

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

15 CRIMINAL WRIT PETITION NO.447 OF 2022

HARSHAL KAILASHRAO ZAREKAR

VERSUS

THE STATE OF MAHARASHTRA

...

Mr. S.C. Arora, Advocate for the petitioner

Mr. S.P. Deshmukh, APP for the sole respondent

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 27th JUNE, 2022

ORDER :

1 Heard learned Advocate Mr. S.C. Arora for the petitioner and learned APP Mr. S.P. Deshmukh for the respondent.

2 The petitioner is the informant, who had filed First Information Report on 22.08.2019 vide Crime No.347/2019 with Pundlik Nagar Police Station, Tq. and Dist. Aurangabad for the offence punishable under Section 406, 420, 120-B read with Section 34 of the Indian Penal Code, 1860 and under Section 3 and 4 of the Maharashtra Protection of Interest of Depositors in Financial Establishments Act, 1999. The investigation is complete and

charge sheet came to be filed with the Special Judge (M.P.I.D. Court), Aurangabad on 25.11.2019 against two persons. It has been alleged that the two accused persons had accepted huge amount from informant and other persons by way of investment had promised that they would double the amount within a stipulated period and after accepting the amount it has been misappropriated. It was to the tune of Rs.4,30,98,999/-.

3 The factual matrix giving rise to the present petition are that at Exh.58 in Special (MPID) Case No.10/2019 the present petitioner had filed said application praying for directions for investigation under Section 156(3) and 173(8) of the Code of Criminal Procedure to be given to the Investigating Officer and then it was also prayed that Police Inspector, Economic Offence Wing, to be directed to carry out investigation under Section 156(3) of the Code of Criminal Procedure against one Kachru Mohan Dike and to add him as accused No.3 in the said crime.

4 The said application was objected on behalf of the prosecution as well as accused No.1 had objected the said application by filing written say and after hearing both sides the learned Special Judge (MPID Court), Aurangabad partly allowed the application. The Investigating Officer was directed to conduct further investigation as per Section 173(8) of the Code of

Criminal Procedure, however, the prayer for investigation under Section 156(3) of the Code of Criminal procedure was rejected. Hence, this writ petition.

5 Learned Advocate appearing for the petitioner submitted that in view of the rejection of the prayer for sending the matter for investigation under Section 156(3) of the Code of Criminal Procedure the petitioner is invoking the constitutional powers of this Court under Article 227 of the Constitution of India read with inherent powers under Section 482 of the Code of Criminal Procedure to challenge the above order. Since beginning the Investigating Officer has taken a soft attitude towards said Kachru Dike, when in fact, allegations were made against him in the First Information Report itself by the petitioner. It was stated in the written complaint that he should be made as an accused No.3, however, at the time of charge sheet it has been filed only against two persons. The Investigating Officer has conducted the investigation in a very formal way. He has deleted Section 4 of the Maharashtra Protection of Interest of Depositors in Financial Establishments Act earlier, however, thereafter it came to be added later on. Section 4 of the M.P.I.D. Act provides attachment of properties on default of return of deposits. However, the properties were not attached and at that time also the informant – present petitioner was required to move the Courts.

Now, after the steps have been taken, the properties are stated to be attached and supplementary charge sheet has also been filed. Yet, another defect has been kept as it is by not including said Kachru Dike as accused No.3. The informant as well as other witnesses have stated that amount of Rs.7,00,000/- was given to said Kachru Dike in September, 2019. When it comes to the misappropriation of the amount it will have to be then further connected to the fact that when the amount was handed over to accused No.3, then, how there can be misappropriation by accused Nos.1 and 2. The informant and witnesses have also stated that they had seen accused No.3, who is in fact, the father-in-law of accused No.1, used to sit in the office of the accused Nos.1 and 2. These aspects were sufficient to infer conspiracy, but the Investigating Officer has not taken any action, rather in the say to application Exh.58 he says that no written document has been produced and mere statement will not be sufficient to array him as accused. Though the learned Special Judge has directed Investigating Officer to conduct further investigation under Section 173(8) of the Code of Criminal Procedure; yet, the prayer to send the matter for investigation in respect of accused No.3 to be added under Section 156(3) of the Code of Criminal Procedure will not be a complete justice for the informant and others. He placed reliance on the decision in **Vinubhai Haribhai Malaviya and others vs. State of Gujrat and another, (2019) 17 SCC 1**, wherein the Three Judge Bench of the Hon'ble

Apex Court held that such power under Section 156(3) of the Code of Criminal Procedure is available even at post-cognizance stage until trial commences i.e. charges are framed. Such power can also be exercised suo motu by the Magistrate himself, depending on the facts of each case. It was reiterated that the said powers of the Magistrate under Section 156(3) of the Code of Criminal Procedure are very wide enough to ensure a proper investigation is made. Learned Advocate for the petitioner also submitted that order dated 23.02.2022 simply said that the application is allowed and directions were given to the Investigating Officer to conduct further investigation under Section 173(8) of the Code of Criminal Procedure, however, when clarification was sought it was then stated that the operative order is modified and it was then given on 28.02.2022 stating that the prayer in respect of investigation under Section 156(3) of the Code of Criminal Procedure has been rejected. Under such circumstance, when the concerned Court was inclined to grant entire application, later on has changed his mind. This deserves to be corrected.

6 Per contra, the learned APP supported the reasons given by the learned Special Judge and submitted that the purpose of the informant would be served with the directions those have been given.

