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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.924 OF 2016
WITH
CRIMINAL APPLICATION NO.486 OF 2016

1. Sayed Anwar Ahmed
aged 64 years, Indian Inhabitant,
Occu. : Business, residing at Flat No.202,
Meadow Park – 1, Aksa Masjid Road,
Opp: 24 Karat Multiplex,
Jogeshwari (West),
Mumbai – 400 102.

2. Sayed Ghulam Raza Naqvi
aged 54 years, Indian Inhabitant,
Occu. : Business, residing at Flat No.503,
Lotus Park – 2, B-Wing, Aksa Masjid Road,
Opp : 24 Karat Multiplex,
Jogeshwari (West),
Mumbai – 400 102. … Petitioners

Versus

1. The State of Maharashtra,
(at the instance of Oshiwara
Police Station, Mumbai)

2. Asif Akbarali Mulji,
residing at Guru Nanak Nagar
Near Scout Camp, Behram
Link Road, Jogeshwari (W),
Mumbai – 400 102.

<u>and also at :-</u>

D-13, Zahur Ahmed Chawl,
Santosh Nagar, Link Road,
BehramBaug, Jogeshwari (West),
Mumbai – 400 102. … Respondents

Mr. Subhash Jha with Ms Sanjana Pardeshi and Mr. Mohd. Majjid Siddiqui i/b. M/s. Law Global Advocates.

Dr. F.R. Shaikh, APP for the Respondent No.1 - State.

Mr. Diwakar Dwivedi for the Respondent No.2.

CORAM : A.S. OKA &
ANUJA PRABHUDESSAI, JJ.

DATE : 27th & 28th FEBRUARY, 2017

OVERVIEW

ORAL JUDGMENT :

1 The submissions of the learned counsel appearing for the parties were heard on the earlier date and today the Petition is fixed for dictation of judgment. We are dealing with this Petition elaborately as the issues raised in this Petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C") arise in many matters.

2 The challenge in this Petition is to the proceedings of a complaint file seeking an action under Sub-Section (3) of Section 156 of Code of Criminal Procedure. The complaint was filed by the second respondent before the learned Metropolitan Magistrate, 10th Court at Andheri alleging commission of offence punishable under Sections 452, 465, 466, 468, 471, 420 read with Section 34 of the Indian Penal Code.

On the said complaint on 7th October, 2000, the learned Metropolitan Magistrate passed the following order :-

> "Received. Heard.
> Sr. P.I. of Oshiwara is directed to investigate u/s. 156(3) Cr.P.C."

3 On the basis of the said order, in the year 2014, the second respondent who was the complainant in the said complaint filed Criminal Writ Petition No.3488 of 2014 in this Court. The said Writ Petition was filed making a grievance as regards the failure of the police to take action on the basis of the order dated 7th October, 2000. The said Writ Petition came up before a Division Bench of this Court on 17th August, 2015. The Division Bench disposed of the Writ Petition by permitting the second respondent to give a statement before the Inspector of Police, Oshiwara Police Station, Mumbai and by directing the Oshiwara Police Station to comply with the order dated 7th October, 2000 and to proceed further in accordance with law. The said order reads thus :-

> "1. This petition is filed seeking direction to the respondent to comply with the order dated 07.10.2000 passed by the learned Magistrate, 10th Court, Andheri, Mumbai and investigate the complaint filed by the petitioner vide C.C. No.37/S/2000 under Section 156(3)(b) of the Cr.P.C., copy of which is annexed at Exh.A at page 10 to the petition. The grievance of the petitioner is that even the learned Magistrate has passed an order under Section 156(3)(b) of the Cr.P.C. on 07.10.2000 and directed the Senior Police Inspector, Oshiwara Police Station to investigate petitioner's complaint,

so far no action is taken by the Oshiwara Police Station."

2. Mrs. Mhatre, learned APPP placed on record report dated 17.08.2015 submitted by the Senior Inspector of Police, Oshiwara Police Station, Mumbai. The report reveals that all the registers and vital documents have been destroyed in the rainy water during the deluge in Mumbai on 26.07.2005.

3. In the above circumstances, in our considered view, it would be appropriate to dispose of the petition by passing following order.

ORDER

The petitioner is at liberty to give statement before the Senior police Inspector of Oshiwara Police Station, Mumbai and thereafter Oshiwara Police Station shall comply with the order dated 07.10.2000 and proceed further in accordance with law as expeditiously as possible."

