

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

Criminal Writ Petition No. 01133 of 2018

District : Aurangabad

Pramod s/o. Hari (Haribhau)
Khairnar,
Age : 53 years,
Occupation : Business,
Proprietor of Marathwada
Construction Pvt. Ltd.,
Hariprasad Complex,
Plot No.60,
Dashmeshnagar, Aurangabad.

.. Petitioner
(Original
accused)

versus

1. The State of Maharashtra,
Through Police Station,
Satara,
Taluka & Dist. Aurangabad.

2. Shamuvel s/o. Madhukar Shinde,
Age : 49 years,
Occupation : Electrician,
R/o. Ashanagar,
In front of Pandit Jawaharlal
Neharu Mahavidyalay,
Shivajinagar, CIDCO,
Scheme - 12th,
Aurangabad.

.. Respondents
(No.02 -
Original
complainant)

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Mr. V.P. Latange, Advocate, for the petitioner.

*Mrs. P.V. Diggikar, Additional Public Prosecutor,
for respondent no.01.*

Mr. G.J. Pahilwan, Advocate, for respondent no.02.

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

DATE : 11TH SEPTEMBER 2018.

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

01. Rule. Rule made returnable forthwith. By consent, heard finally.

02. Present writ petition is preferred under Articles 226 and 227 of the Constitution of India as well as under Section 482 of the Code of Criminal Procedure, 1973, for quashing the first information report bearing Crime No. 0287/2018, registered with Police Station, Satara, Taluka & District Aurangabad, for offences punishable under Sections 323, 324, 504, 506 of the Indian Penal Code and Section 3(1)(x) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 [**For short, "Atrocities Act"**].

03. Respondent no.02 is the informant who had filed Criminal Misc. Application No. 35 of 2017 before the District & Sessions Court, Aurangabad, against the present petitioner. It was alleged in the said complaint, that accused is a builder by profession and informant is a labour doing electric fitting work. The informant used to do electric fitting work in the flats constructed by accused. Accused has not given the due amount to the informant

and avoided on one or the other pretext. The total amount of Rs. 10,61,365/- is outstanding and, therefore, he issued legal notice to the accused on 27.06.2016. Accused refused to accept the notice and then he had threatened the respondent no.02 on mobile. The informant had gone to the police and at that time, non-cognizable offence was registered. Accused had then started work on 12.07.2016 and 13.07.2016 which was opposed by the informant. At that time, accused gave a telephone call to the informant and abused in the name of accused. He uttered "मांगट्या जास्त माजलास का ? मला वकीला माफत नोटीस पाठवतो, मी तुझे पैसे देणार नाही, तुला काय करायचे ते करून घे". When informant went to police, police avoided to take the complaint. Thereafter, informant was informed through one Avinash Patil on 26.08.2016, that the measurement of the work done by the informant would be done and then he can take his amount. Therefore, informant went along with his friends. At that time, again accused had abused him in the name of caste. His friend Dnyaneshwar Ghorpade was seriously injured in the incident of assault. In spite of the same, police refused to take the first information report. He had also given a reminder to the Police Commissioner, Aurangabad. However, it was informed to him, that the dispute is of civil nature and, therefore, he should knock the doors of the civil court. He had, therefore, filed Criminal Application No. 2837 of 2016 before Judicial Magistrate (F.C.),

Aurangabad. However, that proceedings was disposed of on the ground that the jurisdiction lies with Special Court. Hence, the said complaint was filed with Special Judge i.e. Additional Sessions Judge, Aurangabad.

04. Taking into consideration the complaint and hearing the complainant, the learned Special Judge by his order dated 04.02.2017, directed the police station to investigate / make enquiry under Section 202 of the Code of Criminal Procedure. It appears that the police had made enquiry and a negative report has been given on 01.04.2017. Thereafter, the Special Judge has taken evidence of PW 01 Shamuvel Madhukar Shinde, PW 02 Dnyaneshwar Ambadas Ghorpade, PW 03 Prakash Vivhal Isarwade, PW 04 Dipak Ashok Gaikwad. After perusing the same, it appears that an order has been passed by the learned Special Judge on 26.04.2018, sending application for investigation under Section 156(3) of the Cr.P.C. Police Inspector, Satara Police Station was directed to register the crime against the accused. Enquiry and investigation was directed to be made and to file charge-sheet or report or otherwise. On the basis of said order, FIR vide Crime No. 0287 of 2018 came to be registered on 14.08.2018.

05. The petitioner contends that the allegations in the complaint do not disclose any offence. The

complaint or the FIR is the outcome of *mala fide* intention on the part of respondent no.02. The report of the Assistant Commissioner has not been taken into consideration by the learned Sessions Judge. A detailed enquiry was made under Section 202 of the Cr.P.C. The allegations are made only to blackmail the petitioner who is a contractor. The dispute is in respect of payment of Rs. 10,00,000/- which is of a civil nature. Therefore, he prayed for quashment of the FIR.

