

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

CRIMINAL WRIT PETITION NO. 379 OF 2017

1. Devidas S/o Waman Shinkar,
Age : 70 years, Occ : Business,
 2. Uday S/o Devidas Shinkar,
Age : 48 years, Occ : Business,
 3. Dr. Abhay S/o Devidas Shinkar,
Age : 44 years, Occ : Doctor,
 4. Sau. Vimalbai W/o Devidas Shinkar,
Age : 68 years, Occ : Household,
- Petitioner Nos. 1 to 4 are
R/o : Plot No.1411,
Shinkar Matrusadan, Lane No.4,
Dhule, Tq. & Dist. Dhule.
5. Arun S/o Soniram Shinkar,
Age : 68 years, Occ : Household,
 6. Sau. Savita Arun Shinkar,
Age : 48 years, Occ : Household,
 7. Shri. Shashikant S/o Soniram Shinkar,
Age : 48 years, Occ : Household,

Petitioner Nos. 5 to 7 are
R/o : 704, Silver Bel,
Yogi Park, Baner, Pune.

8. Sau. Pramila Shashikant Shinkar,
Age : 48 years, Occ : Household,
R/o : Deopur, Dist. Dhule.

9. Shri. Ajay S/o Prabhulal Kasodekar,
Age : 50 years, Occ : Business,
R/o : Garud Colony, Nakane Road,
Deopur, Dist. Dhule.
10. Shri. Kapurchand Laxman Baviskar,
Age : 55 years, Occ : Service,
R/o : 24, Govardhan Nagar,
Near Chavra School, Devpur,
Dhule, Dist. Dhule.
11. Anil S/o Gangadhar Songire,
Age : 50 years, Occ : Business,
R/o : Lane No.6, near Bhayanghy
Maruti Gym, Dhule, Dist. Dhule.
12. Sanjay S/o Vitthal Amrutkar,
Age : 51 years, Occ : Service,
working as a Manager of Dadasaheb
Waman Vishnu Shinkar
Nagari Sahakari Pathpedi Ltd.,
Dhule.

PETITIONERS**-VERSUS-**

1. The State of Maharashtra,
Through its Police Inspector,
Deopur Police Station, Dhule,
Tq. & Dist. Dhule.
2. Ashok S/o Shravan Patkar,
Age : 61 years, Occ : Agricultural,
R/o : 17, Patkar Nagar, Devpur,
Dhule, Dist. Dhule.

RESPONDENTS

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Mr. P.M. Shah, Senior Counsel i/b Mr. D.S. Bagul, advocate for petitioners.
Mr. V.M. Kagne, APP for Respondent No. 1 - State.
Mr. C.R. Deshpande, advocate for Respondent No.2.

**CORAM: S.S.SHINDE &
S.M.GAVHANE, JJ.**

Reserved on : 18.07.2017
Pronounced on : 08.09.2017

JUDGMENT: (Per S.S.Shinde, J.):

Rule. Rule made returnable forthwith and heard finally with the consent of learned counsel appearing for the parties.

2. This Petition is filed with the following prayers :-

"C. By way of appropriate order or direction in the like nature, the impugned proceeding bearing No. 22/2017 filed by present respondent no.2 in the Court of learned District Sessions Court, Dhule under sections 406, 409, 417, 418, 420, 467, 468, 471, 120-B and 34 of the Indian Penal Code and under sections 3 and 4 of the M.P.I.D. Act, may kindly be quashed and set aside.

D. By way of appropriate order or

direction in the like nature, the impugned order dated 28.02.2017 passed by the learned District and Sessions Judge, Dhule in proceeding bearing No.22/2017 filed by present respondent no.2 in the Court of learned Additional Sessions Court, Dhule under sections 406, 409, 417, 418, 420, 467, 468, 471, 120-B and 34 of the Indian Penal Code and under sections 3 and 4 of the M.P.I.D. Act, may kindly be quashed and set aside.

E. By way of appropriate order or direction in the like nature, the F.I.R. bearing Crime No. 14/2017 registered with Deopur Police Station in pursuance to the order dated 28.02.2017 passed by the learned District and Sessions Court, Dhule for the offence punishable under sections 406, 409, 417, 418, 420, 467, 468, 471, 120-B and 34 of the Indian Penal Code and under sections 3 and 4 of the M.P.I.D. Act, may kindly be quashed and set aside."

3. Learned Senior counsel appearing for

the petitioners submits that, initially, on 10th April, 2016, present respondent no.2 approached the Police Officer under section 154(1) of Code of Criminal Procedure (for short Cr.P.C.) with a single allegation that, the accused while repaying the loan has availed concession/rebate on the rate of interest of loan. Thereafter, he filed the complaint under the provisions of Indian Penal Code bearing Criminal Misc. Application No.875/2016 in the Court of Judicial Magistrate, First Class at Dhule. Thereafter, the Judicial Magistrate, First Class vide its order dated 12th August, 2016 passed the order that, "I do not think it necessary to send the case for investigation under section 156(3) of Cr.P.C.. Hence put up for verification". He submits that, thereafter the Judicial Magistrate, First Class, vide its order dated 17th August, 2016 directed the complainant to lead evidence vide Section

202(1) of Cr.P.C. Lastly, the Judicial Magistrate, First Class vide order dated 6th September, 2016 fixed the matter for argument. He submits that, on 21st December, 2016, the complainant has withdrawn the Criminal Complaint on the pretext that, he got more documentary evidence after inquiry under the Right to Information Act. As such, there is sufficient evidence against the accused for commission of an alleged offences, therefore, he had withdrawn the said complaint with permission to file a fresh complaint.

4. Learned Senior counsel submits that, after withdrawal of the said complaint, the complainant was duty bound to first approach under section 154 of Cr.P.C. to an officer Incharge of Police Station, and to produce the additional material, which he has received under Right to Information Act.

However, without availing of the remedy under section 154 of Cr.P.C., an immediately within a period of two months from withdrawing an earlier complaint and without producing any additional material/allegations, present respondent no.2 has filed Criminal Misc. Application No.22/2017, before the District and Sessions Court, Dhule, by merely adding sections 3 and 4 of the Maharashtra Protection of Interest of Depositors (In Financial Establishment) Act, 1999 (for short M.P.I.D. Act, 1999). He submits that, the District and Sessions Judge, Dhule, while passing the impugned order dated 28th February, 2017, has not applied his mind, and further directed registration of an offence taking recourse to section 156(3) of Cr.P.C., without assigning single reason and in contravention of the order passed by the Supreme Court of India in the case of **Priyanka Srivastava and another V/s**

State of Uttar Pradesh and others¹. He submits that, it appears from the record of the District Court and perusal of Criminal Misc. Application No. 22/2017 filed by present respondent no. 2 (complainant) that, the same was filed without there being any affidavit in support of averments in said application filed under section 156 (3) of the Cr.P.C. It is observed by the Supreme Court in the case of **Priyanka Srivastava (supra)** that, an affidavit duly sworn by the complainant makes him more responsible, it is because, once the affidavit is found false, he would be liable for prosecution in accordance with law. The Magistrate is duty bound to verify veracity of the same and the nature of the allegations of the case. In the present case, the trial Court has failed to follow the law laid down by the Hon'ble Supreme Court in the case of

1 2015(6) S.C.C. 287

Priyanka Srivastava (supra).

