

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.1209 OF 2023

1. Sanjay Nathmal Jain
age 53 years, occ. Agriculture & business
r/o Plot No. 46, Gat No. 55, Shiv Colony
Jalgaon, Tq. & Dist. Jalgaon.
2. Sunil Mishrilal Jain
age 49 years, occ. Agriculture & business
r/o Ramnakwadi, Dhekusim Road
Amalner, Tq. Amalner
Dist. Jalgaon.
3. Manoj Mishrilal Jain
age 46 years, occ. Agriculture & Business
r/o Ramnakwadi, Dhekusim Road
Amalner, Tq. Amalner
Dist. Jalgaon
4. Ghanshyam Bansilal Agrawal
age 59 years, occ. Agriculture & Business
r/o Maharana Pratap Road, New Plot
Amalner, Tq. Amalner
Dist. Jalgaon
5. Prasannachand Sobhagmal Parakh
age 47 years, occ. Agriculture & Business
r/o Om Palace, Dhekusim Road,
Amalner, Tq. Amalner
Dist. Jalgaon

Applicants

Versus

1. The State of Maharashtra
Through Amalner Police Station
Amalner, Tq. Amalner
Dist. Jalgaon.

2. Vijaykumar vishwanath Dhawale
Age 55 years, occ. Medical Shop
Presently Nil
r/o Deshmukh Complex New Plots
Amalner, Tq Amalner
Dist. Jalgaon

Respondents

Mr. G. S. Rane, Advocate for the applicant.
Mrs. G. L. Deshpande, APP for the State.
Mr. A. K. Tiwari, Advocate for respondent No. 2.

WITH
CRIMINAL APPLICATION NO. 1210 OF 2023

1. Sanjay Nathmal Jain
age 53 years, occ. Agriculture & business
r/o Plot No. 46, Gat No. 55, Shiv Colony
Jalgaon, Tq. & Dist. Jalgaon.
2. Sunil Mishrilal Jain
age 49 years, occ. Agriculture & business
r/o Ramnakwadi, Dhekusim Road
Amalner, Tq. Amalner
Dist. Jalgaon.
3. Manoj Mishrilal Jain
age 46 years, occ. Agriculture & Business
r/o Ramnakwadi, Dhekusim Road
Amalner, Tq. Amalner
Dist. Jalgaon
4. Ghanshyam Bansilal Agrawal
age 59 years, occ. Agriculture & Business
r/o Maharana Pratap Road, New Plot
Amalner, Tq. Amalner
Dist. Jalgaon
5. Prasannachand Sobhagmal Parakh
age 47 years, occ. Agriculture & Business
r/o Om Palace, Dhekusim Road,

Amalner, Tq. Amalner
Dist. Jalgaon

Applicants

Versus

1. The State of Maharashtra
Through Amalner Police Station
Amalner, Tq. Amalner
Dist. Jalgaon.
2. Vinod Dhondu Chaudhari
age 48 years, occ. Photo Studio
r/o Besides HP Gas
Behind Swami Samartha Mandir
Amalner, Tq. Amalner
Dist. Jalgaon

Respondents

Mr. G. S. Rane, Advocate for the applicant.
Mrs. G. L. Deshpande, APP for the State.
Mr. A. K. Tiwari, Advocate for respondent No. 2.

WITH
CRIMINAL APPLICATION NO. 1377 OF 2023

Dr. Sanjeev Ramrao Chavan
age 62 years, occ. Doctor
r/o "Rugnaseva" Hospital, New Plot,
Bhagwat Raod, Amalner
Tq. Amalner, Dist. Jalgaon

Applicants

Versus

1. The State of Maharashtra
2. Vijaykumar Vishwanath Dhawale
age 54 years, occ. Medical Shop
r/o Deshmukh Sani Sankulan, Flat No. 1
New Plots, Opp. Vardhama Xerox
Amalner, Tq. Amalner

Dist. Jalgaon

Respondents

Mr. Joydeep Chatterji, Advocate for the applicant.
Mr. S. P. Sonpawale, APP for the State.
Mr. A. K. Tiwari, Advocate for respondent No. 2.

WITH
CRIMINAL APPLICATION NO. 1378 OF 2023

Dr. Sanjeev Ramrao Chavan
age 62 years, occ. Doctor
r/o "Rugnaseva" Hospital, New Plot,
Bhagwat Raod, Amalner
Tq. Amalner, Dist. Jalgaon

Applicants

Versus

1. The State of Maharashtra
2. Vinod Dodhu Chaudhari
age 48 years, occ. Photo Studio
r/o Near H.P. Gas, Behind Swami Samarth Mandir
Amalner, Tq. Amalner, Dist. Jalgaon

Respondents

Mr. Joydeep Chatterji, Advocate for the applicant.
Mr. S. P. Sonpawale, APP for the State.
Mr. A. K. Tiwari, Advocate for respondent No. 2.

