

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 243 OF 2019

1. Shashikala W/o Jagannath Mamadge
Age : 42 Years, Occ. Household
 2. Jagannath S/o Rama Mamadge
Age : 42 Years, Occ. Labour
Both R/o. Sawargaon (N) Tq. Loha,
Dist. Nanded
At present Bharat Colony, Ahmedpur,
Tq. Ahmedpur, Dist. Latur
- .. APPLICANTS

VERSUS

1. The State of Maharashtra
Through Police Station Officer,
Malakoli, Tq. Loha Dist. Nanded
 2. Anita W/o Ram Jadhav
Age : 30 Years, Occ. Household,
R/o. Bharat Colony, Ahmedpur,
Tq. Ahmedpur, Dist. Latur
- .. RESPONDENTS

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Advocate for Applicants : Mr. H. I. Pathan

APP for Respondents: Mr. A.A. Jagatkar

Advocate for respondent No.2 : Mr. K.T. Shirrurkar (Appointed)

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**CORAM :T.V. NALWADE AND
K.K. SONAWANE ,JJ.**

DATE : 9th JULY, 2019.

JUDGMENT(PER T.V. NALWADE, J] :-

Rule. Rule made returnable forthwith. By consent, heard both the sides for final disposal.

2. The proceeding is filed for relief of quashing of FIR No. 186 of 2018, registered with Malakoli Police Station Tq. Loha District Nanded for the offences punishable under Sections 420, 468 read with Section 34 of the Indian Penal Code.

3. The submissions made and record show that respondent No.2 had filed a private complaint bearing Criminal Application No. 57 of 2018 before the learned Judicial Magistrate, First Class, Loha, District Nanded and he had prayed for issuing direction under Section 156(3) of the Code of Criminal Procedure. This complaint, application was filed on 07.04.2018. It appears that after recording verification statement of the complainant dated 24.04.2018 the learned Judicial Magistrate issued order to call report under Section 202 of the Code of Criminal Procedure by making order dated 10.07.2018. After that police made investigation into the matter under Section 202 of the Code of Criminal Procedure and submitted report dated 19.10.2018. Police did not find any material to proceed ahead in the matter. After that learned Magistrate again considered the prayer made for making investigation under Section 156(3) of the Code of Criminal Procedure and order came to be passed on 18.12.2018. This order does not show that the report given by the police under Section 202 of the Code of Criminal Procedure was considered and verification of the complainant was considered by the learned Magistrate.

4. In the case reported as **(2013) 5 Supreme Court Cases 615 Madhao And Another Vs. State of Maharashtra and Another** the Apex Court has considered the procedure which can be followed by the learned Magistrate and that is at Para No. 18 and 19.

"18. When a Magistrate receives a complaint he is not bound to take cognizance if the facts alleged in the complaint disclose the commission of an offence. The Magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to take cognizance of the offence itself. As said earlier, in the case of a complaint regarding the commission of 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). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3).

19. Where a Magistrate choose to take cognizance he can adopt any of the following alternatives :

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue

process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the Police."

5. If we see the scheme of chapter 15 of the Code of Criminal Procedure, it can be said that before taking cognizance of the offence the Magistrate can make order under Section 190 of the Code of Criminal Procedure and only in that case the order of investigation under Section 156(3) of the Code of Criminal Procedure can be made. If Magistrate records the verification as provided under Section 200 of the Code of Criminal Procedure, it amounts to taking cognizance of the offence. The stage of making order under Section 202 of the Code of Criminal Procedure comes after the stage of Section 200 of the Code of Criminal Procedure is reached. Thus, after reaching stage of 202 of the Code of Criminal Procedure, it is not possible to Magistrate to revert back to Section 190 and then make order of investigation under Section 156(3) of the Code Criminal Procedure. These observations are made by the Apex Court in the case cited supra. Reliance was placed on one more case like **Criminal Application No. 3582 of 2015** decided by this Court on 10.01.2017 (*Smt. Linabai @ Pramilabai W/o Ashok Dhivare Vs. Sthe State of Maharashtra and Another*). On the other hand the learned

counsel for the complainant placed reliance on some observations made by the learned single judge at this sit in the case reported as **2015 All MR (Cri) 2484** (*Dr. Shriram Mukundrao Kalyankar Vs. The State of Maharashtra and Another*). In that matter the learned single Judge has considered the tenability of revision against the order made of investigation under Section 156 (3) of the Code of Criminal Procedure. That point is not at all involved in the present matter.

6. The learned counsel for the complainant submitted that there is sufficient material to show that the offence of cheating and creation of false record is committed by the applicant. This Court is not touching the merit of that kind as it is open to the complainant to produce material before the learned Judicial Magistrate F.C if there is adverse police report given under Section 202 of the Code of Criminal Procedure. That opportunity is always there and allowing the present proceeding does not amount to quashing of everything. In the result, following order :-

ORDER

1. The application is allowed.
2. The order made by learned Judicial Magistrate F.C on Exh. No.1 to make investigation under Section 156(3) of the Code of Criminal Procedure is hereby quashed and

set-aside and the FIR registered on the basis of that order is also quashed and set-aside.

3. However, the main matter before the learned Magistrate bearing C.A. No. 37 of 2018 will remain there in which the complainant will have to opportunity to adduce the material to make out the case for order of issue process.
4. Rule made absolute in the aforesaid terms.

[K.K. SONAWANE]
JUDGE

[T.V. NALAWADE]
JUDGE

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