

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 46 AND 110 OF 2017
CRIMINAL WRIT PETITION NO. 46 OF 2017

Mr. Trajano D'Mello,
Social Activist of major
age, Indian Nationation,
resident of House
No.186/B-4, Peddem
Mapusa, Bardez-Goa. ... Petitioner

V e r s u s

1. STATE, through the
Public Prosecutor, High
Court of Bombay at Goa,
Panaji-Goa.

2. The Police Inspector,
Porvorim Police Station,
Porvorim, Bardez, Goa.

3. Mr Dilip Dnyaneshwar
Parulekar,
H.No.718, Dhanwadda,
Saligao, Bardez-Goa. ..Respondents

Shri Rohit Bras De Sa, Advocate for the Petitioner.
Shri Mahesh Amonkar, Addl. Public Prosecutor for the
Respondent Nos.1 and 2.
Shri S. S. Kantak, Senior Advocate with Mr. Abhijeet Kamat
and Deepak Gaonkar, Advocates for the Respondent No.3.

AND
CRIMINAL WRIT PETITION NO. 110 OF 2017

Shri Dilip Parulekar,
53 years of age, married,
Indian National, r/o. H.
No.353, Dhanwado, ... Petitioner

Saligao, Bardez-Goa.

V e r s u s

1. Mr. Trajano D' Mello,.
Social Activist, Major of
age, R/o. H.No.186/B-4,
Peddem, Mapusa, Bardez-
Goa.

2. STATE OF GOA,
through its Public
Prosecutor, Panaji-Goa.

3.THE POLICE INSPECTOR,
Porvorim Police Station,
Porvorim, Bardez, Goa.

..Respondents

Shri S. S. Kantak, Senior Advocate with Mr. Abhijeet Kamat
and Deepak Gaonkar, Advocates for the Petitioner.

Shri Rohit Bras De Sa, Advocate for the Respondent No.1.

Shri Mahesh Amonkar, Addl. Public Prosecutor for the
Respondent Nos.2 and 3.

CORAM: Nutan D Sardessai, J.

Reserved for Judgment on : 9 March 2018
Judgment Pronounced on : 4 May 2018

JUDGMENT

The Petitioner herein by invoking the jurisdiction of this Court in terms of Articles 226 and 227 and Section 482 of Cr.P.C. has challenged the Order dated 04.10.2016 passed by the learned Additional Sessions Judge, Mapusa, dated 04.10.2016 pursuant to which he had allowed the Petition and

quashed and set aside the order passed by the learned Magistrate and remanded the matter to the Magistrate to re-hear the parties and to pass order in terms of law. It is in this petition, that preliminary objections were raised to its very maintainability and it is on that count that the matter is being heard and decided appropriately.

2. Shri S. S. Kantak, learned Senior Advocate came to be heard on behalf of the respondent no.3, whose contention was that the complaint was filed by the petitioner against four named persons. An application was moved at his instance under Section 156(3) Cr.P.C. in which again there was a reference to the named persons in the complaint not being proceeded with and seeking the intervention of the learned JMFC to direct the respondent no.1 to carry out the investigation in his complaint in terms of Section 156(3) Cr.P.C. The learned JMFC had passed the order dated 14.10.2015 ? (15.10.2015) directing the incharge of the Porvorim Police Station to register the FIR in terms of the complaint filed by the petitioner and to proceed in accordance with law. The learned Addl. Sessions Judge by his Order dated 04.10.2016 had quashed and set aside this order passed by the learned JMFC. Therefore, it was incumbent upon the petitioner to have joined the other three persons named in the

complaint as the party-respondents to this petition. He placed reliance in **Raghu Raj Singh Rousha vs. Shivam Sundaram Promoters Private Limited & anr.** [(2009) 2 SCC 363] and **Manharibhai Mohanbhai Patel & Ors.** [(2012) 10 SCC 517]. The powers under section 482 of the Cr.P.C. had to be exercised to secure the ends of justice and any order passed in favour of the three accused would defeat the ends of justice. The Petition had therefore to be dismissed.

