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

Criminal Writ Petition No. 0279 of 2009

District : Dhule

1. Sanjay s/o Kashinath Agrawal,
   Age : 52 years,
   Occupation : Business,
   R/o. Gauri Bhavan, Ramwadi,
   Malegaon Road, Dhule,
   Dist. Dhule.

2. Ramakant s/o. Vasantlal Agrawal,
   Age : 42 years,
   Occupation : Business,
   R/o. 3073, Agra Road,
   Near Police Chowki,
   Dhule, Dist. Dhule.

.. Petitioners (No.01 - Original accused no.03 & No.02 - Original accused no.19)

versus

1. The State of Maharashtra.

2. Manik s/o. Vanaji Gawali,
   Age : 45 years,
   Occupation : Business,
   R/o. Mogali, Sakri Road,
   Dhule, Dist. Dhule.

.. Respondents (No.02 - Original complainant)

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Mr. Amol S. Sawant, Advocate, for the petitioners.

Ms. V.S. Choudhary, Additional Public Prosecutor, for respondent no.01.

Mr. K.C. Sant, Advocate, for respondent no.02.

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**CORAM : T.V. NALAWADE &
SMT. VIBHA KANKANWADI,JJ.**

DATE : 25TH OCTOBER 2018

JUDGMENT *[Per Smt. Vibha Kankanwadi, J.]* **:**

01. Present petition has been filed by invoking powers of this Court under Articles 226 and 227 of the Constitution of India and inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973, to challenge and quash the complaint bearing R.C.C. No. 788 of 2008, pending before Joint Judicial Magistrate (First Class), Dhule, as well as the order passed by the learned Magistrate on 04.03.2009. Petitioner no.01 is made as accused no.03 and petitioner no.02 is made as accused no.19. The said complaint has been filed by present respondent no.02. The parties are referred as accused persons and complainant hereinafter.

02. The complainant contended that he is member of accused no.01 - Bank. Accused nos.02 to 20 are the Directors, Chairman, Vice-President, etc. Accused no.19 is the Manager and accused no.20 is the Special Executive Officer. Accused no.21 is the auditor who has audited the accounts of the bank for the financial year 2006-07. The bank was established under the Maharashtra Co-operative Societies Act, 1960. Complainant had taken loan to the tune of Rs. 2,85,000/- on 28.08.2003 from the bank. It was to be repaid by the end of 28.08.2007. He could not repay it. At the time of disbursement of the loan, the bank had asked bank cheques from the complainant.

Accordingly he had issued cheques bearing no. 026027 and 026030 drawn on Dadasaheb Rawal Co-operative Bank Ltd., Dondaicha Branch, Dhule. It is alleged that out of those cheques, cheque no. 026030 was handed over by accused nos.2 to 20 to one Chandan Arjundas Pallani, thereby those persons have committed cheating. Complainant had issued legal notice dated 04.06.2005 to that effect and then lodged report with the police station. It is stated that accused no.21 audited the accounts for the year 2006-07 and it has been specifically stated that accused nos.02 to 20 have illegally and in unsafe manner distributed loans. Accused persons have granted those loans against the rules, thereby committed misappropriation of lakhs of rupees. Amount of Rs. 3,10,50,000/- has been distributed as loan without following due procedure. The names of those persons to whom the loan has been so granted have been given. The complainant contends that in all, the misappropriation is to the tune of Rs. 10,83,31,400/-. He, therefore, prayed for criminal action against all the accused persons.

03. After considering the contents of the complaint, the learned Magistrate had sent complaint for investigation under Section 156(3) of the Code of Criminal Procedure. It appears that around 04.03.2009, the report was received which was in the negative. It was stated that detailed investigation

was necessary which has not been carried out and, therefore, the matter was sent for re-investigation and sufficient time was granted. This order and the complaint itself has been challenged in this writ petition.

