

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.1391 OF 2021

Anirudh Ajay Kumar Garg ...Petitioner
Versus
State of Maharashtra and Ors. ...Respondents

Mr. Subhash Jha a/w Mr. Hare Krishna Mishra and Mr. Siddhartha Jha i/b
Law Global, for the Petitioner.

Mr. A. R. Patil, A.P.P for the Respondent No.1 – State.

Mr. Aabad Ponda, Senior Counsel i/b MDP & Partners, for the Respondent Nos.2 to 4.

Mr. Niranjana Mundargi i/b Mr. Parag R. Khan, for the Respondent Nos. 5 and 6.

Mr. Devesh Tripathi, for the Respondent No.7.

CORAM : REVATI MOHITE DERE, J.

RESERVED ON : 17th AUGUST, 2021

PRONOUNCED ON : 30th SEPTEMBER, 2021

ORDER :

1. By this petition preferred under Article 227 of the Constitution of India and under Section 482 of the Code of Criminal Procedure, the petitioner has impugned the order dated 22nd December 2020, passed by the learned Special Judge (under the POCSO Act) Mumbai, in Miscellaneous Application No.817 of 2020 in POCSO Special Case No.631 of 2020, by which the learned Special Judge rejected the petitioner's prayer for referring the matter for investigation to the police

under Section 156(3) of the Code of Criminal Procedure.

2. Learned Counsel for the petitioner submits that the impugned order passed by the learned Special Judge is perverse, illegal and cannot be sustained, inasmuch as, the learned Judge has failed to consider the factual matrix of the case. He submits that the observations made by the learned Special Judge that the complaint ought to have been filed by the male servant or that the complaint is premature or that it is not a counter case and as such cognizance cannot be taken, are observations which are erroneous and cannot be sustained. He submits that the learned Special Judge ought to have entertained the petitioner's application and directed investigation under Section 156(3) of the Code of Criminal Procedure, having regard to the peculiar facts of this case.

3. Learned Counsel for the petitioner further submits that the petitioner had approached the Malabar Hill Police Station, Mumbai, for taking cognizance of his complaint on 14th September 2019, followed by a reminder on 23rd October 2019, however, the police failed to do so, despite the police being duty bound to investigate an offence committed by the respondent No.2 and others under Section 22 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act'). Learned Counsel for

the petitioner submits that the respondent No.2 had filed a false, frivolous and vexatious complaint/FIR, without an iota of truth therein, as against the petitioner and his parents and as such it was incumbent for the learned Judge to proceed as against the respondent No.2 and others. He submits that the petitioner was constrained to file an application, being Miscellaneous Application No.817 of 2020, as against the respondent Nos.2 to 8 before the learned Special Judge, as the police had miserably failed and neglected in their statutory obligation to lodge a complaint. He submits that the petitioner in the said application had prayed for a direction to the police under Section 156(3) Cr.PC. He submits that the learned Special Judge, for reasons recorded therein, which cannot be legally sustained, rejected the said prayer. He submits that as the ground on which the application was rejected, being illegal, the impugned order be quashed and set aside. Learned Counsel relied on the following Judgments in support of his submission;

1. ***A. R. Antulay v/s Ramdas Srinivas Nayak and Ors*¹;**
2. ***State of Haryana and Ors. v/s Bhajan Lal and Ors.*²;**
3. ***Lalita Kumari v/s Govt. of U.P. and Ors.*³;**
4. ***Neeharika Infrastructure Pvt. Ltd. v/s State of Maharashtra and***

1(1984) 2 SCC 500

2 1992 Supp (1) SCC 335

3(2014) 2 SCC 1

Ors⁴ ;

- 5. Upkar Singh v/s Ved Prakash and Ors⁵;**
- 6. State Inspector of Police, Vishakhapatnam v/s Surya Sankaram Karri ⁶ ;**
- 7. Surender Kaushik and Ors v/s State of Uttar Pradesh and Ors⁷**
- 8. P. Sreekumar v/s State of Kerala and Ors⁸;**
- 9. Vinubhai Haribhai Malaviya and Ors v/s State of Gujarat and Anr.⁹ ;**
- 10. Suhara v/s Muhammed Jaleel¹⁰ and**
- 11. N. Chandramohan v/s State and Anr.¹¹**

4. Learned Senior Counsel for the respondent Nos.2 to 4 opposed the petition. He submits that the criminal application filed by the petitioner seeking direction under Section 156(3) Cr.PC as against the respondent Nos.2 to 8, was not maintainable. He submits that no infirmity can be found in the impugned order, warranting interference in writ jurisdiction. According to the learned senior counsel the petitioner had filed the said application under Section 22 of the POCSO Act, as according to him the