7 At the outset, it is to be noted that the charge sheet appears to have been already filed on 25.11.2019 and thereafter again a supplementary charge sheet was also filed by the Investigating Officer. As aforesaid, the First Information Report was lodged by the petitioner on 22.08.2019. In the First Information Report he had given name of all the three accused persons, however, when the charge sheet came to be filed it is against two persons only i.e. on 25.11.2019. The informant thereafter never challenged or objected to the taking of cognizance of the offence against two persons only by the Special Court and even allowed the supplementary charge sheet to be filed. It appears that at Exh.32 he had filed an application for further investigation under Section 173(8) of the Code of Criminal Procedure as well as under Section 156(3) of the Code of Criminal Procedure. That application was dismissed owing to the submissions of the investigating machinery that they are investigating the said crime further. A detailed order was passed by the learned Special Judge while disposing of application Exh.32 on 29.09.2020. That order was challenged by the present petitioner by filing Criminal Writ Petition No.1590 of 2020 before this Court and this Court by order dated 26.11.2021 allowed the petitioner to file fresh application before the Trial Court for further investigation. It was in view of the fact that the application Exh.32 was rejected as further investigation at that time was still going on and the supplementary charge sheet came to be filed. It was

observed that after filing of supplementary charge sheet no application came to be moved seeking further investigation. That direction was given when a statement was made that even after filing of a supplementary charge sheet there is a need for further investigation and, therefore, it appears that said application Exh.58 was filed by him.

8 It is necessary to take into consideration the say filed by the investigating agency and in respect of the investigation that was made as against Kachru Dike uptill now, it is stated that statements of the informant and other witnesses would show that amount was given to Kachru Dike, however, no documentary evidence was given by the complainant or the witnesses. The amount was to the tune of Rs.7,00,000/-. The Investigating Officer says that he had verified the bank statements of Kachru Dike and there is no evidence about the receipt of the amount. The satisfaction of the Investigating Officer is necessary. Unless he satisfied that there is evidence against a particular accused to forward him to the Court along with the charge sheet he cannot take up that step. No doubt, the learned Special Judge has come to the conclusion that the Investigating Officer ought to have investigated the matter further and could not have stopped only on the basis of these two circumstances. The decision in **Vinubhai Malaviya** (supra) was also considered by the learned Special Judge.

9 In **Vinubhai Malaviya** (supra) as regards powers of the Magistrate under Section 156(3) of the Code of Criminal Procedure are concerned, the observations are thus -

“25. It is thus clear that the Magistrate’s power under Section 156(3) Cr.P.C. is very wide, for it is this judicial authority that must be satisfied that a proper investigation by the police takes place. To ensure that a “proper investigation” takes place in the sense of a fair and just investigation by the police – which such Magistrate is to supervise – Article 21 of the Constitution of India mandates that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation which, without doubt, would include the ordering of further investigation after a report is received by him under Section 173(2); and which power would continue to ensure in such Magistrate at all stages of the criminal proceedings until the trial itself commences. Indeed, even textually, the “investigation” referred to in Section 156(1) Cr.P.C. would, as per the definition of “investigation” under Section 2(h) include all proceedings for collection of evidence conducted by a police officer; which would undoubtedly include proceedings by way of further investigation under Section 173(8) Cr.P.C.

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27. Whereas it is true that Section 156(3) remains unchanged even after the 1973 Code has been brought into force, yet the 1973 Code has one very important addition, namely, Section 173(8), which did not exist under the 1898 Code. As we have noticed earlier in this judgment, Section 2(h) of the 1973 Criminal Procedure Code defines

“investigation” in the same terms as the earlier definition contained in Section 2(l) of the 1898 Criminal Procedure Code with this difference – that “investigation” after the 1973 Code has come into force will now include all the proceedings under Cr.P.C. for collection of evidence conducted by a police officer. “All” would clearly include proceedings under Section 173(8) as well. Thus, when Section 156(3) states that a Magistrate empowered under Section 190 may order “such an investigation”, such Magistrate may also order further investigation under Section 183(8), regard being had to the definition of “investigation” contained in Section 2(h).”

After assessing earlier decision of the Hon’ble Apex Court it has been observed that *“There is no good reason given by the Court in these decisions as to why a Magistrate’s powers to order further investigation would suddenly cease upon process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences.”* Thus, in view of the above decision in **Vinubhai Malaviya** (supra) it can be said that the powers were still available to the Magistrate i.e. in this case the Special Judge under MPID Act for referring the matter to investigation under Section 156(3) of the Code of Criminal Procedure. The powers which can be utilized under Section 156(3) and under Section 173(8) of the Code of Criminal Procedure differ in the sense that the powers under Section 156(3) of the Code of Criminal Procedure are very wide, but then whether it requires

to be really utilized, would be a question. When that further investigation under Section 173(8) of the Code of Criminal Procedure would suffice the purpose the informant cannot insist that only the powers under Section 156(3) of the Code of Criminal Procedure should be utilized. Already there is some investigation that has been done in respect of the role played by said Kachru Dike, however, now the Special Judge has come to the conclusion that, that exercise is not sufficient and, therefore, the said directions are given. Now, this Court under its writ jurisdiction need not interfere with the said discretion that has been judiciously used by the concerned Court. Writ petition stands dismissed.

(Smt. Vibha Kankanwadi, J.)

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