04. The application has been objected by the original complainant - present respondent no.02 by filing affidavit in reply. The contents of the said affidavit in reply are nothing but the repetition. Therefore, they have not been repeated again. It is stated that proper procedure had been adopted to know that the accused has committed offence. Audit report was considered by him and, therefore, he is of the opinion that let the investigation be carried out.

05. Heard learned Advocate Shri A.S. Sawant for the petitioners. Heard learned Additional Public Prosecutor Ms. V.S. Choudhary for respondent no.01 - State. So also, heard learned Advocate Mr. K.C. Sant for respondent no.02. Perused the documents on record produced by the petitioners as well as respondents no.01 and 02.

06. Learned Advocate appearing for the petitioners submitted that no specific role has been attributed to the present petitioners i.e. original accused nos.03 and 19. The Investigation Officer had already arrived at the conclusion that with some *mala*

fide intention, the complaint has been filed. Perusal of the transactions would show that there were no serious allegations regarding lapses on the part of the present applicants. The money which was involved in the bank was belonging to public. When it is stated to have been misappropriated, strong evidence was required. The perusal of the audit report would show that there were no lapses. Only it is stated that certain documents were not taken from the persons to whom the loan has been distributed. Specific conclusion was arrived at by the Investigation Officer, that no offence is transpiring against all the accused persons. The learned Magistrate ought to have given a detailed order as to why he is not accepting the report by the Investigation Officer. Directions were given to re-investigate which is not within the ambit of Judicial Magistrate (F.C.).

07. Per contra, it has been submitted on behalf of respondent no.02, that in fact, at this stage, there is absolutely no FIR lodged against the present applicants. That means, no C.R. is there for investigation and, therefore, the petition itself will not lie. If it is held that it is maintainable, then all those documents on which the applicants intend to rely were never before the learned Magistrate or before the Investigation Officer. Those documents cannot be relied by this Court in

writ petition. The case does not fall within the parameters laid in State of ***Haryana & others Vs. Ch. Bhajan Lal & others [AIR 1992 SC 604]***. He relied on the decision in ***State of Bihar and another etc. etc vs. Shri P.P. Sharma & another etc. etc. [AIR 1991 SC 1260]***, wherein it has been held thus :-

> *"'The annexures' to the writ petition challenging cvriminal proceedings against accused were neither part of the police-reports nor were relied upon by the investigating officer. These documents were produced by the accused before the High Court along with the writ petitions. By treating 'the annexures' and affidavits as evidence and by converting itself into a trial Court the High Court cannot declare the accused to be innocent and quashed the proceedings. The appreciation of evidence is the function of the criminal Courts. The High Court, under the circumstances, could not have assumed jurisdiction and put an end to the process of investigation and trial provided under the law."*

He also relied on the decision of learned Single Judge of Allahabad High Court in ***Abdul Aziz and others Vs. State of U.P. & others [2009 CRI.L.J. 1683]***, wherein it has been held thus :-

> *" At this stage of Section 156(3), Cr.P.C. any order made by Magistrate does not adversely affect right of any person, since he has got ample remedy to seek relief at appropriate stage by raising his objections. It is incomprehensible that accused cannot challenge the registrate of F.I.R. by police directly, but can challenge the order made by Magistrate for registration of same with the same consequences. The accused does not have any right to be heard before he is summoned by the Court under*

> *the Code of Criminal Procedure and that he has got no right to raise any objection till the stage of summoning and resultantly he cannot be conferred with a right to challenge the order passed prior to his summoning. Further, if the accused does not have a right to install the investigation, but for the limited ground available to him under the law, it surpasses all suppositions to comprehend that he possesses a right to resist registration of F.I.R."*

He further relied on the decision in ***Mohd. Yousuf Vs. Afaq Jahan (Smt) & another [(2006) 1 SCC 627]***, wherein the procedure to deal with an application or complaint to be sent under Section 156(3) of the Cr.P.C. has been laid down. He further relied on the decision in ***Hemant Yashwant Dhage Vs. State of Maharashtra & others [(2016) 6 SCC 273]***, wherein directions given by the learned Magistrate while sending the matter for investigation under Section 156(3) of the Cr.P.C. were upheld.