4 It is on the basis of the said order that on 27th October, 2015 the impugned FIR was registered. Thus, the order passed by the learned Magistrate on 7th October, 2000 was acted upon after expiry of a period of 15 years. As stated earlier, the challenge in this Writ Petition is not only to the complaint and order passed thereon but also to the FIR registered on the basis of the said Order.

SUBMISSIONS

5 The learned counsel appearing for the petitioner has taken us through the Complaint filed by the second respondent by inviting our attention to the material part of the averments. He urged that the real dispute is about the implementation of a Slum Rehabilitation Scheme

and the real issue agitated by the complainant appears to be the issue of eligibility of the slum dwellers to get permanent accommodation. He pointed out that the Complaint is as vague as possible and at highest, it raises the issue regarding eligibility of certain persons for grant of accommodation in the Slum Rehabilitation Scheme. He has invited our attention to various documents placed on record by the petitioner as well as by the second respondent. In fact, he pointed out on the basis of the documents which are produced by the second respondent that when the Complaint was filed by the second respondent before the learned Magistrate even Annexure-II (list of persons entitled to permanent accommodation under the Scheme) had not become final. He also invited our attention to the correspondence exchanged between the contesting parties.

6 He relied upon various decisions and in particular a decision of the first Court in PIL No.156 of 2006 along with Suo Motu PIL No.6 of 2007[1]. Inviting our attention to the law laid down by the Division Bench, he submitted that in a case like this, at highest, it is only the High Power Committee constituted by the State Government which could have issued directions for setting the criminal law in motion. He also placed reliance on several decisions laying down the scope of powers of the learned Magistrate under Sub-Section (3) of

1 MANU/MH/1023/2009

Section 156 of the Cr.P.C including the well known recent decision of the Apex Court in the case of *Priyanka Srivastava and Anr. Vs. State of Uttar Pradesh and others*[2]. He also invited our attention to the decision of the Full Bench of this Court in the case of *Panchabhai Popotbhai Butani and Ors. Vs. State of Maharashtra and Others*[3]. He invited our attention paragraphs 58 to 60 of the said decision of the Full Bench.

7 The learned counsel appearing for the second respondent urged that the order passed by the learned Magistrate on 7th October, 2000 has attained finality. By inviting attention of the Court to the order passed by a Division Bench of this Court in the Writ Petition filed by the second respondent on 17th August, 2015, he urged that the impugned FIR has been registered as per the directions issued by the Division Bench of this Court. He invited our attention to the documents which are part of the additional compilation. His submission is that there is a material on record to show that fictitious persons have been shown eligible for allotment of permanent accommodation. He relied upon a list which is a part of the compilation and submitted that the persons whose names appear in the list are non-existing persons who have been shown as eligible on the basis of fabricated documents. He relied upon the licenses under the Shops and Establishment Act,1948 as well as the

2 (2015) 6 SCC 287
3 (2010) 1 Mh.LJ 421 (FB)

copies of the electoral roll. He urged that considering the serious allegations of fabrication of documents, no interference can be made in writ jurisdiction in the investigation at this stage.

8 The learned APP while supporting the impugned FIR also tendered on record a copy of the letter dated 5th August, 2016 addressed by the Maharashtra Housing and Area Development Authority (MHADA) to the Commissioner of Police, Mumbai. In the said letter, the MHADA has also relied upon a decision in the case of *Shailesh Gandhi Vs. State of Maharashtra and Ors. in PIL No.156 of 2006* and pointed out to the Commissioner that the impugned FIR could not have been registered by Oshiwara Police Station. The said letter addressed by the Vice-President and Chief Executive Officer of the MHADA records that the matter can be referred to the High Power Committee and therefore, the FIR registered should be withdrawn. A copy of the said letter is taken on record and marked 'M-1' for identification.

CONSIDERATION OF SUBMISSIONS

9 We have given careful consideration to the submissions. We have perused the Complaint as well as the relevant documents on record. In the Complaint, the second Respondent claims that he was working as a cable operator in Zahoor Chawl which is situated