WITH
CRIMINAL WRIT PETITION NO. 473 OF 2023

1. Jaypal Manikrao Hire
age 43 years, occ. Service presently
working as PI at M.I.D.C. Police Station, Jalgaon
r/o Having official address at
M.I.D.C., Police Station, Jalgaon
Tq. & Dist. Jalgaon

2. Shatrughna Atmaram Patil
age 40 years, occ. Service
presently working as API at RCF Poice Station
Chembur, Mumbai
r/o Having Official Address at
RCF Police Station, Chembur, Mumbai.
3. Milind Ashok Bhamre
age 49 years, occ. Service
presently working as Police Head Constable
r/o Having Official Address at
Police Station Amalner
Tq. Amalner, Dist. Jalgaon
4. Suryakant Raghunath Salunkhe
age 38 years, occ. Service
presently working as Police Constable
r/o Having official address at
Police Station Amalner
Tq. Amalner, Dist. Jalgaon
5. Nilesh Subhash More
age 28 years, occ. Service
presently working as Police Constable
r/o Having official address at
Police Station Amalner
Tq. Amalner, Dist. Jalgaon
6. Sunil Kautik Hatkar
age 47 years, occ. Service
presently working as Police Constable
r/o Having official address at
Police Station Amalner
Tq. Amalner, Dist. Jalgaon

Petitioners

Versus

1. Vijaykumar Vishwanath Dhawale
age 54 years, occ. Medical Shop
r/o Deshmukh Sani Sankulan, Flat No. 1

New Plots, Opp. Vardhama Xerox
Amalner, Tq. Amalner
Dist. Jalgaon

2. The State of Maharashtra
Through the office of Public Prosecutor
Criminal Side, Bombay High Court
Bench at Aurangabad

Respondens

Mr. V. D. Sapkal, Senior Counsel instructed by Mr. J. V. Patil,
Advocate for the petitioners.

Mr. S. P. Sonpawale, APP for the State.

Mr. A. K. Tiwari, Advocate for respondent No. 1.

WITH
CRIMINAL WRIT PETITION NO. 474 OF 2023

1. Shatrughna Atmaram Patil
age 40 years, occ. Service
presently working as API at RCF Poice Station
Chembur, Mumbai
r/o Having Official Address at
RCF Police Station, Chembur, Mumbai.
2. Jaypal Manikrao Hire
age 43 years, occ. Service presently
working as PI at M.I.D.C. Police Station, Jalgaon
r/o Having official address at
M.I.D.C., Police Station, Jalgaon
Tq. & Dist. Jalgaon
3. Milind Ashok Bhamre
age 49 years, occ. Service
presently working as Police Head Constable
r/o Having Official Address at
Police Station Amalner
Tq. Amalner, Dist. Jalgaon
4. Suryakant Raghunath Salunkhe
age 38 years, occ. Service

presently working as Police Constable
r/o Having official address at
Police Station Amalner
Tq. Amalner, Dist. Jalgaon

5. Nilesch Subhash More
age 28 years, occ. Service
presently working as Police Constable
r/o Having official address at
Police Station Amalner
Tq. Amalner, Dist. Jalgaon

6. Sunil Kautik Hatkar
age 47 years, occ. Service
presently working as Police Constable
r/o Having official address at
Police Station Amalner
Tq. Amalner, Dist. Jalgaon

Petitioners

Versus

1. Vinod Dhondu Chaudhari
age 48 years, occ. Business
r/o Besides HP Gas
Behind Swami Samarth Mandir
Amalner, Tq. Amalner
Dist. Jalgaon
2. The State of Maharashtra
Through the office of Public Prosecutor
Criminal Side, Bombay High Court
Bench at Aurangabad

Respondents

Mr. V. D. Sapkal, Senior Counsel instructed by Mr. J. V. Patil,
Advocate for the petitioners.
Mr. S. P. Sonpawale, APP for the State.
Mr. A. K. Tiwari, Advocate for respondent No. 1.

CORAM : R. M. JOSHI, J.
RESERVED ON : 11th OCTOBER, 2023.
PRONOUNCED ON : 23rd OCTOBER, 2023.

JUDGMENT

1. A landlord is interested in seeking possession of premises let out to tenants. Tenant filed suit seeking injunction against the landlord and subsequent purchasers restraining them from obstructing their possession over the property. Landlord commits suicide. Police get information about the said suicidal death and also suicide note left behind by the deceased. No offence is registered. Tenants are called in the police station and they are detained there for more than 24 hours. While they are in custody of police, premises concerned are demolished. Documents were got executed from them in presence of police personnel. The contents of document are approved by PI of Police Station. Said documents are to the effect that the tenants are voluntarily surrendering tenancy rights in favour of the landlord.