08. Learned Additional Public Prosecutor submitted that initially then Investigation Officer had come to the conclusion that no offence has been made out. Even the present Investigation Officer is also of the same view. The police papers have been made available for perusal.

09. The first and foremost fact that is required to be noted is that the complainant himself was a borrower from accused no.01 - Bank. His loan was outstanding and, therefore, by order dated 19.12.2005, the Deputy Registrar, Co-operative

Societies, Dhule, has passed an order to recover the said amount from the informant. Definitely, therefore, we will have to consider that there was some intention behind the action taken by the complainant. The documents to the extent of loan transaction by present complainant have been placed on record. He had preferred revision application under Section 154 of the Maharashtra Co-operative Societies Act, 1960, before the Divisional Joint Registrar, Co-operative Societies, Nasik Division, Nasik. The said revision application was not entertained. Thereafter, it appears that an application was filed before District Deputy Registrar, Co-operative Societies, Dhule, regarding transfer of property belonging to the complainant in favour of the Bank. Accordingly, order has been passed on 02.09.2008. Under such circumstance, the question is whether the FIR is *bona fide*. Certainly, the answer is in the negative.

10. Taking into consideration the allegations in the FIR and the statements of the witnesses, the then Investigation Officer had come to the conclusion that no offence is made out against any of the accused persons. It appears that before the final order is passed by the learned Magistrate, the present proceedings have been filed.

11. At one breath, the complainant is taking

advantage of the audit report and at another breath, he is criticizing the same. Learned Advocate appearing for the petitioners has taken us through the entire audit report which has been filed on record. If we peruse the report filed by the earlier Investigation Officer, we can see that he had also gone through the said report. Therefore, it cannot be stated that those documents which were not before the police are tried to be relied by the petitioners in this petition. Though it has been stated by the auditor that certain compliances have not been before sanctioning or disbursing the loan amount, yet ultimately the auditor who had conducted the audit, had come to the conclusion that there is no misappropriation. The basic question, therefore, arises is, what prejudice has been caused due to the complainant. When he himself is a borrower, he cannot point out the defects in the audit report in order to show that with criminal intention or by conspiracy, amount has been misappropriated from the bank. How the bank has been made as accused, is also a question under the said circumstance. We need not go much deep into the audit report because the appropriate authority was supposed to take action on the basis of any lapses were there. Those loan transactions are stated to have been cleared by the concerned borrowers. The ratio laid down in the above said authorities relied by respondent no.02 cannot be disputed. However, those ratios are not applicable to the facts of this case. Definitely, the writ petition was maintainable. What has been held to be not maintainable is an application exercising power under Section 482 of the Cr.P.C. Here, both the sections have been invoked for filing the writ petition.

12. It is to be noted that a negative report was produced before the learned Magistrate stating that offence appears to have not been made out. Without discussing in detail, as to what are the lacunas and on which point, further investigation is required, a cryptic order has been passed by the learned Magistrate. Learned Magistrate cannot order re-investigation. Definitely, there is difference between re-investigation and further investigation. Even if for the sake of arguments it is accepted that such power was available with the learned Magistrate, it appears that the present Investigation Officer is also of the same view. A positive finding has been arrived at by the Investigation Officer that the complaint has been filed with mala fide intention by the complainant as he himself is a borrower and the loan amount is still outstanding from him. Therefore, case is made out to exercise our powers under Articles 226 and 227 of the Constitution of India, to quash and set aside the complaint and to set aside the order.

13. Hence, the following order :-

(a) The criminal writ petition is allowed.

(b) Relief is granted in terms of prayer clause "B".

(c) Rule made absolute in the above terms.

(Smt. Vibha Kankanwadi)
JUDGE

(T.V. Nalawade)
JUDGE

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