06. Respondent no.02 has filed his affidavit in reply and contended that the learned Sessions Court by passing an order on 04.02.2017, had called the report under Section 202 of the Cr.P.C. and the negative report was given. However, thereafter evidence has been led and, therefore, the learned Sessions Judge has come to the conclusion that case is made out for sending it for investigation. The police authorities had not registered the offence deliberately and, therefore, he had no other option.

07. Heard learned Advocate Mr. V.P. Latange for the petitioner. Heard learned Additional Public Prosecutor Mrs. P.V. Diggikar for respondent no.01. So also, heard learned Advocate Mr. G.J. Pahilwan for respondent no.02. All the advocates have argued in support of their respective contentions.

08. At the outset, it can be seen that in view of the provisions under the Atrocities Act, the Special Court has power to take cognizance of any complaint. Therefore, the Special Judge while dealing with any case under the Atrocities Act, would have all the powers of a Magistrate, as they are under Cr.P.C. Here, in this case, immediately after the complaint was filed, the learned Sessions Judge had called upon the police to make enquiry under Section 202 of the Cr.P.C. That means, he had intended to take the procedure under Section 200 and succeeding sections in Chapter XV of the Code. After the negative report had come, it has not come on record that another application challenging the negative report was filed by the complainant. However, it appears that thereafter, statements of four witnesses including that of the informant was taken. It is specifically stated on the depositions that those depositions are taken prior to the issuance of process. That means, the procedure in the part of Section 202 of the Cr.P.C. regarding enquiry to be made by the Magistrate / Special Court himself were taken up. Here, the observations of the Hon'ble Apex Court in the case of *Devarapalli Lakshminarayana Reddy & others Vs. Narayana Reddy & others* [AIR 1976 SC 1672] can be relied upon, wherein it has been observed thus :-

" The power to order police investigation under Section 156(3) is different from the power to direct

investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). "

The Hon'ble Apex Court has further observed thus :-

" The expression "taking cognizance of an offence" by the Magistrate has not been defined in the Code. The ways in which such cognizance can be taken are set out in clauses (a), (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If instead of proceeding under Chapter IX he has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence."

09. The said difference between the enquiry

under Section 202 of the Cr.P.C. and the power of the Magistrate under Section 156(3) of the Cr.P.C. was considered by the Hon'ble Apex Court in the case of *Ramdev Food Products Pvt. Ltd. Vs. State of Gujarat* [AIR 2015 SC 1742], wherein it is observed thus :-

" The power under Section 202 is of different nature. Report sought under the said provision has limited purpose of deciding "whether or not there is sufficient ground for proceeding". If this be the object, the procedure under Section 157 or Section 173 is not intended to be followed. Section 157 requires sending of report by the police that the police officer suspected commission of offence from information received by the police and thereafter the police is required to proceed to the spot, investigate the facts and take measures for discovery and arrest. Thereafter, the police has to record statements and report on which the Magistrate may proceed under Section 190. This procedure is applicable when the police receives information of a cognizable offence, registers a case and forms the requisite opinion and not every case registered by the police.

Thus, the direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone issuance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightway direct investigation, such a direction is issued. Cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed". Subject to these broad guidelines

available from the scheme of the Code, exercise of discretion by the Magistrate is guided by interest of justice from case to case."

10. Thus, it is to be noted that the order of directing the investigation to be made under Section 156(3) of the Cr.P.C. passed by the learned Magistrate itself was illegal.

11. The learned Sessions Judge did not consider while passing the order for sending the case under Section 156(3) of the Cr.P.C., that he had already passed order under Section 202 of the Cr.P.C. and a report has been submitted by the Assistant Police Commissioner, Usmanpura Division, Aurangabad. The statements recorded during the course of the said enquiry / investigation ought to have been considered by the learned Sessions Judge. The statements which have been recorded by the learned Special Judge of the four witnesses is nothing but the reiteration of the complaint and it appears that their statements were also recorded before the police. When the FIR is filed on the basis of such a defective order, it cannot be allowed to sustain. It is to be noted that there was a dispute regarding payment between the complainant and the accused and, therefore, the possibility of implication ought to have been considered by the learned Special Judge. Hence, case is made out to exercise powers of this Court under Section 482 of the Cr.P.C. as well as under Articles

226 and 227 of the Constitution of India.

12. Hence, the following order :-

(a) The criminal writ petition is allowed.

(b) The first information report bearing Crime No. 0287/2018, registered with Police Station, Satara, Taluka & District Aurangabad, for offences punishable under Sections 323, 324, 504, 506 of the Indian Penal Code and Section 3(1)(x) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989, to the extent of the present petitioner, is hereby quashed and set aside.

(c) Rule made absolute in the above terms.

(Smt. Vibha Kankanwadi)
JUDGE

(T.V. Nalawade)
JUDGE

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Bhagwan
Govindrao
Puranik

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signed by
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