4 AIR 2021 SC 1918

5 (2004) 13 SCC 292

6 (2006) 7 SCC 172

7 (2013) 5 SCC 148

8 (2018) 4 SCC 579

9 (2019) 17 SCC 1

10 2019 SCC OnLine Ker 1237

11 2019 SCC OnLine Mad 3666

respondent No.2 and others had lodged a false and bogus FIR as against him and others. Learned Senior Counsel submits that Section 22 provides for imprisonment with 6 months only and as such, the said offence is a non-cognizable offence. Learned Senior Counsel thus submits that the application seeking direction to the police under Section 156(3) Cr.PC itself was not maintainable at the threshold, inasmuch as, no cognizance could have been taken by any Court, Section 22 of POCSO Act being a non-cognizable offence. He further submits that since the offence under Section 22 would fall in the category of non-cognizable offences, the question of police registering an FIR would not arise nor could the Court have passed an order under Section 156(3) of the Code of Criminal Procedure. Learned Senior Counsel submits that the allegation that the respondent No.2 filed a false case in connivance with others, as against the petitioner and others, is baseless, inasmuch as, the police after investigation have filed a charge-sheet as against the petitioner and other accused. He further submits that the application of the petitioner, before the learned Special Judge seeking direction under Section 156(3) Cr.PC., is filed as a counter blast to the complaint/FIR lodged by the respondent No.2, as against the petitioner and his parents under Section 21 of the POCSO Act. Learned Senior Counsel relied on the following Judgments, in support of his submission;

1. ***Waryam Singh and Another v/s Amarnath and Another*¹²;**
2. ***Nagendra Nath Bora and Another v/s The Commissioner of Hills Division and Appeals, Assam and Ors.*¹³;**
3. ***State of Haryana and Others v/s Bhajan Lal and Others*¹⁴;**
4. ***Panchabhai Popotbhai Butani and Others v/s State of Maharashtra and Others*¹⁵;**
5. ***T. T. Antony v/s State of Kerala and Others*¹⁶;**
6. ***Upkar Singh v/s Ved Prakash and Others*¹⁷;**
7. ***Mary Angel and Others v/s State of T.N*¹⁸**

5. Mr. Mundargi, learned counsel for the respondent Nos.5 and 6, supported the submission advanced by the learned senior counsel for the respondent Nos. 2 to 4.

6. Learned APP submitted that the allegations as against the police officers are senseless allegations and as such there is no merit in the petition and that no interference is warranted in the impugned order.

12 (1954) SCR 565

13 AIR (1958) SC 398

14 (1992) SUPP (1) SCC 335

15 (2010 (1) Mh.L.J. 421

16 (2001) 6 SCC 181

17 (2004) 13 SCC 292

18 (1999) 5 SCC 209

7. Learned Counsel for the petitioner and learned senior counsel for the respondent Nos.2 to 4 also filed their written submissions, as directed by this Court vide order dated 17th August 2021.

8. A few facts as are germane for deciding the petition are as under:-

The petitioner is the husband of respondent No.2 and respondent Nos.3 and 4, in-laws. Respondent Nos.5 and 6 are the maid servants looking after the twin children of the respondent No.2 and the petitioner and respondent Nos.7 and 8 are the Additional Commissioner of Police and Police Inspector, Malabar Hill Police Station, Mumbai, respectively. Respondent No.2 filed a complaint/FIR being C.R. No.48 of 2019 with the Malabar Hill Police Station on 27th May 2019, as against the male servant who was working with them i.e. when the respondent No.2 was staying with the petitioner and his family. The allegation against the male servant was that he inappropriately touched the private part of their son. It was alleged by the respondent No.2 in the FIR, that the said act was committed by the male servant in the presence of the petitioner's parents, however, they failed to report the matter to the police. The offences alleged in the FIR lodged by the respondent No.2 as against the accused were under Sections 323, 354, 34 of the Indian Penal Code and under Sections 4, 8, 12

and 21 of the POCSO Act. It is a matter of record that after investigation, charge-sheet was filed as against the male servant as well as the petitioner and his parents for the alleged offences punishable under Sections 354, 212, 323, 34 of the Indian Penal Code and under Sections 8, 10 and 21 of the POCSO Act.

According to the petitioner, as the respondent Nos. 2 to 8 had lodged a false complaint and given false information, they had committed an offence under Section 22 of the POCSO Act. It is the petitioner's case, that initially he had made a complaint to the police, however, as the police failed to take cognizance of his complaint, he filed an application as against the said respondents in the Special Court being Miscellaneous Application No.817 of 2020 and prayed therein, for an order under Section 156(3) Cr.PC. According to the petitioner, the said respondents had lodged a false and frivolous case as against their male servant and against him and his parents. According to the petitioner, not only have the respondent Nos.2 to 6 committed an offence punishable under Section 22 of the POCSO Act, but even the respondent No.7, the Additional Commissioner of Police, at whose instance and behest the petitioner was arraigned as an accused in the FIR, as well as the respondent No.8 – Avinash Shinde, Police Inspector, Malabar Hill Police Station (Investigating Officer) who deliberately and with an oblique and ulterior motive in collusion with the other respondents lodged a