5. Learned Senior Counsel further submits that, respondent no.2 in the present case should have filed the affidavit in terms of dictum of the Hon'ble Supreme Court of India, which should have been consist of (i) previous complaint, if any, the orders passed by the Court on that complaint, if any, subsequent events and the information received after filing of the said complaint, (ii) Delay in lodging complaint, (iii) The application filed under section 154(1) contains same allegation as impugned proceeding and (iv) The orders passed by any competent court in any proceeding touching the same subject of impugned proceeding. He submits that, even though petitioner nos.1, 2, 9, 10 and 11 are the Directors of Dadasaheb Waman Vishnu Shinkar Nagari Sahakari Pathpedi Ltd., Dhule (hereinafter

referred to as "the Pathpedi"), and therefore, the provisions of sections 3 and 4 of M.P.I.D. Act are not applicable to the Co-operative Society, there is no whisper in the impugned order dated 28th February, 2017 as to how the provisions of sections 3 and 4 of the M.P.I.D. Act, would attract, or to whom the deposits are not returned.

6. Learned senior counsel further submits that, the complainant and his wife availed the loan facility from the said Pathpedi and since they failed to repay the said loan amount, the Pathpedi obtained the Recovery Certificate under Section 101 of the Maharashtra Co-operative Societies Act, 1960 (M.C.S. Act, 1960). He submits that, in order to repay the said loan amount, the complainant and his wife issued two different cheques; the said cheques were dishonored. As such the Pathpedi filed two different

proceedings bearing S.T.C. No. 4246/2003 (Dadasaheb Waman Vishnu Shinkar Nagari Patpedhi Ltd., V/s Ashok Shravan Patkar) and S.T.C. No.4247/2003 (Dadasaheb Waman Vishnu Shinkar Nagari Pathpedi V/s Ashok Shravan Patkar) under section 138 of the Negotiable Instruments Act (for short N.I. Act). Learned senior counsel submits that, the Judicial Magistrate, First Class on 30th June, 2005 after recording the evidence, convicted present respondent no.2 in S.T.C. No.4247/2003 (Dadasaheb Waman Vishnu Shinkar Nagari Pathpedi V/s Ashok Shravan Patkar). The Magistrate on 5th July, 2005 after recording evidence convicted the wife of present respondent no.2 in S.T.C. No.4246/2003 (Dadasaheb Waman Vishnu Shinkar Nagari Pathpedi V/s Ashok Shravan Patkar).

7. It is further submitted that, the Joint Charity Commissioner appointed present

respondent no.2 as a fit person under section 41(D), on the trust namely "Ladshakiya Wani Samaj Sanstha" registered by present petitioner no.1 and his family members. The family members of petitioners approached High Court by filing Writ Petition No.7256/2010 (Shri Nandlal Taniram Sonje and others V/s The State of Maharashtra and others) and the High Court by considering the past record of respondent no.2 quashed the appointment of present respondent no.2 as a fit person. He submits that, the Advocate General of Maharashtra State has prosecuted the present respondent no.2 under the provisions of the Maharashtra Vexatious Litigation (Prevention) Act, 1971. Learned Senior counsel submits that, in order to take revenge, respondent no.2 has filed the present proceeding against the family members of Shinkar family. The present proceeding is not initiated against all the Directors of

Pathpedi, however, the same is initiated by adopting the method of pick and choose policy, that too members of Shinkar family only. One of the allegation in complaint/proceeding is that, petitioner nos. 1, 2, 3, 4, 8, 9 and 10 have taken concession/rebate on the rate of interest of loan. However, the proceeding shows that, present respondent no.2 has not filed affidavit duly sworn by him indicating that, how many persons have taken concession/rebate on the rate of interest of loan, and which provisions of law have been flouted while sanctioning concession/rebate on the rate of interest. Learned counsel submits that, it is a matter of record that, present respondent no.2 and his wife has also availed the facility of concession/rebate on the rate of interest of loan. Though present respondent no.2 has filed interventions in Writ Petition no.3330/2014 (Shri Devidas

Waman Shinkar and others V/s The State of Maharashtra and others) and Writ Petition No.7883/2015 (Shri Devidas Waman Shinkar and others V/s The State of Maharashtra and others), present respondent no.2 deliberately with an ulterior motive for wreaking vengeance, withheld the said orders from the District and Sessions Court. Therefore, learned senior counsel submits that, the complaint/proceeding instituted by respondent no.2, is manifestly attended with malafide and/or the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance. In support of aforesaid contentions, the reliance is also placed on the exposition of law by the Hon'ble Apex Court in the case of **State of Haryana V/s Bhajan Lal**².

8. Learned senior counsel submits that,

² 1992 AIR (SC) 604

the allegations in the first information report or the complaint, even if taken at its face value and read in its entirety, the same does not constitute any offence or make out a case against the petitioners. He submits that, the allegations made in the first information report or the complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach to a conclusion for proceeding against the accused. The allegations clearly depicts that the present proceeding manifestly attended with malafide and/or the same is instituted with an ulterior motive to take revenge against Shinkar family only. Learned Senior counsel submits that, the complainant has neither made all the Directors as a party accused nor made any allegations against the said Directors. Therefore, this is nothing but a pick and choose policy adopted by respondent no.2 just to settle his personal

grudge.

9. It is further submitted that, Bombay High Court at Principal Seat in the case of **Sayed Anwar Ahmed and ors V/s The State of Maharashtra and ors³** has reiterated the view taken by the Supreme Court in the case of **Priyanka Srivastava (supra)**.

10. So far as, an allegation in first information report against petitioner no.1 Shri Devidas S/o Waman Shinkar that the order under Sections 88 and 98 of the Maharashtra Co-operative Societies Act, 1960 is passed in the year 2012, and the liability of Rs.1,03,29,152/- is fixed upon him is concerned; it is submitted that, both the orders dated 31.03.2012 and recovery certificate dated 30.08.2012 issued under section 98 are challenged before the High

3 MANU/MH/0680/2017

Court by filing Writ Petition No. 3330 of 2014 (Shri. Devidas Waman Shinkar and others V/s The State of Maharashtra and others), and High Court vide order dated 8th August, 2014 has granted stay to the enforcement of both the orders. It is further submitted that, after the orders were passed, the Pathpedi has recovered Rs.1.43 Crores by taking an action under section 101 of the M.C.S. Act and under section 138 of the Negotiable Instruments Act. It is submitted that, the orders are of the year 2012. In view of the proposition laid down by the Supreme Court in the case of **Priyanka Srivastava (supra)**, more particularly, in para 31, present respondent no.2 should have filed affidavit giving explanation of delay and the Magistrate should have applied its mind on the aspect of delay.

11. So far as, allegation in first

information report against petitioner no.1 that, he has withdrawn excess amount from the cash credit account is concerned, it is submitted that, the cash credit account was closed long back in the year 2004 by paying interest @ 16% to 18% per annum. Petitioner no.1 has paid an amount of Rs.74,13,557/- towards interest only.