2. These are broadly set of facts, as they are appearing from applications being Misc. Application No. 137/2022 and 147/2022 filed by the tenants before Judicial Magistrate First Class, Amalner,

for seeking direction to register crime and to investigate the same under Section 156(3) of Code of Criminal Procedure. Learned Magistrate, on the day of presentation of complaint, placed the said matters for recording verification. Verifications were recorded on 3rd October, 2022 and 12th October, 2022 respectively. Thereafter, order dated 20th December, 2022 was passed directing an inquiry under Section 202 of Code of Criminal Procedure and to call report from Superintendent of Police, Jalgaon about involvement of non-applicants No. 7 to 13 therein.

3. Being not satisfied with the said order, respondents/original applicants/tenants preferred Criminal Revision Application No. 4/2023 and 5/2023 under Section 397 of Code of Criminal Procedure before Additional Sessions Judge, Amalner. By passing order dated 23rd March, 2023, said revision came to be allowed and the order passed by Judicial Magistrate First Class, Amalner on 20th December, 2022 was set aside. It was directed that application filed before Judicial Magistrate First Class be forwarded to the concerned police station for investigation under Section 156(3) of Code of Criminal Procedure. Direction was issued to Local Crime Branch, Jalgaon to conduct investigation into the said crime.

Petitioners being aggrieved by orders passed by Revisional Court have preferred petitions involving Article 227 of Constitution of India and Section 482 of Code of Criminal Procedure.

4. Petitioners in Criminal Writ Petitions No. 473/2023 and 474/2023 are police personnel attached to Amalner Police Station at the relevant time. Criminal Applications No. 1209/2023 and 1210/2023 are filed by purchasers of the property in question from erstwhile landlord deceased Rajeew Ramrao Chavan. Brother of the deceased filed Criminal Applications No. 1377/2023 and 1378/2023. Since all these petitions/applications involve same facts and similar questions of law, by consent of both sides, they are heard together finally and decided by this common judgment.

5. Broadly, it is the contention of the petitioners that no offence has been committed by them and the tenants/applicants on their own accord has executed documents/affidavit as well as possession receipt handing over possession of the tenanted premises to the wife of the deceased landlord. The purchasers of the said property claim that they have no concern with the said transaction as possession of property is handed over to wife of deceased.

Similar is the case of brother of deceased and he claims that he has neither witnessed the said document nor possession is handed over to him. As far as police personnel are concerned, it is their main contention that considering the provisions of Section 156(3) and 197 of Code of Criminal Procedure and in particular Maharashtra Amendment of 2015 to Section 156(3), no offence could be directed to be registered against them without obtaining sanction as they are public servants. It is also sought to be claimed that once cognizance is taken by Magistrate of application as complaint, it is not open to direct registration of First Information Report and investigation into the same. Similarly, as report of enquiry under Section 202 of Code of Criminal Procedure has been filed, it is not open to turn the clock back.

6. Submissions :

Criminal Writ Petitions No. 473/2023 and 474/2023

6.1 Learned Senior Counsel among other contentions raised following issues and relied upon binding precedents to support his submissions :-

(i) Order directing the complainant to record verification amounts to taking cognizance and since the said order has not been

challenged, it was not open for the Revisional Court to set the clock back.

(ii) In view of Maharashtra Amendment to Section 156(3) of Code of Criminal Procedure, no offence can be registered against any public servant without obtaining prior sanction, irrespective of fact whether offence alleged is arising out of or related to discharge of his duties.

(iii) That it is not been open for the Magistrate at that stage to decide as to whether the alleged acts on the part of public servant are arising out of discharge of their duties or in the colour of the duty and that the same only could be considered by the Sanctioning Authority while granting of sanction. (Sainath vs. State of Maharashtra and others, 2018 ALL MR (Cri) 2151), (Anil Kumar and others vs.M. K. Aiyappa and others, (2013) 10 SCC 705)

(iv) There is non-compliance of Section 154 of Code of Criminal Procedure which is mandatory for the purpose of maintaining an application under Section 156(3) of Code of Criminal Procedure. (Priyanka Srivastava and others vs. State of U.P. and others, AIR 2015 SC 1758) and (Wasim Ishaque Shaikh and others vs. Aileen Darabshaw Mistry, MANU/MH/0729/2023)

(v) Filing of affidavit is mandatory and failure on the part of complainant to file affidavit disentitles him to seek any order under Section 156(3) of Code of Criminal Procedure. (Babu Venkatesh and others vs. State of Karnataka and others, (2022)5 SCC 639)

Criminal Applications No. 1209/2023 and 1210/2023

6.2 Learned counsel for applicants apart from adopting above submissions argued that the Revisional Court has committed serious error of appreciation of facts and has recorded incorrect finding in respect of execution of document and handing over possession of the disputed property etc. According to him, purchasers of the property have nothing to do with possession obtained from the tenants. He also contended that once the matter is placed for verification, the Court is deemed to have taken cognizance of application as complaint and hence it is not open for the Magistrate thereafter to issue any order under Section 156(3) of Code of Criminal Procedure. He also drew attention of the Court to the report of inquiry conducted by the police authorities under Section 202 of Code of Criminal Procedure submitted before the Judicial Magistrate First Class to claim that the order passed by the Judicial Magistrate First Class has been implemented and hence the order of Revision Court does not sustain.