adjoining to Scout Camp. In paragraph 2 of the Complaint, he has described the land on which the Scout Camp is situated with reference to survey numbers. It is alleged that some of the accused have encroached upon certain portion of the land in Scout Camp. It is alleged that some of them destroyed trees on the open land by putting chemicals. The Complaint alleges that the accused and their associates have formed a committee under the name and style as Guru Nanak Nagar Co-operative Hsg. Society Ltd. It is alleged that accused in connivance and collusion with the employees of the Competent Authority have submitted a list of more than 400 members along with a plan of redevelopment of Guru Nanak Nagar Co-operative Hsg. Society Ltd. and Aaradhana Society to the Slum Rehabilitation Authority. It is alleged that though 400 slum dwellers have been shown, in fact, there are only 40 members of Guru Nanak Nagar Co-operative Hsg. Ltd. It is alleged that some of the persons included in the list of 400 persons are in fact residents of adjoining area. Paragraph 7 contains an allegation that the list submitted by the members of the said Society to the Competent Authority is false and fabricated and even a copy of the plan submitted is forged one. There is mere assertion in paragraph 8 that the second respondent has been repeatedly lodging complaints with various authorities about the activities of the accused and their associates. It is alleged that since the accused are influential persons, they are ensuring that the complainants are filed without investigation. There is a vague assertion that he lodged various complaints with Oshiwara Police Station, MHADA and other authorities but there is no investigation carried out. We have already quoted the cryptic order passed by the learned Metropolitan Magistrate on 7th October, 2000 running into two lines. There are absolutely no reasons recorded for issuing the impugned direction to the Senior P.I of Oshiwara Police Station to investigate.

10 Now, we turn to the order dated 17th August, 2015 passed in Criminal Writ Petition No.3488 of 2014. Only direction sought in the said Petition under Article 226 of the Constitution of India appears to be against the State of Maharashtra to comply with the order dated 7th October, 2000 passed by the learned Magistrate on the aforesaid Complaint. From the title of the order dated 17th August, 2015, it is obvious that persons who are named as accused in the Complaint on which the said order is passed were not made parties to the Petition. In any case, the said persons were not before the Court when the petition was disposed of. In fact, the learned APP made a statement that the registers and other documents of the police station have been destroyed due to floods on 26th July, 2005. The only direction issued by the Division Bench is of directing the Oshiwara Police Station to comply

with the order dated 7th October, 2000 which was in force as on that date. In the said Petition, the Division bench had no occasion to go into the legality of the said order.

11 It is not the case made out by the second Respondent that the present petitioners were at any relevant time aware of the order dated 7th October, 2000. The FIR was registered 15 years thereafter on the basis of the aforesaid direction of the Division Bench. The aforesaid direction of the Division Bench will not preclude the present petitioners from challenging the order passed under Section 156(3) of the Cr.P.C. The legality and validity of the FIR depends on the outcome of the said challenge.

12 Before we come to the law laid down by the Apex Court and this Court, even going by the assertions made in the Complaint by the second respondent, when the Complaint was filed, the Competent Authority had not even approved the list of eligible slum dwellers by finalising Annexure – II. As we understand from the documents, the proposal was to implement a Slum Rehabilitation Scheme under Regulation 33(10) of the Development Control Regulations for the City of Mumbai of 1999 (for short "DCR").

13 There are elaborate provisions made in the DCR for preparation of list of eligible slum dwellers. Under the Redevelopment Scheme under Regulation 33(10) for rehabilitation of the slum dwellers, there is a provision for providing a tenement in exchange of dwelling of those inhabitants whose names and structures appear in the electoral roll as on 1st January, 1995. Under clause (i) of Appendix IV of the D.C.R, the eligibility criteria for allotment of permanent accommodation is also laid down. Under the DCR, there are different authorities for certifying the correctness of Annexure – II depending upon the category of the lands sought to be developed. There is an elaborate process of preparation and finalisation of the Annexure - II containing the names of the persons eligible for rehabilitation. In the City of Mumbai, there are large number of Slum Rehabilitation Projects being implemented under Regulation 33(10) of the DCR. Considering the fact that there was no proper machinery created for dealing with the grievances about the implementation of the Slum Rehabilitation Scheme, the Full Bench of this Court in the case of *Tulsiwadi Navnirman Co-op. Housing Society Ltd. and Anr. Vs. State of Maharashtra and Others*[4], expressed a view that an Authority will have to be created for dealing with the all grievances in connection with Slum Rehabilitation Schemes. Ultimately, the State Government accepted the suggestion of creating a High Power Committee for dealing with various disputes

4 2007(6) Mh.L.J. 851

concerning the implementation of the schemes under Regulation 33(10). As per the judgment of the Full Bench dated 1st November, 2007 a Government Resolution was issued on 15th November, 2007 constituting the High Power Committee. It may not be out of place to mention here that the High Power Committee is still functioning and in fact the State Government has accepted the suggestion of this Court to constitute additional High Power Committee. That is what is recorded in the judgment and order dated 23rd December, 2016 in Writ Petition No.2326 of 2016.