12. It is submitted that, already C.R. No.97/2013 is registered for purchase of Mangal Karyalaya by the Department and charge-sheet bearing No.660 of 2014 is filed and therefore, in view of provisions of Article 20(2) of the Constitution of India, no person shall be prosecuted and punished for the same offence more than once. In respect of allegations of purchase of Mangal Karyalaya by Pathpedi are concerned, it is submitted that, already the F.I.R. is registered and the charge-sheet is filed,

therefore, in view of law laid down by the Supreme Court in the case of **T.T. Antony V/s State of Kerala and others**⁴, in particular, paras 26 and 27 thereof, the second F.I.R. crime No. 14/2017 registered on the basis of the impugned order is not maintainable. It is submitted that, so far registration of R.C.C. No. 566 of 2007 is concerned, it is submitted that, the High Court in Criminal Writ Petition No. 496/2007 (Dadasaheb Waman Vishnu Shinkar Nagari Sahakari Pat Sanstha Ltd., V/s The State of Maharashtra and others) has quashed the proceedings in R.C.C. No. 566/2007.

Another allegation against petitioner no.1 that, he has availed the concession/rebate on interest of loan account is concerned, it is submitted that, on this charge, proceeding under section 88 of the

4 (2001) 6 SCC 181

M.C.S. Act, was initiated, however, no charge is fixed. It is also submitted that, this Court in Writ Petition No.7883/2015 (Shri Devidas S/o Waman Shinkar and others V/s The State of Maharashtra and ors) vide order dated 3rd August, 2015 granted stay to the said proceeding initiated under section 88. It is also submitted that, the Commissioner for Co-operation issued circulars dated 30th October, 1998, 1st April, 2004 and 27th April, 2006 and further reduced the rate of interest of loan of Credit Societies. It is also submitted that, by passing the Resolution in the Annual General Body meeting, the Pathpedi has unanimously resolved and accepted the said circulars and further given rebate on interest to all the loan accounts. It is also submitted that, the Pathpedi has given rebate on interest amount to near about 452 loan account holders. Respondent no.2 and his wife have also

availed the said benefit of rebate on an interest amount. It is submitted that, as per bye-law no.1.11 of the Pathpedi, the rate of interest is 16%. The petitioner no.1 has paid interest on the loan amount at the rate of 16% to 18%. The rebate is given in the year 2004 and account is made Nil in the year 2004, as such there is delay in lodging the complaint and present respondent no.2 has not offered any explanation of 13 years or delay in making such grievance.

13. So far as an allegation against petitioner no.2 - Uday S/o Devidas Shinkar that, he has availed of the concession/rebate on interest of loan account is concerned, it is submitted that, already his loan account is made Nil in the year 2005, and therefore, the said allegation cannot survive, and there is no question of further investigation of the said allegation.

14. So far as an allegation against petitioner no.3 - Dr. Abhay S/o Devidas Shinkar that, he has availed of concession/rebate on interest of loan account is concerned, it is submitted that, he is not the Director or employee of the said Pathpedi and his account is already made Nil in the year 2005 itself.

15. So far as an allegation in respect of petitioner no.4 Sau. Vimal Devidas Shinkar that the order under sections 88 and 98 of the M.C.S. Act is passed in the year 2002 is concerned, it is submitted that the said order is challenged before the High Court in the aforementioned Writ Petition No. 3330/2014 (Shri Devidas Waman Shinkar and others V/s The State of Maharashtra and others). Even the allegation in respect of availing of concession/rebate on interest of

loan account is concerned, the case of petitioner no.4 is like petitioner no.1. It is submitted that, F.I.R. bearing C.R. No.698 of 2012 is registered wherein petitioner no.4 is an accused, and therefore, on the same set of allegations, petitioner no.4 cannot be prosecuted or punished in view of the provisions of Article 20(2) of the Constitution of India. The registration of second F.I.R. on the same set of allegations like made in C.R. No. 698/2012 is not permissible in view of the law laid down by the Supreme Court in the case of **T.T. Antony (supra)**.

16. It is submitted that, there is allegation against petitioner no.5 - Shri Arun Shinkar that, on 31st March, 2006 he has availed loan facilities and the same was not repaid. It is submitted that, in respect of the said allegation already C.R. No.92/2016

is registered with Deopur Police Station under sections 420, 465, 466, 467, 471, 406 read with 34 of I.P. Code and under sections 3 and 4 of the M.P.I.D. Act at the instance of Shri Bhupesh Devidas Patil Auditor, and therefore, the second F.I.R. is not maintainable on the same set of allegation.

So far as petitioner no.6 - Sau. Savita Arun Shinkar is concerned, he is wife of accused no.5 and she has not availed of any loan. She is neither director nor employee of the said Pathpedi.

17. It is submitted that, so far an allegation of order passed under sections 88 and 98 of the M.C.S. Act, 1960 in the year 2012 as against petitioner no.7 is concerned, it is submitted that, the same is subject matter of Writ Petition No. 3330/2014 (Shri Devidas Waman Shinkar and others V/s The

State of Maharashtra and others) and the same arguments, which are already advanced qua petitioner no.1, are also adopted in the case of petitioner no.7. Already C.R. No. 97/2013, making allegations in respect of purchase of Mangalkaryalaya is already registered against petitioner no.7, and therefore, on the same set of allegations the second F.I.R. i.e. Crime No. 14/2017, is not maintainable.

18. It is further submitted that, so far as petitioner no.8 - Sau.Pramila Shashikant Shinkar is concerned, she is already made accused in C.R. No. 97/2013, and therefore, on the same set of allegations, there cannot be second FIR in respect of purchase of Mangalkaryalaya. So far availing of any concession/rebate on the rate of interest on the borrowed amount of petitioner no.8 is concerned, it is submitted that, the loan transaction is of 2006. She was neither

Director nor the employee.

19. So far as allegations against petitioner no.9 - Shri Ajay S/o Prabhulal Kasodekar in respect of recovery certificate issued against the father of petitioner is concerned, the same is the subject matter of Writ Petition No. 3330 of 2014 (Shri Devidas Waman Shinkar and others V/s The State of Maharashtra and others) and along with petitioner no.1, he is also one of the petitioner in the said Writ Petition. It is submitted that, the recovery certificate was not issued in respect of the petitioner. The said certificate was issued against the father of petitioner no.9. It is submitted that, so far as concession/rebate on the rate of interest is concerned, it is submitted that, the loan transaction is of 2004 to 2006 and the said account is made Nil in the year 2006, and the explanation offered by

petitioner no.1 in respect of allegation of availing of concession/rebate on the rate of interest is also applicable in the case of petitioner no.9.

20. So far as allegations against petitioner no.10 Shri Kapporchand Baviskar is concerned, it is submitted that, he has become the Director in the year 2015 and the allegations made in the first information report that, he is the close relative of Shinkar family and the present Managing Committee members, are not maintainable against him. The allegations which relates to the period, prior to year 2006 cannot be made applicable in the case of petitioner no.10.

21. So far as allegation against petitioner no.12 - Shri Sanjay Amrutkar in respect of the concession/rebate on rate of interest is concerned, it is submitted that,

since he has not taken loan, the question of availing of concession/rebate of rate of interest does not arise. Therefore, learned senior counsel relying upon the pleading in the Petition, grounds taken therein and annexures thereto, submits that the Petition may be allowed.

22. Learned counsel appearing for respondent no.2 submits that, since already the first information report is registered pursuant to the directions issued by the Additional Sessions Judge, Dhule, it is not desirable to quash the first information report. It is submitted that, it is observed by the Sessions Court that, without carrying out proper investigation, it is not desirable to issue process against accused by the Court at initial stage. Thus the Additional Sessions Judge has not taken the cognizance and referred the matter to the police. It is

submitted that, in view of the above, position, the order passed by the Sessions Court on 28th February, 2017 cannot be challenged by way of filing Writ Petition or application under section 482 of the Cr.P.C. The only remedy available is to file the criminal revision application before the appropriate Court. In support of the aforesaid contentions, the reliance is placed on the judgment of the Division Bench of the Bombay High Court Bench at Aurangabad in Writ Petition No.159/2014 (**Avinash S/o Trimbakrao Dhondage V/s The State of Maharashtra and another decided on 21st October, 2015**) and connected matters thereto. It is submitted that, the said judgment has been confirmed by the Supreme Court.