He relied upon judgments in case of Rameshbhai Pandurao Hedau vs. State of Gujrat, (2010) 4 Supreme Court Cases 185 and Suresh Chand Jain vs. State of M.P. and another, (2001) 2 Supreme Court Cases 628 to support his submissions.

Criminal Applications No. 1377/2023 and 1378/2023

6.3 Learned counsel for applicants made submissions about incorrect observations recorded by the learned Additional Sessions Judge in the impugned order. In this regard, it is submitted that the brother of the deceased has no concern with the taking over of possession of the disputed property or execution of affidavit etc. However, such observations are incorrectly made while passing impugned order. He also adopted arguments of other counsels.

6.4 Learned counsel for respondents/tenants supported the impugned order. It is his submission that Maharashtra Amendment to Section 156(3) would apply only if the offence committed by a public servant has nexus to his duty and done while performing of his duty and not otherwise. By drawing attention of Court to report of inquiry, submitted by Additional Superintendent of Police, it is argued that prima facie offences alleged against the petitioners are

cognizable and hence Magistrate committed error in not issuing directions under Section 156(3). It is also submitted that there is substantial compliance of direction of Hon'ble Apex Court while filing application.

Facts appearing from record :

7. Prima facie perusal of material placed on record and in particular inquiry conducted by Additional Superintendent of Police more than sufficiently demonstrates that Rajeev was owner/landlord of property wherein two tenants had premises in their possession. Landlord sold property to purchasers, vide registered sale-deed dated 27th October, 2021. Tenant filed suit being Regular Civil Suit No. 27/2021 against landlord and subsequent purchasers, seeking order restraining interference in his possession over tenanted premises. On 8th March, 2022, Rajeev committed suicide and AD was registered vide No. 18/2022 under Section 174 of Code of Criminal Procedure on the same day. It further appears that it was informed to the Amalner police about a suicide note being left by the deceased holding tenants responsible for his death. In spite of such knowledge of the concerned police no First Information Report was registered. Admittedly, tenants were called to Amalner Police Station on 9th March, 2022.

They were detained in the police station for 28 hours (which claimed to be a voluntary stay, in the enquiry conducted by Additional Superintendent of Police). While they were in police station, the tenanted premises were demolished by using JCB. Documents surrendering tenancy were executed in presence of police personnel of Amalner Police Station. The said fact of apparent illegal detainment of tenants gets confirmed by letter dated 21st October, 2022 issued by Dr. Rajeev Mundhe, Superintendent of Police addressed to PI Hire, i.e. petitioner in Criminal Writ Petitions No. 473/2023 and 474/2023 certifying him for registration of crime immediately, though the report was lodged after 25 days of incident of suicide. Superintendent of Police also confirms the fact that the complainants/tenants were detained in the police station and though it is observed that it is not legally correct but no action is taken in this regard by stating that he does not find any ill-motive therein.

8. In the light of aforestated facts, the Applications under Section 156(3) of Code of Criminal Procedure before Judicial Magistrate First Class were filed for seeking direction to the concerned police station to investigate into the crime and subsequent events in Magistrate Court are required to be considered. In

Applications, specific allegations are made against the petitioners herein and the facts regarding his illegal detention, obtainment of Rs. 1,00,000/- by police personnel, obtainment of documents and demolition of the premises are specifically averred. In paragraph No. 5 of the application, it is specifically stated that on 4th April, 2022, a complaint was lodged with concerned police station as well as reminder was issued on 18th April, 2022.

Non-compliance of Section 154(1) and (3) of Code of Criminal Procedure :

9. Section 154 of Code of Criminal Procedure requires the information in respect of cognizable offence to be given to the Officer In-charge of the police station. Sub-section (3) provides that any person aggrieved by refusal on the part of the Officer In-charge of police station to record information may send substance of such information in writing to the Superintendent of Police. Section 156 of Code of Criminal Procedure enables the Magistrate to order investigation. The Hon'ble Apex Court in case of Priyanka Srivastava (supra) has held that for the purpose of exercising powers under

Section 156(3) of Code of Criminal Procedure, compliance of Section 154(1) and 154(3) is mandatory.