3. Shri Rohit Bras De Sa, learned Advocate for the petitioner submitted at the outset that Section 156(3) Cr.P.C. was contained in Chapter XII and submitted that the judgment in **Raghu Raj** (supra) was clearly distinguishable. The Judgment in **Manharibhai** (supra) dealt with Chapter XV and in any event both these judgments were in terms of Chapter XV of the Code of Criminal Procedure where the Magistrate had taken cognizance and were clearly distinguishable. He relied on the order of a learned Single Judge in **State vs Shri Sainath Shivram Jhalmji** [Criminal Revision Application No.4/2009] in support of his case. It was his contention next that in terms of the Goa Amendment to Section 156(3) Cr.P.C., a notice was required to be given to the State and there was no right in the accused to be heard. It was his

contention therefore that the preliminary objections had to be dismissed.

4. In **Raghu Raj Singh** (supra), the question at large before the Hon'ble Apex Court was whether the High Court in exercise of its jurisdiction under Section 397 and 401 of the Code of Criminal Procedure could pass an order in the absence of the accused persons in the facts and circumstances of the case. In the brief facts, the respondent no.1-Company had filed a complaint in the Court of the Additional Chief Metropolitan Magistrate, New Delhi under Section 200 of the Code accompanied by an application under Section 156(3) of the Code. The Metropolitan Magistrate in whose Court the complaint Petition was transferred, refused to direct investigation in the matter by the Station House Officer in terms of Section 156(3) of the Code stating that all the facts were within the knowledge of the complainant, both the complainant and the accused have been dealing with one another by way of contractual agreement and an MoU was entered between them as alleged in the complaint. There appeared to be some dispute between the parties in respect of the immovable properties and the payments pertaining to the sale of the same and the complainant submitted that the accused had cheated him. In the facts and circumstances of

the case, there was no requirement of collection of evidence by the police at that stage as the complainant could lead his evidence and in view thereof dismissed the application under Section 156(3)Cr.P.C. and proceeded to deal with the complaint under Section 200 Cr.P.C. and subsequent provisions. Aggrieved thereby, the respondent no.1 filed a revision before the High Court impleading the State only as a party which on the very first day of hearing passed the order that it was agreed that the impugned order be set aside with a direction to the learned Magistrate to examine the matter afresh after calling for a report from the police authorities and after hearing the learned Counsel for the parties. The police authorities were directed to hold a preliminary inquiry on the basis of the complaint made by the petitioner and submit a report to the learned Magistrate and in that view of the matter disposed off the petition giving rise to the appeal at the instance of the appellant-accused.

5. In **Raghu Raj** (supra) it was contended on his behalf that having regard to the fact that the complaint was filed in terms of Section 200 of the Code read with Section 156(3) thereof and as the learned Magistrate had directed the respondent no.1 to produce witnesses so as to enable it to proceed in terms of Chapter XV of the Code, the revision

application could not have been disposed off without notice to him. Quite on the contrary it was contended on behalf of the respondent no.1 that the Criminal Revision Application having been filed at the pre-cognizance stage, the accused had no right to be heard. The Apex Court did not find favour with the contention on behalf of the respondent no.1 that the accused had no right to be heard and that he was not prejudiced and in any event at the pre-summoning stage he was not an accused. The Apex Court considered sub-section (2) of Section 401 of the Code which referred not only to an accused but also to any person and if he is prejudiced to be required to be heard. The learned Metropolitan Magistrate had refused to exercise its jurisdiction under Section 156(3) of the Code. Had an opportunity of hearing been given to the appellant, he could have shown that the revision application was not maintainable and/or even otherwise no case had been made out for the interference with the impugned judgment. The Apex Court was also seized of the fact that the learned Magistrate had taken cognizance, had applied its mind and refused to exercise jurisdiction under Section 156(3) of the Code. In that view of the matter, it was held that the impugned judgment could not be sustained and set it aside directing the High Court to implead the appellant as a party in the Criminal Revision Application and to hear the same afresh. This judgment unlike

the contention of Shri Rohit Bras De Sa, applies to the case at hand where the learned Magistrate had taken cognizance and directed the police to register an FIR in terms of the complaint dated 18.10.2014 of the petitioner and to proceed in accordance with law.

