

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 3713 OF 2015

1. Enercon GmbH, a company incorporated and existing under the laws of Germany and having its registered office at Dreekamp 5, D26605, Aurich Germany.
2. Dr.Aloys Wabben, German Inhabitant, having his office at Dreekamp 5, D26605, Aurich, Germany.
3. Hans-Dieter Kettwig, German Inhabitant having his office at Dreekamp 5, D26605, Aurich, Germany.
4. Stefan Knottnerus Meyer, German Inbahitant having his office at Dreekamp 5, D26605, Aurich, Germany.
5. Wolfgang Juilfs, German Inhabitant, having his office at Dreekamp 5, D26605, Aurich, Germany.
6. Nicole Fritsch-Nehring, German Inhabitant having his office at Dreekamp 5, D26605, Aurich, Germany.
7. Christoph Buttner, German Inhabitant, having his office at Dreekamp 5, D26605, Aurich, Germany.
8. Warner Popkes, German Inhabitant having his office at 26789 Leer, Germany.
9. Rainer Boehm, German Inhabitant having his office at Zippelhaus 5, 20457, Hamburg, Germany.

... Petitioners

Versus

1. The State of Maharashtra (through the Sr. Inspector of Police, Economic Offences Wing -

Unit III, Crime Branch, CID, Compound of the
Office of Commissioner of Police, Brihan Mumbai,
Annex Building III, 2nd Floor, Near Phule Market,
Mumbai 400 001.

2. Yogesh J. Mehra, Indian Inhabitant,
residing at 101, Hare Krishna Residency
Society, J.P.V.D. 'scheme, North South
Road No. 8, Viole Parle (W), Mumbai 400 049
and having his office at Plot No. 9A, Veera
Desai Road, Andheri (West), Mumbai 400 053.
3. The Senior Inspector of Police, Oshiwara
Police Station, Mumbai.

..Respondents

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Mr. Mahesh Jethmalani, Sr. Counsel a/w Ms. Gunjan a/w Mr. Vivek Vashi
a/w Ms. Sharma a/w Mr. Krishnendu Satya i/by M/s. Bharucha & Partners
for the petitioner no. 1.

Mr. Satish Maneshinde a/w Mr. Jejeebhoy a/w Mr. Vivek Vashi a/w Ms.
Sharma a/w Mr. Krishnendu Satya i/by M/s. Bharucha & Partners for
petitioner nos. 2 and 3.

Mr. Abad Ponda a/w Mr. Vivek Vashi a/w Ms. Sharma a/w Mr. Krishnendu
Satya i/by M/s. Bharucha & Partners for petitioner nos. 4 to 9.

Mr. Samsheer Garud a/w Joy Pereira and Ms. Juhi Vaila i/by M/s. Jaykar &
Partners for respondent no. 2.

Mr. J.P. Yagnik, APP for the State.

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**CORAM : RANJIT MORE &
V. L. ACHLIYA, JJ.**

RESERVED ON : FEBRUARY 16, 2016.

PRONOUNCED ON : APRIL 5, 2016.

ORAL JUDGMENT (Per V.L. Achliya, J.) :

Rule. Rule made returnable forthwith. By consent of the
parties, petition is heard finally at the stage of admission itself.

2. Petitioners herein have filed this petition under Article 226 and 227 of the Constitution of India and section 482 of the Code of Criminal Procedure. They have challenged the order dated 18th July, 2008 passed under section 156(3) of the Code of Criminal Procedure, 1973 (for short "Code") by Metropolitan Magistrate, 22nd Court, Andheri and consequential FIR registered bearing MECR No. 2/2008 dated 22.7.2008 on various grounds as set out in the petition.

3. At the time of taking up petition for hearing, the learned counsel for both the side agreed to restrict their arguments on the limited issue as to whether in the absence of a complaint to the police u/s 154 of Code, a Complaint can be directly made before the Magistrate under section 156(3) of the Code.