10. In the instant case, there is specific pleading in the application that on 4th April, 2022, a complaint was made to the PI Amalner Police Station giving details with regard to the acts which prima facie disclose offence against petitioners. There is further pleading to the effect that reminder was issued on 18th April, 2022. There are documents on record which indicate that said written complaint was received by Amalner Police Station on 4th April, 2022. Section 154(1) of Code of Criminal Procedure, mandates Officer Incharge of a police station to record substance of a oral or written complaint in book to be kept by such officer in form as prescribed by State Government. Acknowledgment of complaint dated 4th April, 2022 filed on record shows that there is compliance of Section 154(1) of Code of Criminal Procedure. The said complaint is also addressed to the other senior officers including Superintendent of Police, Amalner. However, no cognizance of the said complaint has been taken by the concerned police station. There is compliance of Section 154(1) of Code of Criminal Procedure. As regards compliance of Section 154(3) of Code of Criminal Procedure, admittedly, complaint

dated 4th April, 2022 was addressed to all superior officers including Superintendent of Police and reminder was also issued on 18th April, 2022. Thus, this is not a case wherein without approaching to concerned police station or higher police authorities, an application came to be filed before Magistrate invoking his jurisdiction under Section 156(3) of Code of Criminal Procedure. No further compliance is expected from any victim of the crime at the hands of police personnel. Thus, this Court finds no substance in the contention of petitioners that there is non-compliance of Section 154(1) and Section 154(3) of Code of Criminal Procedure.

Cognizance of complaint by Magistrate :

11. It is the main contention of petitioners that the learned Magistrate by directing applicants to record verification has taken cognizance of the same and since the said order has not been taken exception to, now it is not open for the complainant to claim that the order under Section 156(3) of Code of Criminal Procedure should have been passed by the Magistrate.

12. At the outset, it needs to be recorded that tenants filed application under Section 156(3) of Code of Criminal Procedure and

not complaint contemplated by Section 2(d) of Code of Criminal Procedure. An application would constitute a complaint, if allegations are made with a view that Magistrate takes action under this Code. A bare perusal of applications in that case, would show that the same is made only for direction under Section 156(3) of Code of Criminal Procedure and not for any other purpose. There is no definition of term 'cognizance' in Code of Criminal Procedure however, in view of judgments of Hon'ble Supreme Court, it can be said that taking cognizance only happens when a Magistrate examines the alleged commission of offence and a critical analysis of the facts before the Court is done and further action is taken thereon. Thus, for the purpose of taking cognizance there must be application of mind by the Magistrate to the facts of the case and it also must reflect from order passed.

The Hon'ble Apex Court in case of Anil Kumar (supra) in paragraph No. 8 has observed thus :-

“8. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through

the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation Under Section 156(3) Code of Criminal Procedure, should be reflected in the order, though a detailed expression of his views is neither required nor warranted.....”

13. In the instant case, it is absolutely clear from the record that as is often found done by Magistrates in a private complaint, the application was posted for recording verification mechanically, which reflects from said order “put up for verification”. This does not indicate any application of mind to the facts of the case before passing said order. Even at the time of recording of verification statement of complainant, the Magistrate was not required to apply his judicious mind to facts of the case and was only expected to record statement given by complainant on oath. It is thus clear that for the first time on 20th December, 2022, while passing the impugned order, the learned Magistrate can be said to have taken cognizance of the applications and after analysing the facts and circumstances, as reflected in the said order, direction was issued for obtaining report under Section 202 of Code of Criminal Procedure. Thus, cognizance has been taken of only on 20th December, 2022 and

not at any time before. The applicants have promptly challenged the said order before the Revisional Court. Thus, this Court finds no reason or justification to accept the contention of petitioners that the Magistrate has taken cognizance of the complaint with order of “put up for verification” and recording of verification. Even otherwise, applicants had asked for direction under Section 156 (3) of Code of Criminal Procedure and if Magistrate was not inclined to issue such directions, he could have simply dismissed applications.

Non-filing of affidavit along with application :-

14. Issue is raised about non-filing of affidavit along with complaint which is a mandatory requirement after the judgment of the Hon’ble Apex Court in case of Babu Venkatesh (supra). Hon’ble Apex Court in the said judgment has observed that :-

“25. This Court has clearly held that, a stage has come where applications Under Section 156(3) of Code of Criminal Procedure are to be supported by an affidavit duly sworn by the complainant who seeks the invocation of the jurisdiction of the Magistrate.

26. This Court further held that, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also verify the veracity of the

allegations. The court has noted that, applications Under Section 156(3) of the Code of Criminal Procedure are filed in a routine manner without taking any responsibility only to harass certain persons.

27. This Court has further held that, prior to the filing of a petition Under Section 156(3) of the Code of Criminal Procedure, there have to be applications Under Section 154(1) and 154(3) of the Code of Criminal Procedure. This Court emphasizes the necessity to file an affidavit so that the persons making the application should be conscious and not make false affidavit. With such a requirement, the persons would be deterred from casually invoking authority of the Magistrate, Under Section 156(3) of the Code of Criminal Procedure. In as much as if the affidavit is found to be false, the person would be liable for prosecution in accordance with law.”

29. From the perusal of the complaint it can be seen that, the complainant/Respondent No. 2 himself has made averments with regard to the filing of the Original Suit. In any case, when the complaint was not supported by an affidavit, the Magistrate ought not to have entertained the application Under Section 156 (3) of the Code of Criminal Procedure. The High Court has also failed to take into consideration the

legal position as has been enunciated by this Court in the case of Priyanka Srivastava v. State of U.P. (supra), and has dismissed the petitions by merely observing that serious allegations are made in the complaint. (emphasis supplied.)