14 It is in the context of this background that we turn to the decision of the Division Bench of this Court in the case of *Shailesh Gandhi.* As noted in the judgment, the petitioner in the said PIL is an activist under the Right to Information Act,2005. In the facts of the case, there were as many as 87 complaints concerning Rehabilitation Schemes under DCR. This Court referred to the constitution of the High Power Committee and the procedure to be followed for sanction of a Slum Rehabilitation Schemes under Regulation 33(10). The Division Bench dealt with the issue of disposal of the said 87 complaints. Ultimately, the Division Bench disposed of the Petition by issuing the following directions :-

> "It is neither permissible nor possible for this Court to examine these 87 complaints on their merit and

supervise their inquiry or day to day investigation. It is, therefore, essential that some directions must be issued in regard to the proper investigation and disposal of these complaints and that too expeditiously. It is apparent from the record that there are different types of complaints which would require to be dealt with and investigated by different authorities. A kind of preliminary examination of all these complaints, therefore, would be necessary before actual investigating machinery is put in motion. There might be matters which can be remedied and corrected at the department level, while in other complaints, element of criminality may be involved which requires proper investigation by the concerned authorities. It is the duty of the court to ensure that rule of law prevails and the serious matters are not scuttled by administrative authorities or are not delayed in a manner which would completely render the complainant's grievances incapable of being redressed and remedied.

In our view, the most appropriate way to handle these matters would be to issue certain directions and leave it open to the Authorities concerned to proceed in accordance with law while ensuring that all the matters are examined judiciously and persons responsible for committing illegalities and acting in an unfair manner are brought to book. Thus, while disposing of this Writ Petition, we issue the following directions:

(a) **All these 87 complaints, except the one's which are already before the Court of Competent Jurisdiction, would be examined by the members of the High Powered Committee constituted by the State and the Committee upon the inquiry and examination of the relevant records shall record its opinion.**

(b) **While examining these complaints, the High Powered Committee shall take assistance of the police officers not below the rank of an Additional Commissioner.**

(c) **The collective opinion of these Authorities shall be recorded and the concerned departments shall take action in furtherance thereto in accordance with law.**

(d) Wherever departmental or administrative action is called for, the concerned department whether the State of Maharashtra or statutory bodies like MHADA, BMC and SRA shall take action in accordance with the disciplinary rules applicable to its officers/employees without any further delay.

(e) **Wherever element of criminality is involved, particularly in cases of fraud, impersonation or like cases, the investigation would be handed over to an appropriate agency which shall then proceed with the matter in accordance with law and without being influenced in any manner whatsoever by the position or status of the person involved in the case.**

(f) All these complaints would be examined by the High Powered Committee assisted by the Additional Commissioner of Police nominated by Director General of Police, Maharashtra, expeditiously. In the event this Committee finds that illegalities or irregularities coupled with the element of criminality justify passing of certain interim directions with regard to stopping, regulating or even cancelling the development schemes, in order to achieve the object of settlement of genuine slum dwellers and the public interest, it would be free to do so, subject to the orders that may be passed by the Courts of Competent Jurisdiction."

(emphasis added)

15 As noted in the Judgment, 87 complaints (except the one which was already before the Court of competent jurisdiction) were

ordered to be examined by the members of the High Power Committee. A direction was also issued to the High Power Committee to take assistance of a Police Officer not below the rank of Additional Commissioner. It was laid down that if the High Power Committee finds an element of criminality such as fraud, impersonation, fabrication, the High Power Committee would hand over investigation to a proper agency which thereafter shall proceed with the matter in accordance with law without being influenced by any manner whatsoever by the position or the status of the person involved in the case.

16 Now, going back to the facts of the case, on the date of filing of the Complaint, the Competent Authority which was empowered to finalise Annexure -II as per the scheme of Regulation 33(10) of the DCR had not even finalised Annexure-II which is very apparent from the documents produced by the second respondent in his compilation. Thus, on facts, it is abundantly clear that on the date on which the Complaint was entertained by the learned Metropolitan Magistrate, there was not even a final decision taken on the eligibility of slum dwellers for grant of permanent accommodation. The complaint is based on very vague assertions about the submission of a list of 400 persons by the office bearers of the society. As we have noted above, on the complaint filed by the second respondent, a very cryptic order was passed by the

learned Magistrate which does not record any reasons for directing action to be taken under Sub-Section (3) of Section 156 of the CrPC.

17 As far as power under Sub-Section (3) of Section 156 of the CrPC is concerned, there are various decisions of the Apex Court and this Court. In the case of *Anil Kumar and Others. Vs. M.K. Aiyappa and Another*[5]*,* 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) CrPC 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 CrPC, 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) CrPC, 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)

5 (2013) 10 SCC

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.