4. In view of limited issue posed for our consideration, it is not necessary to discuss in detail the facts leading to filing of the complaint and other challenges raised in the petition. We confine ourselves to deal with the limited issue as to whether the impugned order dated 18.07.2008 passed under section 156(3) of the Code by the Magistrate, without the complaint being made to police as contemplated under section 154 of Code and consequential registration of FIR on the basis of said order is sustainable in law. At the outset, the fact is not in dispute

that respondent no. 2/Complainant had directly approached the Magistrate under section 156(3) of the Code vide complaint dated 18/07/2008. There is no controversy as to the fact that before approaching the Magistrate under section 156(3) of the Code, respondent no. 2 has not filed any complaint as contemplated under section 154 of the Code. The impugned order dated 18/07/2008 passed under section 156(3) of the Code passed by the Magistrate reads as under :

- “(1) Complaint be sent for investigation to the concern police station, as per the provision of section 156(3) of the Criminal Procedure.*
- (2) The concern police officer is hereby direction to investigate the complaint s per provisions of section 156(3) of the Criminal Procedure Code and submit his report on or before 24-10-08.”*

Sd/-

18.07.2008

5. We have heard the learned counsel for both the sides. The learned counsel for the petitioners has submitted that the legal issue falls for consideration of this Court is no more *res integra* as the Full Bench of this Court in the case of **Panchabhai Popatbhai Butani and Ors. Vs. State of Maharashtra**,¹ has specifically dealt the said issue and held in uncertain terms that except the cases where the police

¹ 2010 Vol. 112(1) Bom.L.R. 427

failed to act instantly and the facts of the case show that there is possibility of evidence of commission of offence being destroyed and/or tampered with, in all other circumstances, the person must invoke provisions of section 154 of the Code before taking recourse to the powers of the Magistrate under section 156(3) of the Code. He submitted that the complaint discloses no such exceptional circumstances to justify the act of the complainant to directly approach the Magistrate under section 156(3) of the Code. So also the order passed by the Magistrate discloses no such exceptional circumstances which has prompted the learned Magistrate to pass the impugned order without the Complainant taken recourse to section 154(1) and 154(3) of the Code. It is further submitted that in the case of **Priyanka Srivastava and another Vs. State of U.P. and Others**² the Apex Court has considered the implications of the filing of complaint under section 156(3) of the Code without prior applications under section 154(1) and 154(3) of the Code & held that while filing the petition under section 156(3) of the Code, a person must spelt out in clear terms of prior applications under section 154(1) and 154(3) of the Code. In the background of the undisputed facts that before filing the complaint under section 156(3) of the Code, respondent no. 2 has not filed any complaint under section 154(1) nor approached superior authority as provided under section 154(3) of the Code, learned counsel submitted that the impugned order

2 2015 6 SCC 257

passed is *per se* illegal, without jurisdiction and same is liable to be quashed. It is further submitted that in consequences of such order passed without jurisdiction and in gross violation of law, all consequential proceedings including registration of FIR deserves to be quashed.

6. Per contra, the learned counsel appearing for respondent no. 2, though not disputed the factual aspect that the complaint under section 156(3) of the Code was filed without taking recourse to section 154(1) and 154(3) of the Code, submitted that in the facts and circumstances of the case, the order can not said to be illegal and *void ab initio*. He has submitted that at the most the order can be termed as irregular and outcome of procedural irregularity committed on the part of the Magistrate. He has further submitted that as impugned order dated 18/07/2008 is already implemented and FIR has been registered, this Court can only consider quashing of the FIR. He has submitted that the only ground for quashing of FIR would be to see the contents of the FIR and the FIR can be quashed if the contents of the FIR are taken on its face value discloses no commission of cognizable offence. He has further submitted that, non-compliance of procedure prescribed under section 154(1) and 154(3) of the Code before making an application to the concerned Magistrate for directions u/s 156(3) at the most can be treated as irregularity. He has further submitted that in the light of the

decision of the Full Bench of High Court in the case of ***Panchabhai Popatbhai Butani (supra)***, Writ Petition No. 270 of 2009 involving identical facts came to be disposed of by the Division Bench of this Court vide order dt. 6th September, 2010. While deciding said petition, the Court has refused to quash the FIR after going through the contents of the FIR. It is further contended that the FIR cannot be quashed on technical grounds. It is further contended that the provisions of section 154(1) and 154(3) are not mandatory in nature. In this context, the learned counsel has referred and relied upon the decision of the Apex Court in the case of **State Versus N.S. Ganeswaran**³. He has further argued that the decision in the case of *Priyanka Srivasatava (supra)* have no bearing in deciding the present case as facts of the case are altogether different. Lastly the learned counsel has contended that at the most passing of impugned order under section 156(3) without approaching police for registration of offence under section 154(1) or 154(3), can be termed as an error or omission or irregularity and as provided u/s 465 of Code, such order calls for no interference unless a case of failure of justice has been made out.