23. The Supreme Court in the case of **HDFC Securities Limited and others V/s State**

of Maharashtra and another⁵ has laid down the law that the order passed under section 156(3) directing registration of the first information report and submission of report after investigation, if challenged by way of filing Writ Petition or under section 482 of Cr.P.C., the same is premature challenge. It is submitted that, therefore, the Supreme Court in the said case held that the stage of taking the cognizance arises only after the investigation report is filed before the Magistrate concerned. Therefore, the challenge to an order under section 156(3) of Cr.P.C. is premature, as the stage of cognizance comes after the report is filed by the police after completing the investigation. It is submitted that, after making compliance of the provisions of sections 154(1) and 154(3) by the complainant, there are averments made in the

5 (2017) 1 SCC 640

complaint. Learned counsel invites our attention to para 15 of the complaint filed before the Sessions Court and submits that the complaint was filed in Deopur Police Station by respondent no.2. Thereafter, as the cognizance was not taken, on 18th April, 2016, the complaint was filed before the Superintendent of Police, Dhule. The said complaint is filed after full-fledged compliance of provisions of sections 154(1) and 154(3) of the Cr.P.C. On the basis of the complaint filed by respondent no.2 i.e., original complainant, the Superintendent of Police, Dhule had issued letter to the Police Inspector of Deopur Police Station, Dhule to register the crime if the offence is made out. It is submitted that, in the case of **Priyanka Shrivastav (supra)**, the Supreme Court was pleased to direct that, the application under section 156(3) of Cr.P.C. should be supported by the affidavit. The

said directions have been issued only with a view that, if the averments in the application are found false, the appropriate legal action can be taken against the complainant/applicant. Non-filing of the affidavit in support of the application is an irregularity covered under section 460 of Cr.P.C., which does not vitiate the proceedings. Even otherwise, the complainant cannot be directed to file the affidavit in support of his complaint application.

24. It is submitted that, while deciding the Writ Petition No. 3713 of 2015 in case of **Enercon GMBH a Company V/s The State of Maharashtra**, the judgment is relied upon by the petitioners in Criminal Writ Petition No.379/2017 and the point decided relates to compliance of the provisions of sections 154(1) and 154(3) of Cr.P.C. and point of requirement of affidavit along with the

application under section 156(3) of Cr.P.C. had not been adjudicated in the said case. It is submitted that, it is true that, respondent no.2 had filed Criminal Misc. Application No.817/2016 before the Chief Judicial Magistrate, however, the same was withdrawn and to that effect respondent no.2 has disclosed the said fact in the complaint. It is submitted that, there are averments in the complaint, which would attract the offences under the provisions of M.P.I.D. Act. The complainant/applicant has enclosed the important evidence from which the offences under sections 406, 409, 417, 418, 467, 468, 471, 120(B) read with 34 of the Indian Penal Code and offence under the M.P.I.D. Act are prima facie evident. It is submitted that, it is true that, the complainant and his wife were convicted for the offence punishable under section 138 of the Negotiable Instruments Act, 1881 and the

sentence till rising of the Court was ordered. Infact the complainant and his wife have deposited the amount in that case, but still the financial institute continued the proceeding. The said fact cannot be a reason to say that, the complaint is malafide. It is submitted that, the allegations in respect of cancellation of appointment of the complainant in connection with "Ladshakhiya Wani Samaj Sanstha" have no concern with the present complaint. It is further submitted that, the other factors stated by the petitioners against the complainant are the statements disclosing the entire story or happening, so also the circumstances. The said factors are being brought before this Court only to cause prejudice against the complainant and the said facts have no concern with the prayers in the Petition and the impugned order.

25. It is submitted that, the various submissions made by the petitioners about their non-involvement in the offence or involvement of others into the crime in question are their probable defence, however, the same cannot be taken into consideration at this preliminary stage, where the order passed under section 156(3) is under challenge in Criminal Writ Petition. It is submitted that, the complaint application was filed by the complainant on 10th April, 2016 in Deopur Police Station, Dhule and on 18th April, 2016, he had filed the application before Superintendent of Police, Dhule. So also there is report of Deopur Police Station dated 2nd June, 2016, wherein it is stated in column no.16 that "प्रभारी अधिकारी यांची शिफारस स्वतः चौकशी केली आहे." and from this it is evident that, the concerned Police Officer had made the inquiry and recommended for registration of the crime. In other words, it

is the satisfaction of the Police Officer, that, the cognizable offence has been prima facie made out. In these circumstances, it was the bounden duty of the police to register the crime and to investigate the same. In support of abovesaid contentions, the learned counsel placed reliance on the exposition of law by the Supreme Court in the case of **Ramesh Karmari V/s State (N.C.T. of Delhi) and ors**⁶. It is submitted that, on the basis of the order dated 28th February, 2017, the crime no. 14 of 2017 has been registered in Deopur Police Station, Dhule. The investigation has been commenced and thereafter some of the accused have been arrested by the Police. The statements of some of the witnesses must have been recorded. What is done by the police would be nullified if the first information report is quashed at this stage, when the investigation

6 AIR 2006 S.C. 1322

has been substantially proceeded. If the police found that, the first information report is false, the police would take appropriate action against the complainant. If the first information report is quashed the serious crime would remain uninvestigated even after the registration of crime. Therefore, learned counsel appearing for respondent no.2 submits that, the Petition may be rejected.

26. Learned A.P.P. appearing for the respondent/State submits that, pursuant to the directions issued by Additional Sessions Judge, Dhule vide order dated 28th February, 2017, the F.I.R. bearing C.R. No. 14 of 2017 is registered and pursuant to registration of said F.I.R., the investigation has been carried out. He further submits that, Mr.Bhupesh Devidas Patil, the Auditor has also registered the F.I.R. bearing C.R.

No.92/2016 for the offences punishable under Sections 420, 465, 466, 467, 471, 408 read with 34 of the I.P. Code and under Sections 3 and 4 of the M.P.I.D. Act. The said F.I.R. is registered on the basis of the enquiry made by the Auditor and also the audit report and in pursuance to the directions issued by the Divisional Joint Registrar. He further submits that, crime no.97/2013 is registered alleging illegalities committed by the Pathpedi while purchasing the Mangal Karyalaya.

27. We have heard the learned senior counsel appearing for the petitioners, learned A.P.P. appearing for the respondent/State and the learned Advocate appearing for respondent no.2 at length. With their able assistance, we have carefully perused the pleadings in the Petition, grounds taken therein, reply filed by

respondent no.2 and affidavit in rejoinder and also the written notes of arguments submitted by the learned counsel appearing for the petitioners, learned counsel appearing for respondent no.2, and also investigation papers made available for perusal by the learned A.P.P. appearing for respondent/State.