6. In **Manharibhai Kakadia** (supra) a similar question being the sole question which arose for consideration before a three Judge Bench of the Apex Court was whether a suspect is entitled to hearing by the Revisional Court in a revision preferred by the complainant challenging an order of the Magistrate dismissing the complaint under Section 203 of the Criminal Procedure Code. In the brief facts, the respondent no.1 had filed a complaint in the Court of the Chief Judicial Magistrate, Surat, CJM for short against the appellants alleging that they had pre-planned a conspiracy, created forged documents bearing signatures of the complainant and his family, used the documents as true and genuine and by making false representation obtained registration of Indoregency Cooperative Housing Society and by doing so the accused have caused financial loss and physical and mental agony to the complainant and his family members and have deceived the complainant and his family members by obtaining huge financial advantage by taking possession of

their property. The CJM in exercise of his powers under Section 202 of the Code directed an enquiry to be made by the Police Inspector into the allegations made in the complaint and submit his report within thirty days. The Investigating Officer investigated into the matter and submitted a 'C' Summary Report since in his opinion the dispute between the parties was of a civil nature and no offence was made out. The CJM accepted the 'C' Summary Report submitted by the Investigating Officer and in view thereof the respondent-complainant challenged the order in revision application filed under Section 397 read with Section 401 of the Code in the Gujarat High Court. The appellants having come to know of the criminal revision application made an application for joining them as the party respondents which application came to be dismissed by the learned Single Judge of the Gujarat High Court giving rise to the Appeal before the Apex Court.

7. In **Manharibhai Kakadia** (supra), it was contended on their behalf that the plain language of Section 401(2) of the Code entitled the appellants to be heard in the criminal revision application filed by the respondent no.1 challenging the order of the CJM as no order could be made to their prejudice or the other person unless he had had an opportunity of being heard under Section 401(2) of the Code.

The result of acceptance of the 'C' Summary Report is that criminal proceedings launched by the complainant have come to an end and if the revision application preferred by the complainant is accepted, that would have the effect of revival of the complaint and setting the criminal process back to motion which would be definitely prejudicial to the appellants and before any such prejudicial order is passed, the appellants ought to be heard. Besides, cognizance has been taken by the CJM which was not equivalent to the issuance of process. It was contended on behalf of the respondent no.1 complainant that the CJM had not taken cognizance of the offence and the appellants had no role to play at any stage prior to the issuance of process. Reference was made to certain provisions including Chapter XIV, XV and XVI and also Section 156, 173, 190 and 202 of the Code. The respondent no.1 having filed the revision petition against the dismissal of the complaint at a pre-cognizance stage, the appellants did not have any right of hearing under the provisions in terms of Section 401(2) of the Code.

8. In **Manharibhai Kakadia** (supra) the Hon'ble Apex Court in order to appreciate the rival submissions examined certain provisions of the Cr.P.C. namely the power of the Police Officer to investigate cognizable cases in terms of

Section 156, the cognizance of offence by Magistrate under Section 190, the examination of the Complainant under Chapter XV of the Code, the postponement of the issue of process under Section 202 and the dismissal of the complaint in terms of section 203 Cr.P.C. It also dealt with the High Court's power of revision in terms of Section 401 Cr.P.C. sub-section (2) whereof clearly reads as :

"No order under this Section shall be made to the prejudice of the accused or other person unless he had an opportunity of being heard either personally or by pleader in his defence."