false, frivolous and vexatious FIR, had committed an offence under Section 22 of the POCSO Act. It is the case of the petitioner that the male servant against whom allegations of Sections 4, 8 & 12 of POCSO were made, for touching the private part of the male child, are false and baseless. He submits that the male servant accidentally touched the private part of the child and that there was no sexual intent to commit any such offence. It is the case of the petitioner that his mother (also arraigned as an accused in the FIR) was present at the time of the incident and that no such incident of sexual assault as alleged ever took place. According to the petitioner, although the incident alleged is stated to have taken place on 3rd May 2019, the complaint/FIR was lodged by the respondent No.2 belatedly i.e. on 27th May 2019, thus, showing the falsity of the case. It is not necessary to go into the merits of the FIR/complaint lodged by respondent No.2, as charge-sheet has been filed in the said case, as against the petitioner and others. It is also informed that the petitioner and his parents have filed a petition in this Court and have sought quashing of the FIR/charge-sheet as against them.

9. The question in the present petition is whether the application filed by the petitioner seeking an order under Section 156(3) of the Code of Criminal Procedure for initiating action under Section 22 of the POCSO

Act, as against the respondent Nos.2 to 8 in the facts, was maintainable.

10. It is well settled that when an application is filed seeking an order under Section 156(3) Cr.PC, it is not mandatory for the learned Magistrate to issue such a direction, as a matter of course, without advertent to the facts of the case. Admittedly, the application was filed by the petitioner praying for an order under Section 156(3) Cr.PC for initiating action under Section 22 of the POCSO Act, as against the respondent Nos.2 to 8.

11. Section 22 of the POCSO Act, reads as under:-

22. Punishment for false complaint or false information. –

(1) Any person, who makes false complaint or provides false information against any person, in respect of an offence committed under sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where a false complaint has been made or false information has been provided by a child, no punishment shall be imposed on such child.

(3) Whoever, not being a child, makes a false complaint or provides false information against a child, knowing it to be false, thereby victimising such child in any of the offences under this Act, shall be punished with imprisonment which may extend to one year or with fine or with both.

12. As noted earlier, the FIR in the said case was lodged by the respondent No.2, as against the male servant i.e. the principal offender on 27th May 2019, for inappropriately touching her son. In the said FIR, offences alleged against the petitioner and others were under Sections 323, 354, 34 of the Indian Penal Code and under Sections 4, 8, 12 and 21 of the POCSO Act. After investigation, charge-sheet was filed as against the servant as well as the petitioner and his parents, for the alleged offences punishable under Sections 354, 212, 323, 34 of the Indian Penal Code and under Sections 8, 10 and 21 of the POCSO Act. Since after investigation, charge-sheet is filed, at this stage, it cannot be concluded that a false complaint has been lodged by the respondent Nos.2 to 8.

13. Learned Counsel for the petitioner submits that apart from Section 22 of the POCSO Act, there are other Sections under the Indian Penal Code which have been disclosed in para 9 of the application filed by the petitioner before the learned Special Judge i.e. Sections 167, 191, 192, 193, 211, 465, 466, 467, 474 r/w 120B, of the I.P.C., and as such some of the said offences are cognizable. It is pertinent to note that except Sections 167 and 474, all other offences are non-cognizable. As far as the said Sections are concerned, there are no pleadings in the petitioner's application filed before the learned Special Court (under the POCSO Act) to support

the applicability of the same to the facts in question. It is also pertinent to note that before the learned Special Court, the complaint/application was filed by the petitioner alleging an offence punishable under Section 22 of the POCSO Act and none of the I.P.C. offences were even urged. Be that as it may, in the facts, the petitioner's application filed before the learned Special Court, being premature, was clearly not maintainable. Apart from the aforesaid, the petitioner (and not the male servant – accused) had filed an application before the learned Special Judge alleging that a false case was filed against the accused, including the male servant and that the male servant had no sexual intent as he had accidentally touched the child's private part, and the respondent Nos. 2 to 8 by filing a false case had committed an offence under Section 22 of the POCSO Act. Whether or not the male servant had sexual intent or not, is not for the petitioner to plead and the same is a matter of trial. The male servant is facing prosecution under the POCSO Act, where there is a presumption under Sections 29 and 30 of the POCSO Act. As noted above, as charge-sheet has been filed, the application filed by the petitioner before the learned Special Court, being premature, was not maintainable.

14. There can be no dispute about the proposition of law stated in the judgments relied upon by the learned counsel for the petitioner, as well as the learned senior counsel for the respondent Nos.2 to 4, however, the same have no bearing in the facts of the present case and as such are not required to be adverted to in detail.

15. Although, learned counsel for the petitioner contended that the application filed by the petitioner before the learned Special Judge, should have been treated as a counter case/cross case, it is difficult to accept the said proposition and as such the said submission stands rejected.

16. Considering the aforesaid, no infirmity can be found in the impugned order dated 22nd December 2020, passed by the learned Special Judge (under the POCSO Act) Mumbai, in Miscellaneous Application No.817 of 2020 in POCSO Special Case No.631 of 2020.

17. Accordingly, the petition being devoid of merit stands dismissed.

18. It is made clear, that the observations made in this order are restricted to the challenge in this petition.

19. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.