

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1458 OF 2017
with
CRIMINAL APPLICATION NO. 474 OF 2018

Harjeetsingh S/o Tirathsingh Sawhney,
Age: 55 years, Occ. Business,
R/o H.No. 5-1-55/1-P1, Osmanpura,
Aurangabad. ... **Petitioner**

Vs.

1. The State of Maharashtra
Through the Superintendent of Police,
Aurangabad.
2. Paramjitsingh S/o. Tirathsingh Sawhney,
Age: 51 years, Occ. Nil,
Besides NCC Canteen, Osmanpura,
Aurangabad. ... **Respondents**

Mr. Harjeetsingh S/o Tirathsingh Sawhney, Party in person.
Mr. A.R. Kale, A.P.P. for the Respondent-State.
Mr. Pratik Rathod h/f. A.R. Rathod, Advocate for Respondent No.2

CORAM : MANGESH S. PATIL, J.

DATE OF RESERVING THE JUDGMENT : 06.08.2018
DATE OF PRONOUNCING THE JUDGMENT : 04.09.2018

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith.

2. The learned A.P.P. waives service for the respondent no.1.
The learned advocate for the respondent no.2 also waives the service.
With the consent of both the sides the matter is heard finally at the stage

of admission.

3. Shortly stated the facts leading to the filing of the writ petition may be summarised as under:

The petitioner lodged the F.I.R. No. I-3/2011 on 22.10.2011 with Jinsi Police Station, Aurangabad for the offence punishable under Section 379 of the I.P.C. alleging that he had parked his scooter no. MH-20-AV-911 in front of Sant Jwaladas Math, Kailasnagar, however it was stolen along with important documents in respect of Court proceedings kept in the dickey. The concerned Police Head Constable Mr. Ware conducted the investigation and submitted a report to the concerned Judicial Magistrate stating that it was a false complaint and the scooter was found parked near the house of the petitioner. The learned Magistrate accepted the report by the order dated 31.03.2011 and the proceeding was closed. Being aggrieved and dissatisfied by such closure of the case the petitioner preferred criminal revision *inter alia* on the ground that without extending any opportunity of being heard the case was closed behind his back. The learned Additional Sessions Judge quashed and set aside the order passed by the Magistrate accepting the 'B' summary report and directed it to be considered after extending him an opportunity of being heard.

Accordingly, the petitioner was heard and the learned Magistrate refused to accept the 'B' summary report and passed an order to that

effect on 07.01.2013.

It appears that since thereafter neither the Magistrate monitored and insisted for any further report from the Investigating Officer nor did the latter seem to have taken any steps after the 'B' summary report was rejected.

The petitioner then filed a private complaint R.C.C. No. 2039/2015 before the Magistrate against the respondent no.2 herein, the concerned Investigating Officer and two more persons alleging that in fact the scooter was stolen by the accused nos.1 to 3 and so also they had stolen the original cheques, bank memos and notices which were kept in the dicky of the scooter. He alleged that during the proceedings initiated by his father against the accused nos.1 and 2 during the course of evidence, these accused had come out with a defence and had led evidence saying that before the father of the petitioner who was the original complainant died he had settled the dispute between them out of Court and had handed over the original cheques, bank memos and notices to them. Not only that but even they had led the evidence and produced these original documents in those criminal cases. As a result of such testimonies by them during those criminal proceedings it was transpired that those documents which were kept in the dicky of the scooter which was stolen were in their custody. Since the accused no.3 i.e. the respondent no.2 who happens to be his brother and had testified

in the criminal proceedings under Section 138 of the Negotiable Instruments Act supporting the accused nos.1 and 2, the petitioner also suspected the respondent no.2 to have stolen the scooter in connivance with the accused nos.1 and 2. He therefore sought to prosecute all the accused under Section 379 of the I.P.C.

It appears that the learned Magistrate recorded the statement of the petitioner under Section 200 of the Cr.P.C. and by the order dated 09.02.2016 directed the process to be issued against the accused nos. 1 to 3 for the offence punishable under Section 379 of the I.P.C.

Feeling aggrieved by such direction for issuance of process the respondent no.2 preferred Criminal Revision No. 68 of 2016 in the Court of Sessions Judge at Aurangabad. By the impugned order the learned Additional Sessions Judge quashed and set aside the order of the Magistrate dated 09.02.2016 directing the process to be issued and further directed the complaint to be restored to its original stage and directed the parties to appear before the concerned Magistrate on 07.08.2017.

It is necessary to note that by the impugned order, the learned Additional Sessions Judge concluded that the order was illegal as no list of witnesses was provided along with the complaint as is mandated by Sub-section 2 of Section 204 of the Cr.P.C.

He also concluded that since it was a complaint case in respect of which already a police report was pending inquiry, in view of Section 210 of the Cr.P.C., the Magistrate ought to have waited for the police report to be filed after rejection of the 'B' summary report.

4. The petitioner who appears in person submits that when he had lodged the F.I.R. in respect of theft of scooter and all the original cheques, bank memos and the notices were kept in the dickey of the scooter. He would point out that during seizure panchanama of the scooter the dickey was found empty. He would further point out that in the testimonies of the respondent no.2 and the other two accused in proceedings filed under Section 138 of the Cr.P.C. they have specifically come out with a case that all these original cheques, bank memos and the notices were in their custody as, according to them, those matters were amicably settled by the other two accused with the father of the petitioner and the respondent no.2. He would further submit that in view of such statements on oath by the respondent no.2 and the other two accused they have clearly admitted that the original documents were in their custody. Since he had alleged about those having been stolen along with the scooter and the fact of custody of documents was only revealed subsequent to the filing of the F.I.R., a fresh cause had accrued to him to lodge the successive complaint.