Hon'ble Apex Court therefore has held that for the purpose of filing of an application under Section 156(3) of Code of Criminal Procedure, compliance of Section 154(1) and (3) is must. Meaning thereby, an application under this provision would not be tenable in case of said non-compliance. However, Hon'ble Apex Court, while holding that when application under Section 156(3) is not supported by an affidavit, Magistrate ought not to have entertained that application. Thus, bar is created for entertainment of application unless affidavit in support thereof is filed by applicant. In respectful view of this Court filing of an affidavit even after filing of application, would make the same entertainable. Thus, it would be open for the applicant to file affidavit in the intervening period from filing of application and entertainment thereof and such defect could be curable one.

In a recent judgment, Hon'ble Apex Court in case of Godrej Sara Lee Ltd. vs. Excise and Taxation Officer, 2023 SCC OnLine Sc 95 has distinguished terms "maintainability" and "entertainability" in the context of exercise of writ jurisdiction with following observations in paragraph No. 4. Relevant part thereof is reproduced thus :-

"4. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the high courts, writ remedy being discretionary."

Though these observations pertain to maintainability or entertainability of writ petition, before High Courts but from ratio culled out therefrom it can be said that in case of non-maintainability there would be complete bar to the jurisdiction such as non-compliance of Section 154(1) and (3) before filing application under Section 156(3). But as far as non-filing of affidavit is

concerned, application becomes non-entertainable, meaning thereby on compliance of requirement of filing of affidavit such application can be entertained by Magistrate.

15. Moreover, from observations made by Hon'ble Apex Court in case of Babu (supra) it is clear that in an appropriate case Magistrate would be well advised to verify truth and verify veracity of allegations and direction of filing an affidavit is to ensure that complainant takes responsibility of the allegations and that he would be deterred from casually invoking authority of the Magistrate. Thus, in appropriate case, Magistrate may call upon the applicant to file affidavit in support of complaint and to owe responsibility of statements made therein. A reference can be made to judgment of Uttarakhand High Court in case of Commercial Toyota vs. State of Uttarakhand and another in Criminal Revision Application No. 252/2019 wherein it is held thus :-

"12. The very observation made in paragraph 30 (as quoted above) of the judgment of the Priyanka Srivastava's case (supra) where a responsibility has been shouldered on the Magistrate with regards to the priority of the application to be supported by an affidavit, i.e. the stage when the proceedings are

initiated that in itself makes the defect of the application being supported by an affidavit as to be curable in nature because if an application is not supported by an affidavit and is rejected, it may in a particular circumstance result into depriving of a right of a citizen to invoke the proceedings of Section 156(3) and in these circumstances the Court or the Magistrate can always direct the applicant to file an affidavit in support of his application under Section 156(3) so as to make it maintainable before the Court. If that defect of application under Section 156(3) not being supported with affidavit, is made as an incurable, it may at times in some cases be giving superior hard to the Magistrate to deprive the applicant of filing application under Section 156(3) by rejecting the same on this procedural ground itself.”

Thus, in the instant case, it would be open to relegate the matter back to the learned Magistrate with direction to seek compliance of the filing of affidavit before passing appropriate order. However, in the peculiar facts and circumstances of the case, wherein there are serious allegations against police personnel and matter in question pertains to two years before, it would not be advisable to call upn the respondents/tenants to go before the Magistrate and seek order afresh. In any event, in the instant case, tenants on oath

before Magistrate have reiterated contents of application and thus they owned responsibility thereof. Having considered peculiarity of facts of this case, the same can be treated substantial compliance of directions of Hon'ble Apex Court, which of course may not be applicable in any other case.

Direction under Section 156(3) of Code of Criminal Procedure against public servant :

16. It is sought to be canvassed by learned Senior Advocate in Criminal Writ Petitions No. 473/2023 and 474/2023 that with introduction of the Maharashtra amendment to Section 156(3), there is complete ban on filing of First Information Report against public servant without sanction irrespective of the fact whether the act has been done while acting or purporting to act in discharge of official duties or not. To support this submission reliance is sought to be placed on the judgment of Division Bench of this Court in case of Sainath (supra).

17. Perusal of judgment of Sainath does not show that any such proposition as sought to be canvassed by the petitioners is

accepted by the Court. Paragraph No. 9 of the said judgment shows that what has been held therein is that direction under Section 156(3) against public servant cannot be issued in respect of act done or purported to be done in discharge of duties, without sanction.