9. The Hon'ble Apex Court considered various judgments cited for and against the contentions raised on behalf of the appellants and considered the question in the case where the complaint had been dismissed by the Magistrate under Section 203 post-cognizance stage and pre-issuance of process, whether on challenge to the legality of the order of dismissal of complaint being laid by the complainant in a revision application before the High Court, the persons who are arraigned as accused in the complaint have a right to

be heard. The Hon'ble Apex Court after considering a host of judgments relief for and against the said contentions held at para 46 that the legal position is fairly well settled that in the proceedings under Section 202 of the Code the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, upto the stage of issuance of process, the accused cannot claim any right of hearing. Section 202 contemplates postponement of issue of process where the Magistrate is of the opinion that further inquiry into the complaint either by himself is required and he proceeds with the further inquiry or directs an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. If the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint under Section 203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revisions application preferred by the complainant against the order of the dismissal of the complaint. Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at any stage of the proceedings until the issuance of process under Section 204, yet in Section 401(2) of the Code provided that no order

in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or any other person unless he had an opportunity of being heard either personally or by pleader in his own defence. The Apex Court considered three expressions namely "prejudice", "other person" and "in his own defence" in Section 401(2) being significant for understanding their true scope, ambit and width and in that context referred to Black's Law Dictionary, Webster Comprehensive Dictionary and the Law Lexicon by P. Ramanatha Aiyar and that the expression "in his own defence" comprehends, inter alia, for the purposes of Section 401(2) in defence of the order which is under challenge in revision before the Sessions Judge or the High Court.

10. In **Manharibhai Kakadia** (supra), the Hon'ble Apex Court further held at para 48 as under :

"48. In a case where the complaint has been dismissed by the Magistrate under Section 203 of the Code either at the stage of Section 200 itself or on completion of inquiry by the Magistrate under Section 202 or on receipt of the report from the police or from any person to whom

the direction was issued by the Magistrate to investigate into the allegations in the complaint, the effect of such dismissal is termination of complaint proceedings. On a plain reading of sub-section (2) of Section 401, it cannot be said that the person against whom the allegations of having committed offence have been made in the complaint and the complaint has been dismissed by the Magistrate under Section 203, has no right to be heard because no process has been issued. The dismissal of complaint by the Magistrate under Section 203 – although it is at preliminary stage – nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed crime. Once a challenge is laid to such order at the instance of the complainant in a revision petition before the High Court or Sessions Judge, by virtue of Section 401(2) of the Code, the suspects get right of hearing before revisional court although such order was passed without their participation. The right given to “accused” or “the other person” under Section 401(2) of

being heard before the revisional court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under Sections 200, 202, 203 and 204. In the revision petition before the High Court or the Sessions Judge at the instance of complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of express provision contained in Section 401(2) of the Code. The stage is not important whether it is pre-process stage or post process stage."

11. The Hon'ble Apex Court considered the judgment of a two-Judge Bench in Raghu Raj Singh Rousha and in view of that matter held that the impugned order could not be sustained and was liable to be set aside and the appellant's application for impleadement in the criminal revision petition stood allowed. This judgment too amply substantiates the contention of Shri Kantak, learned Senior Advocate appearing for the respondent no.1 that the complaint was lodged against

only named persons including the respondent no.1. An offence was directed to be registered against them in terms of the complaint under Section 156(3) Cr.P.C. and the order having been reversed by the Additional Sessions Judge in revision, the named persons excluding the respondent no.1 were required to be heard in terms of Section 401(2) of the Cr.P.C.