7. We have thoroughly considered the submissions advanced by the respective counsel for the parties. The fact is not in dispute that respondent no.2 has directly approached the Magistrate under section 156(3) of the Code, seeking direction to investigate the complaint. The

³ (2013) 3 Supreme Court Cases 594.

issue raised in the petition as to whether in absence of a complaint to the police, a complaint can be made directly before the Magistrate was referred for consideration of the Full Bench of this Court in the case of ***Panchbhai Bootani (supra)***. While deciding said reference, the Full Bench of this Court has examined the entire scheme under the Code of Criminal Procedure with reference to the question referred for consideration of the Full Bench. On due examination of the scheme and precedents of law, the Full Bench has recorded its answer to questions of law referred for its consideration as under :

“Question No. (i)

Whether in absence of a complaint to the police, a complaint can be made directly before a Magistrate?

Answer Normally a person should invoke the provisions of [Section 154](#) of the Code before he takes recourse to the power of the Magistrate competent to take cognizance under [Section 190](#) of the Code, under [Section 156\(3\)](#). At least an intimation to the police of commission of a cognizable offence under [Section 154\(1\)](#) would be a condition precedent for invocation of powers of the Magistrate under [Section 156\(3\)](#) of the Code. We would hasten to add here that this dictum of law is not free from exception. There can be cases where non-compliance to the provisions of [Section 154\(3\)](#) would not divest the Magistrate of his jurisdiction in terms of [Section 156\(3\)](#). There could be cases where the police fail to act instantly and the facts of the case show that there is possibility of the evidence of commission of the offence being destroyed and/or tampered with or an applicant could approach the Magistrate under [Section 156\(3\)](#) of the Code directly by way of an exception as the Legislature has vested wide discretion in the Magistrate.

8. Thus the Full Bench of this Court in the case of *Panchabhai (supra)* has held in uncertain terms that normally a person should

invoke provisions of section 154 before he takes recourse to the powers of the Magistrate competent to take cognizance under section 190 of the Code, under section 156(3). It is further held that at least intimation to the Police of commission of cognizable offence under section 154(1) would be a condition precedent for invocation of powers of the Magistrate under section 156(3) of the Code. It is further observed that in exceptional cases, wherein the police failed to act instantly and the facts of the case show that there is possibility of evidence of commission of the offence being destroyed and/or tampered with, discretion lies with the Magistrate to entertain the Complaint under section 156(3) of the Code of Criminal Procedure, without prior recourse to Section 154 of Code by the complainant. Therefore, the question which falls for our consideration is whether any such exceptional circumstances spelt out in the Complaint, so as to justify the act of complainant to directly invoke the jurisdiction of the Magistrate under section 156(3) of the Code as well as exercise of discretion by Magistrate. In order to ascertain this fact, we have perused the complaint. The complaint filed by respondent no. 2, nowhere mentions such exceptional circumstances to entertain the complaint under section 156(3) of the Code without prior recourse to section 154(1) or 154(3) of the Code. It is pertinent to note that on 18/07/2008, respondent no. 2 has filed a complaint seeking direction to the Senior Inspector of Police Station, Oshivara to register and investigate the complaint. On the same day, the learned Magistrate has

passed an order to refer the complaint for investigation to the concerned police station. So also in the complaint, it is nowhere mentioned that prior to approaching Magistrate intimation was given to the police of commission of cognizable offence. The order passed nowhere reflects any extreme urgency in the matter or any exceptional circumstances which leads to exercise of discretion by Magistrate and passing of such order under section 156(3) of the Code. From the face of the order, it appears that the learned Magistrate has acted in a very casual manner. The order has been passed mechanically and that too without application of mind. Therefore, on due examination of the impugned order in the light of the decision of Full Bench of this Court in the case of *Panchabhai Vs. State (supra)*, we are of the considered opinion that, the impugned order is not sustainable in law.