5. The petitioner also submitted that since after rejection of

the 'B' summary report on 07.01.2013, no further investigation was conducted and even for this reason he had no choice but to file a private complaint. Therefore no fault can be found with him in filing the successive complaint.

6. The petitioner would then submit that since there was sufficient material before the Magistrate to direct the process to be issued, there was no apparent perversity or arbitrariness in the order passed by the Magistrate and the learned Additional Sessions Judge could not have invoked the revisional powers under Section 397 of the Cr.P.C. In the absence of sufficient and cogent reasons the learned Additional Sessions Judge has exceeded the powers and has passed an illegal order which may be quashed and set aside restoring the order passed by the Magistrate.

7. The learned advocate for the respondent no.2 strongly opposed the petition. He submitted that the complaint was devoid of any list of witnesses which is mandated by law and the illegality would go to the jurisdiction of the Magistrate. Similarly, in spite of having noted that it was a successive complaint, the learned Magistrate failed to resort to the procedure provided under Section 210 of the Cr.P.C. The complaint was filed beyond the period of limitation provided under Section 468 of the Cr.P.C. and ignoring all these defects the learned Magistrate directed the process to be issued. The order was clearly

arbitrary and capricious and was rightly interfered with by the learned Additional Sessions Judge.

8. I have carefully gone through the papers. By filing a separate Criminal Application No. 474 of 2018 the petitioner has sought to produce the copies of the documents particularly the papers of the investigation and the copies of the testimonies of the respondent no.2 and the other two accused recorded in the proceedings under Section 138 of the I.P.C. I do not find any impediment in allowing such documents to be perused which are relevant and would certainly help in deciding the writ petition.

9. Admittedly, the petitioner had lodged the F.I.R. alleging theft of the scooter. Conspicuously, though the details were not given in the F.I.R. he had vaguely referred to the loss of important Court documents which were kept in the dicky of the scooter. Admittedly, he has filed the present complaint alleging about theft of such documents which were kept in the dicky of the scooter which was stolen. Therefore, there cannot be any dispute about the fact that the present complaint is nothing but a second complaint in respect of the same crime.

10. It also stands admitted that the first crime was duly investigated and a 'B' summary report was submitted before the Magistrate. Meaning thereby that according to the Investigating Officer

there was material to show that the complaint was false and he had requested to close it. The Magistrate initially accepted the report by order dated 31.03.2011. The matter was taken to the revisional Court. It was remanded back for considering the report by the Magistrate after extending an opportunity to the petitioner to be heard. Accordingly, the Magistrate reconsidered the matter and by the order dated 07.01.2013, refused to accept the 'B' summary report.

11. It is important to note that going by the scheme of the Cr.P.C. and particularly that of Chapter XII to XVI whenever report is submitted by the Investigating Officer to a Magistrate either under Section 169 or 173 of the Cr.P.C., the report is not binding on the Magistrate and in spite of a negative report he has jurisdiction to direct further investigation or take cognisance of the offence and proceed further in accordance with law. Though the learned Magistrate had refused to accept the 'B' summary report, by the order dated 07.01.2013, it seems that nothing further had happened. Neither the Magistrate directed further investigation or took cognizance himself under Section 190 of the Cr.P.C. and even the Investigating Officer concerned did not solicit any directions once his 'B' summary report was rejected. Whatever may be the reason, it is apparent that since the date of passing of the order dated 07.01.2013 no further steps were taken by the Magistrate or the Investigating Officer.

12. In view of such state of affairs, at the first blush the submission of the petitioner that he had no option but to file the second complaint does appear to be attractive. However, the fact remains that inspite of the fact that the earlier crime was still pending awaiting further progress in view of rejection of the summary report by the learned Magistrate, the petitioner instead of filing the second complaint could have insisted for further progress in the earlier matter.

13. Be that as it may, it is important to note that by the impugned order the learned Additional Sessions Judge has simply pointed out couple of irregularities in the form of absence of any list of witnesses which is mandatory in view of Sub-section 2 of Section 204 of the Cr.P.C. and the failure on the part of the Magistrate in not taking recourse to Section 210 of Cr.P.C. It is precisely for these reasons that the learned Judge has not dismissed the complaint under Section 203 of the Cr.P.C. albeit he allowed the revision and simply directed the order for issuance of process to be quashed and set aside and relegated the matter to its original stage before the Magistrate. Meaning thereby that the learned Judge impliedly directed the Magistrate to consider the matter afresh in the light of the provisions of Sub-section 2 of Section 204 and Section 210 of the Cr.P.C. It is precisely for these reasons that the learned Judge also directed the parties to appear before the learned Magistrate. Needles to state that though the impugned order directs the parties to appear before the Magistrate, bearing in mind the fact that he

was setting aside the order directing process to be issued against the respondent no.2, the latter could not have been directed to appear before the Magistrate. To this extent the learned Judge has committed an error in directing even the respondent no.2 to appear before the Magistrate. Therefore, to this extent the impugned order is not sustainable in law albeit the respondent no.2 has not taken exception to such a direction.

14. To sum up, there is no illegality committed by the learned Additional Sessions Judge in allowing the revision and setting aside the order passed by the Magistrate directing the process to be issued and restoring the case to its original stage, expecting the Magistrate to follow the procedure as demonstrated therein. The petitioner has not been put to any prejudice whatsoever by the impugned judgment and order and the writ petition is liable to be dismissed.

15. The writ petition is dismissed. The rule is discharged.

16. The criminal application also stands disposed of.

(MANGESH S. PATIL, J.)