr. Police Inspector of Vikhroli Police Station to investigate the same. After receipt of the said order dated 26.9.2002, the Vikhroli Police Station registered MECR No.4/2002 under Section 420, 452, 506(ii) read with 34 of the I.P.C.

6) The concerned Investigating officer after completion of investigation filed the report dated 4.12.2002 thereby stating that after investigating the complaint, it is found that the said complaint was false and the same is summarized as "B-Summary". The learned Magistrate by its order dated 12.12.2003 accepted the said report and treated it as a report under Section 169 of the Cr.P.C. The said order dated 12.12.2003 passed by the learned Magistrate which is reproduced herein below for the sake of convenience.

ORDER

“Perused Case papers. Heard learned A.P.P. for the State and Remand Officer A.P.I. Shri. Khutwad. According to the prosecution there is no evidence against the accused persons and therefore, the prosecution filed this application to discharge the accused u/Sec.169 of Cr. P. C. Hence, all the accused stand discharged vide Sec.169 of Cr.P.C. Their bail bonds, if any stand cancelled and sureties are discharged”.

7) The record further discloses that after acceptance of the said report filed by the A.P.I. under Section 169 of Cr. P. C. by an order dated 12.12.2003, the Sr. Inspector of Police, Vikhroli Police Station submitted further report dated 15.12.2003 thereby seeking permission to prosecute the petitioner as the complaint filed by the petitioner was found to be false. The said prosecution was sought under the category of “B-summary with prosecution”. After receipt of the notice of the said report dated 15.12.2003 the petitioner filed his reply to the same on 29.3.2004 and also filed protest petition of the even date. In the said protest petition filed by the petitioner, the Respondent Nos. 1 to 3 filed an application for intervention on 16.4.2004 below Exh.6. The petitioner filed his reply to the said intervention application on 8.6.2004. The learned Magistrate by its order dated 1.12.2004 allowed the said application filed by respondent Nos. 1 to 3 below Exh.6. Feeling aggrieved by the said order dated 1.12.2004 the petitioner preferred Criminal Revision Application bearing No.22/2005 in the Court of Sessions at Greater

Mumbai. The learned Additional Sessions Judge, City Civil and Sessions Court, Greater Bombay dismissed the said revision application by its Judgment and order dated 16.3.2006.

8) As stated herein above, the order dated 12.12.2003 thereby discharging the respondent Nos.1 and 2 in a report under Section 169 of the Cr. P. C. and the order dated 1.12.2004 passed by the learned Magistrate thereby allowing the intervention application of respondent Nos. 1 to 3 are under challenge in the present petitions.

9) The learned counsel appearing for the petitioner submitted that at the time of accepting B-Summary report and the discharging respondent Nos. 1 to 3 under Section-169 of the Cr.P.C. the petitioner was not granted an opportunity of being heard and to protest the grant of such discharge. He submitted that it was incumbent on the part of the Magistrate to first issue notice to the petitioner, afford him an opportunity of being heard and then to pass an appropriate order in that behalf. In support of his contention, he relied on the decision rendered by the learned Single Judge of this Court in the case of **Maroti vs. The State of Maharashtra and ors. reported in 2015(4) Bom.C.R.(Cri.)504**. He further submitted that if the opportunity of being heard would have been granted to the petitioner to challenge the report submitted by police dated 4.12.2003, the Magistrate would not have been required to pass subsequent order below Exh.6 thereby allowing the intervention application of the respondent Nos. 1 to 3 in protest petition filed by the petitioner on a report submitted by the Investigating officer dated 15.12.2003. He submitted that in view of

the Judgment in the case of Maroti vs. The State of Maharashtra (supra) the order dated 12.12.2003 passed by the learned Magistrate deserves to be quashed and set aside and as a consequence thereof the order dated 1.12.2014 passed by the same Court also be quashed and set aside.

10) A minute perusal of the report dated 4.12.2003 demonstrates that the said report was basically submitted for seeking “B-summary” of the said complaint lodged by the petitioner. It is further mentioned in the said report that the accused persons in the said crime may be discharged from offence registered against them. It further appears that the learned Magistrate considered the said report as a report under Section 169 of the Cr.PC. And accepted it, by passing an order dated 12.12.2003.

11) It is the settled position of law that a summary report is always filed under Section 173(2) after completion of the investigation. It appears that the learned Magistrate has erroneously accepted the said report as a report under Section 169 of the Cr.PC. It is a fact on record that, while accepting the said summary report the learned Magistrate did not grant an opportunity of being heard, to the petitioner-original complainant. In the case of Maroti vs. State of Maharashtra the learned Single Judge of this Court has taken into consideration the various decisions of the Supreme Court and High Court and in Para 12 has held as under:

“ I am in complete agreement with the observations of their Lordship of Gujarat High Court. Therefore, in my opinion also, it is mandatory that the learned

Magistrate is under obligation to hear first informant before accepting the discharge as submitted by the Investigating Officer u/s. 169 of the Code of Criminal Procedure”.

12) In view of the above, it was incumbent on the part of the Magistrate to issue notice to the petitioner herein before accepting the report submitted by the police even under Section 169 of the Cr. P. C. As there is error apparent on the face of the record, the order dated 12.12.2003 passed by the learned Magistrate, accepting the report submitted by the Investigating Officer dated 4.12.2003 is hereby quashed and set aside.

13) As far as order dated 1.12.2004 passed below Exh.6 on an application for intervention preferred by Respondents No.1 to 3 is concerned, the record indicates that after the Magistrate passed the order dated 12.12.2003 as stated earlier, the Sr. Police Inspector of Police, Vikhroli Police Station submitted a fresh report dated 15.12.2003 thereby further seeking permission to prosecute the petitioner under the category of “B-Sumary with prosecution”. It further appears that at the time of submitting the report dated 4.12.2003 the Investigating Officer did not seek prosecution of the petitioner and by the subsequent report dated 15.12.2003 the Investigating officer sought the prosecution of the petitioner. The order dated 1.12.2004 passed below Exh.6 thereby allowing the intervention of the respondent Nos. 2 and 3 came to be passed in the protest petition filed by the petitioner herein against the said report dated 15.12.2003. As the order dated 12.12.2003 is quashed on the ground of legal infirmity, in my considered opinion the subsequent

order passed by the Magistrate below Exh.6 dated 1.12.2004 does not survive and the same deserves to be quashed and set aside on that ground alone. As the order dated 1.12.2004 passed by the Magistrate below Exh.6 is quashed herein as a consequence thereof the order dated 16.3.2006 passed by the learned Additional Sessions Judge, Greater Mumbai in Criminal Revision Application No.22/2015 also does not survive and the same is also quashed and set aside.

14) The Magistrate is hereby directed to reconsider the report dated 4.12.2003 submitted under the signature of Sr. Inspector of Police, Vikhroli Police Station in MECR No.4/2002 afresh after issuing notice to the petitioner herein and by granting an opportunity of being heard in the said report.

15) Petitions are allowed in the aforesaid terms.

(A.S. GADKARI, J.)