28. An important point raised by the learned senior counsel appearing for the petitioners that, respondent no.2 in the present case did not file the affidavit duly sworn by him in support of Criminal Misc. application filed by him before the Sessions Court at Dhule in terms of dictum of Hon'ble Supreme Court of India in the case of **Priyanka Srivasta (supra)** goes to the root of the matter. Admittedly, the Criminal M.A. No. 22/2017 filed by respondent no.2 was not supported by the affidavit sworn by him.

The Supreme Court in the case of **Priyanka Srivasta (supra)** held thus :-

"27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the Bank. We are absolutely conscious that the position does not matter, for nobody is above the law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction under Section 156(3) Cr.P.C. and also there is a separate procedure under the Recovery of Debts Due to Banks and Financial Institutions

Act, 1993, an attitude of more care, caution and circumspection has to be adhered to.

28. Issuing a direction stating "as per the application" to lodge an FIR creates a very unhealthy situation in society and also reflects the erroneous approach of the learned Magistrate. It also encourages unscrupulous and unprincipled litigants, like Respondent 3, namely, Prakash Kumar Bajaj, to take adventurous steps with courts to bring the financial institutions on their knees. As the factual exposition would reveal, Respondent 3 had prosecuted the earlier authorities and after the matter is dealt with by the High Court in a writ petition recording a settlement, he does not withdraw the criminal case and waits for some kind of situation where he can take vengeance as if he is the emperor of all he surveys. It is interesting to note that during the tenure of Appellant 1, who is presently occupying the position of Vice-President, neither was the loan taken, nor was the default made, nor was any action under the SARFAESI Act taken. However, the action under the SARFAESI Act was taken on the

second time at the instance of the present Appellant 1. We are only stating about the devilish design of Respondent 3 to harass the appellants with the sole intent to avoid the payment of loan. When a citizen avails a loan from a financial institution, it is his obligation to pay back and not play truant or for that matter play possum. As we have noticed, he has been able to do such adventurous acts as he has the embedded conviction that he will not be taken to task because an application under Section 156(3) Cr.P.C. is a simple application to the court for issue of a direction to the investigating agency. We have been apprised that a carbon copy of a document is filed to show the compliance with Section 154(3), indicating it has been sent to the Superintendent of Police concerned.

29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the Code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really

grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same.

30. In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of

India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

31. We have already indicated that there has to be prior applications under Sections 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 application under Section 156(3) be supported by an affidavit is 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 Kumari⁷ are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."

(Underlines added)

Therefore, it follows from the authoritative pronouncement of the Hon'ble Supreme Court in the case of **Priyanka Srivasta (supra)** that, the application under section 156 (3) of Cr.P.C. should be supported by affidavit duly sworn by the applicant, who seeks invocation of jurisdiction of the Magistrate. In an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the

⁷ (2014) 2 SCC 1

applicant more responsible. It is observed in the said judgment that, the Court is compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

29. As already observed, in the present case, respondent no.2 did not support the application by affidavit duly sworn by him. The law laid down by the Hon'ble Supreme Court in the case of **Priyanka Srivasta**

(**supra**) is binding on all subordinate Courts exercising jurisdiction within their local limits and situate within the territory of India, as has been provided under Article 142 of the Constitution of India. The judgment in the case of **Priyanka Srivasta (supra)** was circulated to all the Magistrates, Sessions Judges and High Courts. Therefore, the Additional Sessions Judge, who passed the impugned order, was bound by the dictum of the Hon'ble Supreme Court in the case of **Priyanka Srivasta (supra)**. It is unfortunate that, the learned Judge did not follow the dictum of Hon'ble Supreme Court and proceeded to pass the impugned order on the basis of the application which was not supported by the affidavit sworn by respondent no.2.

30. The Bombay High Court at Principal Seat at Mumbai, in the case of **Syed Anwar Ahmed (supra)** had occasion to consider the

fact situation of filing the application under section 156(3) of Cr.P.C. not supported by the affidavit sworn by the complainant. The Division Bench has in extenso made reference to the judgment of the Supreme Court in the case of **Priyanka Srivasta in para 19** and also to other judgments of the Hon'ble Apex Court in para nos. 17, 18, 20, 21, and in paras 22 to 25 held thus :-

"17. As far as power under Sub-section (3) of Section 156 of the Cr.P.C. is concerned, there are various decisions of the Apex Court and this Court. In the case of Anil Kumar and Others. v. M.K. Aiyappa and Another MANU/SC/1002/2013 : (2013) 10 SCC, the Apex Court considered the scope of powers under Sub-section (3) of Section 156. What is material is paragraph 11 of the said decision which reads thus:-

"11. The scope of Section 156(3) Cr.P.C. came up for consideration before this Court in several cases. This Court in Maksud Saiyed Case examined the requirement of the application of mind

by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 Cr.P.C., the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation."

(emphasis added)

18. Thus, the Apex Court held that when the learned Magistrate orders investigation under Sub-section (3) of Section 156 what weighed with the learned Magistrate to order investigation should be reflected from his order, though a detailed expression of his views is not warranted. While passing an order under Sub-section (3) of Section 156 of Cr.P.C, surely some reasons are required to be recorded after going through the Complaint as well as the documents produced with the complaint and after hearing the complainant. The reasons should be sufficient to indicate that the learned Magistrate had applied his mind.

20. The relevant decisions of the Apex Court including the decision in the case of Lalita Kumari, were considered by another Division Bench to which one of us (Anuja Prabhudessai, J.) is a member. In paragraph No. 15 of the decision dated 30th March, 2015 in Writ Petition No. 4775 of 2014 (Mr. Pandharinath Narayan Patil & Ors. v. The State of Maharashtra and Anr.) the Division Bench held thus:-

"15. It is thus well settled that the powers under section 156(3) of the Code

cannot be exercised mechanically but are required to be exercised judiciously. The magistrate is not required to embark upon an in-depth roving enquiry as to the reliability or genuineness of the allegations, nonetheless, he has to arrive at a conclusion that the application discloses necessary ingredients of the offence for which investigation is intended to be ordered. Furthermore, the reasons for arriving at such conclusion should be clearly reflected in the order."

(emphasis added)

21. After considering the decision of the Apex Court in the case of Lalita Kumari v. State of U.P., the Apex Court in the case of Priyanka, reminded the learned Magistrates that the Court of Law is involved when power under Sub-section (3) of Section 156 is invoked and it is not the case of the Police taking steps as per Section 154 of the said Code. The Apex Court has reminded the learned Magistrates that there is a difference between the Court of Law exercising the power under Sub-section (3) of Section 156 and the Police acting under Section 154. Therefore, only on the ground that the

allegations made in the Complaint constitute a cognizable offence, an order under Sub-section (3) of Section 156 cannot be mechanically passed. The Apex Court observed that the power under Section 156(3) warrants application of judicial mind. The mandate of law laid down in the case of Lalita Kumari is only against the Police in the context of mandatory provisions of Sub-section (1) of Section 154 of Cr.P.C. From paragraph 29 of the decision in the case of Priyanka, it is apparent that even in a case where the Complaint is seeking an action under Section 156(1) discloses commission of a cognizable offence, it is not necessary that in every such case the learned Magistrate should pass an order under Sub-section (3) of Section 156. It is ultimately the discretion of the learned Magistrate which is to be exercised after considering several factors. What we emphasize even at the risk of repetition is that only because the Complaint filed seeking an action under Sub-section (3) of Section 156 discloses commission of a cognizable offence, the learned Magistrate should not mechanically exercise power without application of judicial mind.