19 Then we come to a recent well known decision of the Apex Court on this aspect in the case of *Priyanka Srivastava,* wherein the Apex Court had an occasion to consider the entire law on the subject of taking action under Sub-Section (3) of Section 156 of the CrPC. The Apex Court also referred to its own decision in the case of *Lalita Kumari Vs. State of Uttar Pradesh and Others*[6]. The Apex Court also considered its earlier decision rendered by a Bench of three Hon'ble Judges in paragraph 21 which reads thus :-

> "**21.** Dealing with the nature of power exercised by the Magistrate under Section 156(3) CrPC, a three-Judge Bench in *Devarapalli Lakshminarayana Reddy* v. *V. Narayana Reddy* [(1976) 3 SCC 252 : 1976 SCC (Cri) 380] , had to express thus: (SCC p. 258, para 17)

6 2014(2) SCC 1

> "*17. …* It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173."

What is held by the Apex Court in the case of *Priyanka* is very relevant for consideration of the present case and especially when there are no reasons recorded by the learned Magistrate for initiating an action under Sub-Section (3) of Section 156. Paragraphs 27 to 30 of the said decision which are very material reads 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) CrPC 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) CrPC 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) CrPC 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 Kumari* [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] are being filed. **That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.** ”
>
> (emphasis added)

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. Vs. 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 Vs. 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 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 emphasis 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 the 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 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 initialled 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 CrPC should be incorporated with material particulars. Moreover, the documents in support of the said averments must filed on record.

26 Now coming back to the facts of the case, we have already quoted the order dated 7th October, 2000 which is a non-speaking order which does not satisfy the tests laid down by the Apex Court. There is non-compliance with the requirements of setting out compliance with Sub-Sections (1) and (3) of Section 154 of Cr.P.C and of producing supporting documents. Hence, the order is completely illegal.

27 We may also note here that there is an endorsement on the complaint that the verification of the complainant has been recorded. If verification was recorded, the impugned order is bad for that reason also, as the pre-cognizance stage was already over when the impugned order was passed. The learned counsel appearing for the first informant tried to submit that a copy of the Roznama or verification statement is not produced. It is not necessary for us to go into the aspect of recording of verification inasmuch as on merits, the impugned order is held to be illegal. Consequently the registration of the First Information Report is also rendered illegal.

28 In the city of Mumbai, there are large number of such Complaints filed concerning execution and implementation of several Rehabilitation Schemes which are being implemented in Mumbai. In view of the law laid down by the decision of this Court in *Shailesh*

Gandhi Vs State of Maharashtra and Others, the aggrieved party must first approach the High Power Committee. As directed by the said Judgment, if the High Power Committee finds that there is an element of criminality and particularly in cases of fraud, impersonation and like cases, the High Power Committee will ensure that the investigation will be handed over to the appropriate agency. As stated earlier, the Complaint in the present relies on so called draft prepared containing names of the eligible slum dwellers. If the complainant has any grievance about the names included in Annexure – II, he can always approach High Power Committee. The said Committee can direct setting of criminal law in motion if it finds element of criminality.

29 In view of the discussion made above, the impugned order dated 7th October, 2000 and consequently, the First Information Report deserves to be quashed and set aside. Considering the law laid down by us, it is not necessary to grant prayer (b). As far as prayer (c) is concerned, the Petitioners will have to file appropriate proceedings in accordance with law.

30 Accordingly, the Petition must succeed and we pass following order:-

ORDER

(i) Rule is made absolute in terms of prayer clause (a), which reads thus:

"(a) that this Hon'ble Court may be pleased to call for records and proceedings concerning C.C. No.37/SS/2000 from the court of the Ld. Metropolitan Magistrate's 10th Court at Andheri, Mumbai and after examining the legality, validity and/or propriety of the purported order dated 7.10.2000 and so also MECR No.21/15 dated 17.10.2015 registered with Oshiwara police station, Mumbai, the same may be quashed and set aside;"

(ii) It will be always open to the second Respondent to take out appropriate proceedings before the High Power Committee;

(iii) All contentions in that behalf are expressly kept open;

(iv) If the second Respondent files appropriate proceedings before the High Power Committee, we are sure that the High Power Committee will expeditiously deal with the same in accordance with law;

(v) Rule is made absolute on above terms;

(vi) We direct the Registrar (Judicial-I) to circulate a copy of this judgment to all the Judicial Magistrates and the Metropolitan Magistrates in the State;

(vii) Criminal Application No.486 of 2016 does not survive and is disposed of.

(ANUJA PRABHUDESSAI, J) **(A.S. OKA, J)**