18. In order to meet these submissions it would be relevant to refer to provisions of Section 197 and 156(3) of Code of Criminal Procedure, which read thus :-

197. Prosecution of Judges and public servants :-

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013] -

(a) x x x

(b) x x x

[Explanation – For the removal of doubts it is hereby declared that no sanction shall be required in case of

a public servant accused of any offence alleged to have been committed under section 166-A, section 166-B, section 354, section 354-A, section 354-B, section 354-C, section 354-D, section 370, section 375, section 376, section 376-A, section 376-AB, section 376-C, section 376-D, section 376-DA, section 376-DB] or section 509 of the Indian Penal Code.

(2) xxx

(3) xxx

(4) xxx

19. This provision therefore creates bar to take cognizance of any offence committed by public servant in respect of act done or purported to have been done in discharge of duties. At this stage it would also be relevant to consider Section 156 of Code of Criminal Procedure, which reads thus :

156. Police officer's power to investigate cognizable case –

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the

ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.

Sub-section (3) empowers Magistrate to direct investigation, as mentioned in sub-section (1). Unlike Section 197, which deals with stage of cognizance, stage for the invocation and exercise of power by Magistrate under Section 156(3) is not of taking cognizance. Therefore, there was found abuse of this provision by unscrupulous persons to cause harassment to public servants. Apparently, in order to curb such complaints, amendment to Section 156 (3) was introduced in State of Maharashtra.

20. The Amendment Act XXXIII of 2016, is reproduced herein below :-

WHEREAS it is expedient further to amend the Code of Criminal Procedure, 1973, in its application to the State of Maharashtra; it is hereby enacted in the Sixty-sixth Year of the Republic of India as follows:-

1. (1) This Act may be called the Code of Criminal Procedure (Maharashtra Amendment) Act, 2015.

(2) It shall come into force on such date as the State Government may, by notification in the Official Gazette, appoint.

2. In section 156 of the Code of Criminal Procedure, 1973, in its application to the State of Maharashtra (hereinafter referred to as "the said Code.") after sub-section (3), the following provisos shall be added, namely:-

“Provided that, no Magistrate, shall order an investigation under this section against a person who is or was a public servant as defined under any other law for the time being in force, in respect of the act done by such public servant while acting or purporting to act in the discharge of his official duties, except with the previous sanction under section 197 of the Code of Criminal Procedure, 1973 or under any law for the time being in force:

Provided further that, the sanctioning authority shall take a decision within a period of ninety days from the date of the receipt of the proposal for sanction and in case the sanctioning

authority fails to take the decision within the said stipulated period of ninety days, the sanction shall be deemed to have been accorded by the sanctioning authority.”

3. In section 190 of the said Code, in sub-section (1), after clause (c), following provisos be added, namely :-

“Provided that, no Magistrate shall take cognizance of any offence alleged to have been committed by any person who is or was a public servant as defined under any other law for the time being in force, while acting or purporting to act in the discharge of his official duties, except with the previous sanction under section 197 of the Code of Criminal Procedure, 1973 or under any law for the time being in force :

Provided further that, the sanctioning authority shall take a decision within a period of ninety days from the date of the receipt of the proposal for sanction and in case the sanctioning authority fails to take the decision within the said stipulated period of ninety days, the sanction shall be deemed to have been accorded by the sanctioning authority.”.

21. This indicates that the amendment is not only made to Section 156 but also to Section 190 of Code of Criminal Procedure. By virtue of this amendment bar is created to take cognizance of complaint and investigation of crime against public servant, when offence is alleged to have been committed while acting or purporting to act in discharge of duty. Thus, there can not be iota of doubt that intention of legislature is not to protect any act of public servant but only those acts which are done in discharge or purported discharge of duty by such public servant. Legislature never seems to have intended to extend protection to the public servant in respect of acts/offences unconnected with discharge of duty. When any such intention is apparently absent, it would not be open to accept the proposition that no offence can be registered or investigated into against the public servant even in respect of act having no bearing on discharge of his duties.

22. Next contention raised is about Magistrate having no right to ascertain whether the act/offence alleged to have been committed is in discharge of duties or not and it has left to the discretion of sanctioning authority. Maharashtra Amendment to Section 156 of Code of Criminal Procedure shows that no Magistrate

shall order any investigation in respect of act done by public servant in discharge of his duties. Meaning thereby, before passing any such order, Magistrate to come to conclusion of course prima facie that the act alleged against public servant forms part of or is in discharge or even purported discharge of duties. It is neither appearing from the relevant provisions nor it would be appropriate to leave such decision which involves application of judicious mind to the discretion of Administrative Authority. In considered view of this Court, only possible interpretation of provision of Section 156 as amended by State of Maharashtra would be that in case Magistrate finds that the offence/act alleged against public servant is touching to discharge of his duties and if there is absence of previous sanction no direction of investigation can be issued under Section 156(3) of Code of Criminal Procedure.