22. The Apex court has laid emphasis on the complainant supporting his case under Sub-section (3) of Section 156 of the Code by filing an affidavit. As observed in paragraph No. 31 of the decision, mere filing of affidavit is not sufficient. In a given case, the learned Magistrate will be well advised to verify the truth and veracity of the allegation. Advantages of filing of such affidavit are also mentioned in the said decision of the Apex Court.

23. Filing of an affidavit is also not empty formality. The manner in which affidavit is to be filed is prescribed in Chapter VII of the Criminal Manual published by this Court in paragraph Nos. 1 to 5, 7 and 8:-

"1. (1) The heading of every affidavit to be used in a Court of Justice shall be "in the Court of....at..... ". naming such Court.

(2) If there be a case pending in Court, the affidavit in support of, or opposition to, an application respecting it, must also begin with the heading "In the matter of the case of..... " in the case.

(3) If there be no case pending in Court heading shall be: In the matter of the application of.

2. Every affidavit shall be drawn up clearly and legibly and, as far as possible, in a language which the person making it understands. It shall be drawn up in the first person and divided into paragraphs numbered consecutively, and each paragraph, as far as may be, shall be confined to a distinct subject or portion thereof.

3. (1) Every person making an affidavit shall state his full name, father's name, surname, age, profession or trade and place of residence and shall give such other particulars as will make it possible to identify him clearly.

(2) The affidavit shall be signed by him in his own hand or he shall make his finger impression thereon.

4. Unless it is otherwise provided, an affidavit may be made by any person having knowledge of the facts deposed to.

5. (1) Every affidavit should clearly specify what portion of the statement is made on the declarant's knowledge and what portion of the statement is made on his information or belief.

2) When a particular portion is not within the declarant's own knowledge but it is stated from information obtained from others, the declarant must use the expression "I am informed" and if it is made on belief should add "I verily believe it to be true." He must also state the source or ground of the information or belief, and give the name and address of, and sufficiently described for the purpose of identification, the person or persons from whom he had received such information.

(3) When the statement rests on facts disclosed in documents or copies of documents procured from any Court or other person, the declarant shall state the source from which they were procured and his information, or belief, as to the truth of the facts disclosed in such documents.

7. All erasures, errors, interlineations, etc, in the affidavit shall be legibly initialed and dated by the declarant.

8. (1) The Officer authorised in this behalf, shall, before administering the oath ask the declarant if he has read the affidavit and understood the contents thereof, and if the latter states that he has not read it, or appears not to understand fully, the contents thereof, or appears to be blind, illiterate or ignorant of the language in which it is written, the Officer administering the oath shall read and explain or cause some other competent person to read and explain in his presence the affidavit to the declarant in the language which both the declarant and the Officer administering the oath understood.

(2) When an affidavit is read, translated or explained as herein provided the Officer administering the oath shall certify in writing at the foot of the affidavit that it has been so read, translated or explained in his

presence and that the declarant understood the same at the time of making the affidavit and made his signature or finger impression in the presence of the Officer."

24. Thus, the requirement of law is that every affidavit should clearly specify what portion of the statement is made on declarant's personal knowledge and what portion of the statement is made on his information or belief. When a particular statement is made on the basis of information and belief, the affidavit must state that the declarant believes the said statement to be true. Particulars of the source or ground of information or belief as provided in clause (2) of paragraph No. 5 of the Chapter VII of the Criminal Manual are required to be disclosed. The manner in which an affidavit should be executed is also laid down in paragraph No. 8 of Chapter VII. An affidavit filed without substantially complying with the requirements of Chapter VII cannot be said to be an affidavit filed in compliance with the directions issued by the Apex Court in the case of Priyanka Srivastava. As stated in the said decision, the object of filing an affidavit is to ensure that

the complainant must face consequences, if his statements made therein are found to be false. To achieve the object of filing an affidavit, it must substantially comply with the requirements specified in Chapter VII of the Criminal Manual.

25. To summarise,

"(a) While dealing with a Complaint seeking an action under Sub-section (3) of Section 156 of Cr.P.C, the learned Magistrate cannot act mechanically. He is required to apply his mind to the contents of the Complaint and the documents produced along with the Complaint;

(b) An Order passed on the said Complaint must record reasons in brief which should indicate application of mind by the Magistrate. However, it not necessary to record detailed reasons;

(c) The power under Sub-section (3) of Section 156 is discretionary. Only because on plain reading of the Complaint, a case of commission of cognizable offence is made out, an Order of investigation should not be mechanically passed. In a given case, the learned Magistrate can go in to

the issue of the veracity of the allegations made in the Complaint. The learned Magistrate must also consider the other relevant aspects such as the inordinate delay on the part of the Complainant. The nature of the transaction and pendency of civil proceedings on the subject are also relevant considerations;

(d) When a Complaint seeking an action under Sub-section (3) of Section 156 is brought before the learned Metropolitan Magistrate or the learned Judicial Magistrate, it must be accompanied by an affidavit in support as contemplated by the decision of the Apex Court in Priyanka Srivastava. The affidavit must substantially comply with the requirements set out in Chapter VII of the Criminal Manual and especially paragraphs 5 and 8 which are quoted above; and

(e) Necessary averments recording compliance with Sub-sections (1) and (3) of Section 154 of the Cr.P.C. should be incorporated with material particulars. Moreover, the documents in support of the said averments must be filed on record."

In the light of discussion

hereinbefore, the Criminal Misc. Application filed by respondent no.2 without supporting the affidavit sworn by him ought to have been held not maintainable. The contention of the learned counsel appearing for respondent no.2 that already the directions were given by the Superintendent of Police to the concerned Police Officer to register the first information report would by any stretch of imagination cannot be said to be the compliance of filing affidavit in support of averments in the application, in the light of discussion in foregoing paragraphs.

31. We have carefully perused the ground no.1 taken in Criminal Misc. Application by respondent no.2. The contention of the learned counsel appearing for respondent no.2 that, not filing affidavit in support of averments in the application/complaint is mere irregularity cannot be accepted in view

of the exposition of law by the Hon'ble Apex Court in the case of **Priyanka Srivasta (supra)** and the judgment of the Division Bench in the case of **Syed Anwar Ahmed (supra)**

32. The view taken by the Division Bench in the case of **Syed Anwar Ahmed (supra)** is reiterated in the case of **Nirmal Bang Securities Private Limited (Formerly M/s. Nirmal Bang) and others V/s State of Maharashtra⁸**, and in para no.9 it is held thus :-

"9. We have given careful consideration to the submissions. As far as the provision of Sub-Section (3) of Section 156 is concerned, the law is summarised by this Bench in the case of Sayed Anwar Ahmed Vs. State of Maharashtra in Criminal Writ Petition No. 924 of 2016 decided on 27th and 28th February, 2017. This Court has extensively considered the decision of the Apex Court in the case of Priyanka Srivastava as well as Lalita Kumari v. State of Uttar Pradesh. The law

8 2017 SCC Online Bom 699

has been summarised in paragraph 25 of the said decision which reads thus:-

"25. To summarise,

(a) While dealing with a Complaint seeking an action under Sub-Section (3) of Section 156 of Cr.P.C, the learned Magistrate cannot act mechanically. He is required to apply his mind to the contents of the Complaint and the documents produced along with the Complaint;

(b) An Order passed on the said Complaint must record reasons in brief which should indicate application of mind by the Magistrate. However, it not necessary to record detailed reasons;

(c) The power under Sub-Section (3) of Section 156 is discretionary. Only because on plain reading of the Complaint, a case of commission of cognizable offence is made out, an Order of investigation should not be mechanically passed. In a given case, the learned Magistrate can go in to the issue of the veracity of the allegations made in the Complaint. The learned Magistrate must also consider the other relevant aspects such as the inordinate delay on the part of the Complainant. The nature

of the transaction and pendency of civil proceedings on the subject are also relevant considerations;

(d) When a Complaint seeking an action under Sub-Section (3) of Section 156 is brought before the learned Metropolitan Magistrate or the learned Judicial Magistrate, it must be accompanied by an affidavit in support as contemplated by the decision of the Apex Court in Priyanka Srivastava. The affidavit must substantially comply with the requirements set out in Chapter VII of the Criminal Manual and especially paragraphs 5 and 8 which are quoted above; and

(e) Necessary averments recording compliance with Sub-Sections (1) and (3) of Section 154 of the CrPC should be incorporated with material particulars. Moreover, the documents in support of the said averments must be filed on record."