9. It is apparent from the face of the record that the petitioner no.1 is a Company incorporated under the laws of Germany. Petitioner no. 2 is described as Chairman and Managing Director of petitioner no.1 company. Petitioner no. 3 is the Managing Director of Petitioner no.1 company. The petitioner no.4 is the General Counsel-Legal of the first Petitioner. The petitioner no.5 is the Chief Risk Officer of the first Petitioner. The petitioner nos. 6 and 7 are the persons holding the posts of Assistants to the Management of petitioner no.1. Petitioner no.8 is the Chartered Accountant and Petitioner no. 9 is the Practicing lawyer

practicing in Germany and legal advisor of petitioner no. 1. From the cause title of the Complaint itself, it is clear that the complaint was filed against the German company and the accused nos. 2 to 9 are the German nationals. The complaint discloses that in the year 1994, the complainant and the accused no.1 company entered into an agreement to provide technical know-how. The dispute referred in the Complaint appears to be cropped up between two companies some time in the year 2006 on certain issues to sign the agreement, which leads to filing of number of proceedings including the criminal complaint. Since we are not dealing with the merits of matter, we refrain ourselves from making any further comments as to whether the dispute is purely Civil in nature or any element of criminality is involved in the matter. However, the fact remains that the complaint discloses no exceptional circumstances to bypass the provisions of section 154 of the Code and to directly invoke the provisions of section 156(3) of the Code and to register offence against the petitioners/accused. In the absence of any exceptional circumstances to directly invoke jurisdiction of Magistrate u/s 156(3) of the Code, the order passed by the learned Magistrate to invoke jurisdiction under section 156(3) of the Code is bad in law. The impugned order passed by the Magistrate cannot be termed as procedural irregularity. The implications of the order passed under section 156(3) are far reaching. The order in question has resulted into registration of FIR against the petitioners who are the foreign nationals.

The facts stated in the petition itself demonstrate the serious consequences which followed the registration of FIR against the petitioner. It is therefore a case of failure of justice being occasioned on account of such order passed by Magistrate. The provisions of Section 465 have no applicability in the matter. Since the order passed by the learned Magistrate is contrary to law, all the consequential proceedings pursuant to the order dated 18th July, 2008 are liable to be held illegal and deserves to be quashed and set aside.

10. We are not inclined to accept the contention of the learned counsel for the respondent no.2 that the provision of Section 154(1) of the Code is directory in nature. The decision in the case of **State Vs. S. Gnashwaran** have no bearing upon the facts of the case in hand as it relates to the interpretation of section 154(2) of the Code, i.e. implication of not providing copy of F.I.R., which is held to be directory. The interpretation of Section 154(1) of the Code was not the subject matter for consideration in the said case. So also the decision in WP No. 270 of 2009 has no bearing upon the facts of the present case as the decision in said petition was taken purely on the basis of facts of the said case. We are bound by the decision of the Full Bench in the case of Panchabhai Butani (supra).

11. In the case of ***Priyanka Srivastava Vs. State of U.P. (Supra)*** the Apex Court has observed that the remedy available under section 156(3) of the Code is not of a routine nature and exercise of powers thereunder requires application of judicial mind. It is further observed that the powers under section 156(3) can not be invoked by the litigant on his own whim to harass others and the same can be invoked only by a principled and really aggrieved citizen approached with clean hands. It is further held that the order under section 156(3) can be passed by the Magistrate, where there is prior applications under section 154(1) and 154(3) while filing the petition under section 156(3). The Apex Court has categorically observed that both the aspect of filing of applications under sections 154(1) and 154(3) prior to filing of the petition under section 156(3) of the Code should be clearly spelt out in the application and necessary documents to that effect shall be filed. In Para 29, 30 and 31 of the judgment, the Apex Court has observed as under :

“We have already indicated that there has to be prior applications Under Section [154\(1\)](#) and [154\(3\)](#) while filing a petition Under Section [156\(3\)](#). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application Under Section [156\(3\)](#) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate Under Section [156\(3\)](#). That apart, we have already stated that the veracity of the same can

also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.”

12. Thus on considering the submissions advanced in the light of the undisputed fact that respondent no.2 had approached the Magistrate under section 156(3) of the Code without prior application under section 154(1) and 154(3) of the Code and the impugned order under section 156(3) has been passed against the mandate of law, we are of considered opinion that in the light of Full Bench decision of this Court in the case of **Panchabhai Butani** (supra) and the decision of the Apex Court in the case of **Priyanka Srivastava** (supra) the impugned order passed u/s 156(3) of the Code and consequential registration of FIR are liable to be quashed and set aside. We are therefore, inclined to allow the petition in terms of prayer clauses (a) and (b). Accordingly, the petition is allowed in terms of prayer clauses (a) and (b). Rule is made absolute in above terms.

[V. L. ACHLIYA, J.]

[RANJIT MORE, J.]