

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 4537 OF 2015

Dr. Vikas Vasantryao Motewar

... Petitioner

vs.

The State of Maharashtra and anr.

... Respondents

Mr. Murtaza Nazmi i/by Jaydev Trivedi, Advocate for the petitioner.

Mr. A. S. Shitole, Additional Public Prosecutor for the State.

Mr. Madhwadan Raja Phal, Advocate for respondent No.2.

Coram : Smt. R. P. SondurBaldota, J.

Date : 17th February, 2016.

P.C. :

1. Rule. Rule made returnable forthwith. By consent of the parties the petition is taken on board for final hearing. Heard the counsel.

2. Respondent No.2 is the owner of Flat No.6-B/602, Alica Nagar, Building No.6, CHS Ltd., Lokhandwala Township, Kandivali (E), Mumbai. She had given the premises on Leave and Licence basis to the petitioner, who had continued in the premises despite expiry of the agreement. He had on account of certain personal difficulties locked the premises and gone to his native place for about three months. When he returned on 3rd February, 2014 he found that the lock of his door was broken and was replaced by a new lock. He then tried to lodge complaint with Samata Nagar Police

Station, but his complaint was recorded as a N.C. complaint. On 8th April, 2014 he filed a detailed written complaint with the same police station alleging illegal dispossession from the flat and theft of gold and silver ornaments and important documents. The police had interrogated some persons but did not let the petitioner know any of the developments in the enquiry. Therefore, on 18th September, 2014 the petitioner filed Criminal Case No.358/SW/2014 in the Court of the Metropolitan Magistrate, 17th Court, Borivali, Mumbai against the respondent alleging the offences punishable under Sections 420, 427, 403 and 447 of I.P.C. and sought investigation under Section 156(3) of Criminal Procedure Code. By the order dated 18th December, 2014, the learned Metropolitan Magistrate directed Samata Nagar Police Station to register F.I.R. against respondent No.2 and investigate into the same. Accordingly, on 20th December, 2014, F.I.R. bearing MECR 06/2014 for the offences punishable under Sections 420, 427, 403 and 447 of I.P.C. was registered against respondent No.2. During the course of investigation, the Chairman of the Society in which the flat is situated had confessed the flat was opened as per the instructions of respondent No.2 on 31st January, 2015. When panchnama of the flat was made, the valuables like gold jewellery and silver ornaments, important documents, cash and laptop etc. were found missing. Then after much persuasion the police filed charge-sheet in the Court of the Metropolitan

Magistrate, 17th Court Borivali, Mumbai on 1st October, 2015 only for the offence punishable under Sections 341 of I.P.C. Surprisingly on the same day respondent No.2 appeared before the learned Magistrate and pleaded guilty to the offence alleged. The learned Magistrate convicted her of the offence and sentenced her to pay fine of Rs.200/-. The fine has been paid by respondent No.2.

3. The main grievance of the petitioner in the present petition is that, when the learned Magistrate proposed not to take any action for the offences punishable under Section 420, 427, 403 and 447 of I.P.C., he ought to have issued notice to the petitioner so as to give him an opportunity of being heard so that he could make his submission to persuade the Magistrate to take cognizance of the offences alleged by the petitioner and issue process. In support of this contentions, Mr. Nazmi, the learned advocate for the petitioner relies upon the following decisions of the Apex Court.

i) Gangadhar Mhatre vs. State of Maharashtra reported in 2004 CRI. L.J. 4623

and

ii) Chittaranjan Mirdha vs. Dulal Ghosh and anr. reported in AIR [Supreme Court of India].

The detailed discussion on the question in "*Chittaranjan Mirdha's*" case reads as under :

"14. When a report forwarded by the police to the Magistrate under Section 173(2)(i) is placed before him several situations 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 either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate, he has again the option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well-settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or 202 also. [See *M/s. India Sarat Pvt. Ltd. v. State of Karnataka and another* (AIR 1989 SC 885)]. The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceeding or takes the view that there is material for

proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the First Information Report lodged becomes wholly or partially ineffective. Therefore, this Court indicated in Bhagwant Singh's case (supra) that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. As indicated above, there is no provision in the Code for issue of a notice in that regard. "

4. Undoubtedly, the learned Magistrate has failed to give notice and committed an error. The petitioner is entitled to have an opportunity of being heard in the matter as regards the commission of the other offences. Hence, the petition is allowed. The Case No.4380/PS/2015 (Original Case No.358/SW/2014) is restored to the file of the Additional Metropolitan Magistrate, 17th Court Borivali, Mumbai for fresh consideration of the offences punishable under Section 420, 427, 403 and 447 of I.P.C. Needless to mention that conviction of respondent No.2 for the offence punishable under Section 341 of I.P.C. remains undisturbed. The petitioner shall appear before the Court of the learned Additional Metropolitan Magistrate, 17th Court Borivali, Mumbai on 5th March, 2016.

[Smt. R. P. SondurBaldota, J.]