In the said judgment, the Division Bench considered the judgment in the case of **HDFC Securities Ltd., (supra)** and in particular para 16 held thus :-

"16. Now, we turn to the decision of the Apex Court in the case of HDFC Securities Limited. In the said case there was an order passed under Sub-Section (3) of Section 156 of Cr.PC on the basis of which FIR was registered. Writ Petitions were filed by the appellants before the Apex Court for quashing FIR. The Writ Petitions were dismissed by the High Court by holding the same as premature. The order passed by the learned Magistrate under Sub-section (3) of Section 156 of Cr.P.C. is quoted in paragraph 12 which records reasons in brief. The order shows that the learned Magistrate had applied his mind to the contents of the complaint and came to the conclusion that the complaint disclosed commission of cognizable offence. The order was not made only on this ground. The learned Magistrate recorded a satisfaction that considering the nature of the offence, it needs to be sent to the police for investigation under Sub-Section (3) of Section 156. The order records that he has even perused the documents filed along with the complaint. Therefore, this was not a case where a single line order was passed ordering investigation. This was a case where the order under Sub-Section (3) of Section 156

disclosed that the learned Magistrate had applied his mind to the complaint. It is in the facts of the case before the Apex Court that the observations were made in paragraph 27 that the Petitions filed before the High Court were filed at premature stage. We are of the view, if the order made under Sub-Section (3) of Section 156 is illegal, the FIR registered on the basis of the order can be quashed to avoid abuse of process of law."

33. It is contended by the petitioners that, respondent no.2 is habitual litigant, various proceedings are pending against respondent no.2. He is rival of Shinkar family. In the year 2001, he and his wife availed the loan facility from the Pathpedi borrowed the loan. Said amount, which was borrowed as loan, was not paid, which resulted into filing the proceedings under section 101 of the Maharashtra Co-operative Societies Act, 1960 (for short M.C.S. Act, 1960) by the said Pathpedi. The Pathpedi obtained Recovery Certificate under Section

101 of the M.C.S. Act, 1960 against respondent no.2 and his wife.

34. In reply to the aforesaid contention of the petitioners, it is admitted by respondent no.2 that the aforesaid proceedings were initiated against respondent no.2 and his wife, and they were convicted and the sentence awarded was till rising of the Court. There is no denial to the fact that, the Advocate General of Maharashtra State has prosecuted the present respondent no.2 under the provisions of the Maharashtra Vexatious Litigation (Prevention) Act, 1971. Therefore, we find considerable force in the arguments of the learned senior counsel appearing for the petitioners that, respondent no.2 has grudge in his mind against the petitioners, and therefore, the criminal proceedings i.e. filing of present complaint by the complainant, is manifestly

attended with malafide and maliciously instituted with malafide intention to wreak vengeance. The Supreme Court in the case of **"State of Haryana V/s Bhajan Lal⁹"** in para 108 of the judgment held thus :-

"108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give

9 AIR 1992 SC 604

an exhaustive list of myriad kinds of cases wherein such power should be exercised.

- 1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
- 2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*
- 3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*
- 4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.*
- 5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of*

which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. *Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*

7. *Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."*

(Underlines supplied)

35. In the light of the aforesaid discussion, the contention of the petitioners that, the criminal proceedings are manifestly attended with malafide and maliciously with ulterior motive for wreaking vengeance on the accused deserves acceptance keeping in view the category no.7 i.e. where a criminal proceeding is manifestly attended with mala

fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

36. Respondent no.2 in his application made allegation in respect of purchase of Mangal Karyalaya. However, in that respect already crime No. 97 of 2013 came to be registered. Therefore, in view of the judgment of the Supreme Court in the case of **T.T. Antony (supra)**, on the same set of allegation, crime no. 14/2017 is not maintainable.

37. Pursuant to the directions issued by the Divisional Joint Registrar, Co-operative Societies to the District Social Auditor Class-I, the Auditor has lodged the complaint with Deopur Police Station, Dhule and on the

basis of the said complaint, on 29th September, 2016 the crime No.92/2016 for the offences punishable under Sections 420, 465, 466, 467, 471 and 342 of the IP Code as well as sections 3 and 4 of the M.P.I.D. Act has been registered. The said complaint submitted by the Auditor is in respect of very same Pathpedi. In the said crime, one of petitioners is already made accused. Since the allegations in the said first information report relates to the affairs of Dadasaheb Waman Vishnu Shinkar Nagari Sahakari Pathpedi and also about the illegalities and irregularities committed while conducting the affairs of the society and at the time of disbursement of loan etc., and therefore, it was not necessary to register the separate offence. In the crime No.92/2016 registered with Deopur Police Station, Dhule for the offences punishable under Sections 420, 465, 466, 467, 471 and 342 of the IP Code as well

as sections 3 and 4 of the M.P.I.D. Act, the Investigating Officer is at liberty to investigate about the allegations made even against the present petitioners so as to find out their role. An investigation is an exclusive domain of the Investigating Officer and the Investigating officer would be at liberty to investigate even about the involvement of present petitioners, and there cannot be any impediment for such investigation. Even the statement of present respondent no.2 can also be recorded in the said crime by the Investigating officer. It appears that, since the Special Auditor did not take any steps to file the complaint with Police Station inspite of the directions by the Superior Officer about the alleged illegalities and irregularities committed by the Directors, employees and borrowers etc., including the petitioners to register the first information report on the basis of such

complaint, respondent no.2 presented the complaint before the Magistrate and the complaint was subsequently withdrawn and thereafter the Criminal Misc. Application No. 22/2017, was presented before the Court of Additional Sessions Judge at Dhule. Since as already observed the crime No. 92/2016 is already registered on the basis of the complaint filed by the Special Auditor on 20th August, 2016, the allegations as against the petitioners made in the present F.I.R. i.e. Crime No.14/2017 can also be gone into in the said first information report. There is no need of further investigation of said F.I.R., which is registered pursuant to directions issued by the Additional Sessions Judge, Dhule.