12. **Sainath Shivram Jhalmi** (supra) was a criminal revision preferred by the State against the order passed by the Addl. Sessions Judge, Panaji who confirmed the order passed by the Magistrate under Section 156(3) of the Cr.P.C. In the brief facts, Jhalmi had filed a complaint under Section 30 of the Goa Daman and Diu Ancient Monuments and Archaeological Sites and Remains Act 1978, Section 3 of the Prevention of Damage to Public Property Act and Section 3 of Defacement of Public Property Act as well as under Section 427 of the IPC. It was alleged in the complaint that the accused no.1 was demolishing and defacing the entire protected monument of Reis Magos Fort by causing immense damage to the said fort and also destroyed walls and have changed the layouts etc. It was also his grievance in the complaint that the accused no.3 had granted permission to the accused no.1 to carry out the work and that on account of the

damage being caused to the protected monument, he was compelled to institute a complaint proceedings before the Magistrate and as no heed was paid to the several letters written by him to the concerned authorities. The learned Magistrate, before whom the complaint case was filed, passed a detailed order under Section 156(3) of the Code of Criminal Procedure. However, the learned Single Judge found favour with the contention of the learned Counsel for the Applicant-State and the judgment of the Apex Court and held that the bar of second revision under Section 397 did not apply in the instant case. The material question which was at large was whether the State had a right to challenge the order passed by the Magistrate directing the complaint lodged before him to be send to the police under Section 156(3) of the Cr.P.C. In that context, the learned Judge observed that two things needed to be considered while answering the question. The first was whether the State who is actually not a party could challenge the order and secondly if the accused named in the complaint case or somebody on their behalf could be heard by the Court before actually the offence is registered by the Police. The learned Single Judge noticed that four persons were arraigned as accused in the complaint case filed by the respondent and found that the accused no.1 was not at all a citizen of India, the accused no.2 was a private citizen and the accused no.3

was the Director of Archives and Archaeology and the accused no.4 were workers at the site and the State was not even a party to the complaint proceedings and therefore apparently had no right to come in revision before the Court for espousing the cause of the accused nos.1, 2 and 4. The learned Judge considered the scope of the complaint received by a Magistrate in terms of Section 200 Cr.P.C. his powers to forward the complaint under Section 156(3) or to take cognizance under Section 200 and then to proceed under Section 202 to either make an inquiry himself or call for a report under Section 202 by postponing the issue of process and that an order passed by the Magistrate under Section 156(3) Cr.P.C. is before taking cognizance i.e. even before recording of the verification statement. In that view of the matter, the learned Single Judge observed that the Magistrate had not passed any order which could be said to affect either the accused or the State and such a right in them may arise only when a complaint is registered as an FIR and till then the accused has no right to be heard at all. The scope of Section 401(2) was not at all at large before the learned Single Judge and therefore this judgment is clearly distinguishable and cannot buttress the plea of the petitioner on any count whatsoever.

13. Shri Rohit Bras De Sa, learned Advocate for the petitioner had referred to the judgment dated 06.05.2016 in **Trajano D' Mello & anr. vs State of Goa and ors.** [PILWP Nos.15 and 16 2017], where the respondent no.1-State through Collector and the respondent nos.15 and 16 i.e. the North Goa Planning and Department Authority and Village Panchayat were directed to take immediate action to stop the unauthorised occupation of the premises with the named persons in accordance with law. This judgment has no direct bearing on the objections raised to the maintainability of this petition and therefore is of no consequence to the case of the petitioner. There is otherwise force in the contention of Shri Kantak, learned Senior Advocate that in case the order of the learned Additional Sessions Judge was set aside quashing that of the learned Magistrate, it would amount to a revival of the order of the learned Judicial Magistrate and the rights of the accused, the named persons in the complaint would be severely affected. They were bound to be heard and the petitioner having failed to implead them in the petition and earlier to seek their impleadment in the revision, they have been seriously prejudiced by the proceedings. Besides, the petitioner who had filed the petition more than a year back had not taken any steps to implead them as the party-

respondents and therefore in their absence the petition would not survive.

14. The preliminary objections are therefore allowed and the petitions are dismissed with no order as to costs.

NUTAN D. SARDESSAI J.