38. There is also another reason to cause interference in the impugned order directing registration of the first

information report. In the impugned order, the cryptic reasons are assigned by the concerned Court without assigning any single reason how the provisions of sections 3 and 4 of the M.P.I.D. Act are attracted. While passing the impugned order, learned Judge did not even consider the fact that, Mohammad Abdul Arif was working as Divisional Joint Registrar, Co-operative Societies as public servant and therefore, to prosecute him, valid sanction is necessary. However, after registration of F.I.R. pursuant to the directions issued by the Additional Sessions Judge, Dhule, very same learned Judge while entertaining an application and granting anticipatory bail to Mohammad Abdul Arif, who was working as Divisional Joint Registrar made observation that, there was no valid sanction to prosecute him. Therefore, there was no proper application of mind by the learned Judge and as a result, by cryptic

reasons, the impugned order is passed and on the basis of the said order, the first information report no.14/2017 with Deopur Police Station for the offence punishable under sections 406, 409, 417, 418, 420, 467, 468, 471, 120-B and 34 of I.P. Code and under sections 3 and 4 of the M.P.I.D. Act is registered.

39. Though the learned counsel appearing for respondent no.2 has placed reliance on the judgment in the case of **HDFC Securities Limited**, in the facts of that case, the issue of filing the affidavit in support of application by the applicant/complainant therein was not involved. In the present case, as already observed, in the light of mandate of the Supreme Court in the case of **Priyanka Srivasta (supra)** and the judgment of the Bombay High Court at Principal Seat in the case of **Syed Anwar Ahmed (supra)**, it was

incumbent upon the learned Judge, who passed the impugned order, to seek compliance from respondent no.2 to file the affidavit in support of Criminal Misc. Application. In the facts of the present case, as already observed the order passed by Additional Sessions Judge is cryptic and without assigning any valid reasons for invoking provisions of sections 3 and 4 of the M.P.I.D. Act. Therefore, the ratio laid down in the case of **HDFC Securities Limited** cannot be made applicable in the facts of the present case, when there is no affidavit sworn by respondent no.2 in support of averments in the Misc. Application and order suffers from non-application of mind. However, we make it clear that, the allegations made against the petitioners cannot go unattended and the Investigating Officer making investigation in Crime No.92/2016 will be at liberty to cause the

investigation even in respect of the present petitioners also, since the said first information report is lodged on the basis of the complaint filed by the Special Auditor with Deopur Police Station, Dhule. We further make it clear that, there is no impediment to the Investigating Officer to cause the investigation keeping in view the allegations in the first information report registered on the basis of complaint lodged by the Special Auditor even against the petitioners, even though there are certain directions by the Minister and in turn the Special Auditor mentioned in that respect that, no offence should be registered against Devidas Waman Shinkar. As already observed, the investigation is an exclusive domain of the Investigating Officer and the Investigating Officer is at liberty to add any person/persons as an accused in ongoing investigation keeping in view the allegations

in the first information report, and can also cause the further investigation. In substance, the allegations made in the First Information Report no. 14/2017 can be taken care of in ongoing investigation in crime no.92/2016 for the offence punishable under Sections 420, 465, 466, 467, 471, 406 read with section 34 of I.P. Code and under Sections 3 and 4 of the M.P.I.D. Act, and the Investigating Officer can record the statement of respondent no.2.

40. The contention of the learned counsel appearing for respondent no.2 that, the revision as against the impugned order passed by the Additional Sessions Judge is maintainable, and therefore, the present Petition under Article 226 of the Constitution of India read with section 482 of the Cr.P.C. may not be entertained, cannot be accepted. It needs to be emphasized that

the scope of exercise of jurisdiction of section 482 of Cr.P.C. is explained in greater details by the Supreme Court in the case of **State of Haryana V/s Bhajan Lal** and various pronouncement of the Supreme Court in recent past. The Supreme Court in the case of **Prabhu Chawla Vs. State of Rajasthan and Anr. in Criminal Appeal No. 842 of 2016 with Criminal Appeal No. 844 of 2016**, decided on 5th September, 2016, in para 3 held thus :

3. While considering all these matters at the SLP stage, on 05.07.2013, a Division Bench found the impugned order of the High Court to be against the law stated in *Dhariwal Tobacco Products Ltd. v. State of Maharashtra*¹⁰. In that case the Division Bench concurred with the proposition of law that availability of alternative remedy of criminal revision under Section 397 Cr.P.C. by itself

10 [2009] 2 SCC 370

cannot be a good ground to dismiss an application under Section 482 of Cr.P.C. But it noticed that a later Division Bench judgment of this Court in the case of Mohit alias Sonu v. State of Uttar Pradesh¹¹ apparently held to the contrary that when an order under assail is not interlocutory in nature and is amenable to the revisional jurisdiction of the High Court then there should be a bar in invoking the inherent jurisdiction of the High Court. In view of such conflict, these cases were directed to be placed before the Hon'ble Chief Justice for reference to a larger Bench and that is how the matters are before this Bench for resolving the conflict.

41. The Supreme Court after detailed discussion in paras 4 and 5; in para 6 of the said judgment held thus:

¹¹ [2013] 7 SCC 789

6. In our considered view any attempt to explain the law further as regards the issue relating to inherent power of High Court under Section 482 Cr.P.C. is unwarranted. We would simply reiterate that Section 482 begins with a non-obstante clause to state: "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice." A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J. "abuse of the process of the Court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more." We venture to add a further

reason in support. Since Section 397 Cr.P.C. is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 Cr.P.C. only to petty interlocutory orders! A situation wholly unwarranted and undesirable.

42. It clearly emerges that, the Supreme Court approved the law laid down in the case of ***Dhariwal Tobacco Products Ltd. and ors. Vs. State of Maharashtra and another***¹² and ultimately held that, the availability of alternative remedy of criminal revision under Section 397 of the Code of Criminal Procedure by itself cannot be a good ground to dismiss an application under Section 482 of the Code of Criminal Procedure. The judgment in the case of ***Dhariwal Tobacco Products Ltd.*** [supra] is holding the field, since the date

¹² [2009] 2 SCC 370

of its pronouncement of the said judgment in the year 2009.

43. It is further not necessary to elaborate the reasons. Suffice it to say that, in the light of discussion in the foregoing paragraphs, we are of the considered view that, the impugned order passed by the Additional Sessions Judge, Dhule, deserves to be quashed and consequently the F.I.R. bearing C.R. No. 14 of 2017 registered on the basis of the same also deserves to be quashed.

44. Accordingly, the impugned order dated 28th February, 2017 passed by the Additional Sessions Judge, Dhule in Criminal Misc. Application No. 22/2017 is quashed and set aside. Consequently, the first information report i.e. Crime No. 14/2017 registered with Deopur Police Station for the

offence punishable under sections 406, 409, 417, 418, 420, 467, 468, 471, 120-B and 34 of the I.P. Code and under sections 3 and 4 of the M.P.I.D. Act on the basis of the said order is also quashed. Rule made absolute on above terms.

An observations made hereinbefore on the merits of the allegations in the first information report No. 14/2017 are prima facie in nature and cannot be construed as an impediment to the Investigating Officer, who is investigating into the F.I.R. no.92/2016 registered with Deopur Police Station, Dhule to proceed with the investigation in accordance with law. The Investigating Officer is free to cause the investigation even in respect of the petitioners in said crime, however, in accordance with law.

45. The Registrar (Judicial), High Court

of Judicature of Bombay, Bench at Aurangabad shall ensure that the copy of this judgment and order is circulated by e-mail or any other fastest mode of communication to all the learned Judges working in District and Sessions Courts and also trial Courts dealing with the criminal matters and also all Judicial Magistrates functioning within the territorial jurisdiction of the Bombay High Court.

[S . M . GAVHANE]
JUDGE

[S . S . SHINDE]
JUDGE

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