Exercise of power under Section 397 of Code of Criminal Procedure by Revisional Authority

23. Learned Revisional Court has rightly observed in the impugned judgment in paragraph No. 20 that acts alleged against the

public servant are not in discharge or purported discharge of their duties. The observation about conspiracy hatched by the accused gets support from facts apparent on record. While exercising power under Section 397 of Code of Criminal Procedure, Revisional Court is permitted to go into legality of order impugned before it. Perusal of order of the Magistrate dated 20th December, 2022, does not show proper application of mind to the facts and law and it was rightly interfered with by Revisional Court.

24. Prima facie perusal of facts on record indicates that cognizable offences are committed by petitioners and in such circumstances it was not open for the Magistrate to refuse investigation under Section 156(3) of Code of Criminal Procedure. In this regard, useful reference can be made to the judgment of Hon'ble Apex Court in case of XYZ vs. State of Madhya Pradesh, 2022 LiveLaw (SC) 676 and paragraphs No. 22 to 24 of the judgment are reproduced below :-

“22. In the present case, the narration of facts makes it clear that upon the invocation of the jurisdiction of the Magistrate under Section 156(3) of CrPC, the JMFC came to the conclusion that serious allegations had been levelled against the

accused by the appellant and, that, from a perusal of the documents in this regard, the statements of the complainant were satisfactory. After taking note of the fact that the police had at an earlier stage reported that the occurrence of an incident or offence was not found, the JMFC opined that, from the facts which were set out by the complainant in the complaint, prima facie, the occurrence of an offence was shown.

24. Therefore, in such cases, where not only does the Magistrate find the commission of a cognizable offence alleged on a prima facie reading of the complaint but also such facts are brought to the Magistrate's notice which clearly indicate the need for police investigation, the discretion granted in Section 156(3) can only be read as it being the Magistrate's duty to order the police to investigate. In cases such as the present, wherein, there is alleged to be documentary or other evidence in the physical possession of the accused or other individuals which the police would be best placed to investigate and retrieve using its powers under the CrPC, the matter ought to be sent to the police for investigation. (emphasis supplied)

Thus, once cognizable offence is made out it is duty of Magistrate to exercise powers under Section 156(3) and direct investigation therein which in the case in hand has not been exercised by Magistrate. Revisional Court, therefore, has rightly invoked its jurisdiction under Section 397 of Code of Criminal Procedure and directed investigation of crime. In the instant case, application filed before Magistrate and material placed before this Court, this is a fit case wherein investigation must be done into the allegations against petitioners and others.

Direction to Local CID to investigate :-

25. Impugned order is also challenged on the ground that learned Additional Sessions Judge has exceeded its jurisdiction by directing investigation into the crime to be conducted by Local CID, Jalgaon. By referring to Section 156 and 36 of Code of Criminal Procedure, it is contended that the concerned police station or superior officer than Incharge of police station may conduct investigation. There is no doubt that the provisions of Section 156 and 36 deal with power of police officers to conduct investigation, within the local area of jurisdiction of that police station. It is

therefore not open for the learned Revisional Court to direct investigation by any other agency. Exercise of jurisdiction under Section 397 of Code of Criminal Procedure ought to have been restricted to the challenge to the order impugned. The direction issued by the said Court with regard to the agency to investigate cannot sustain.

26. However, in particular facts and circumstances of the case, it would not be in the interest of justice even to direct Superintendent of Police of Jalgaon district to conduct investigation leave apart any officer inferior to him. The said opinion is inevitable in view of the documentary evidence on record. The enquiry conducted by Additional Superintendent of Police clearly shows prima facie unlawful detention of the complainant in the police station however, the Superintendent of Police of the district fails to initiate any action in this regard on his own. Infact he goes one step ahead and gives certificate to PI, Amalner Police Station that there was no ill motive in the said detention of complainants by concerned police personnel and furthermore appreciates prompt recording of First Information Report, when admittedly no First Information Report is lodged for 25 days, though police had knowledge of

commission of cognizable offence after suicidal death of Rajeev, which is in utter disregard to the dictum of Lalita Kumari's case by Supreme Court.

27. It would be travesty of justice if investigation into the crime is entrusted to local police station or even to the Superintendent of Police. This Court, therefore, finds it fit to invoke its inherent jurisdiction under Section 482 of Code of Criminal Procedure and to issue direction to concerned police station to register crime on the basis of the complaint made before Magistrate in Criminal Misc. Applications No. 137/2022 and 146/2022 and forthwith to transfer investigation to Crime Investigation Department, Ahmednagar. Having regard to the alleged involvement of high rank police personnel in crime in question, the said investigation shall be conducted by any officer not below rank of Deputy Superintendent of Police. Such officer is not permitted to delegate investigation to any officer inferior to his rank. Investigation of crime be completed at the earliest.

28. In the above circumstances, challenge made to the impugned order must fail. Petitions/applications stand dismissed with above observations and directions.

29. Pending application, if any, does not survive and stands disposed of.

30. Learned counsel for applicants/petitioners seek extension of interim order for the period of four weeks to approach the Hon'ble Apex Court.

31. Learned counsel for informant and learned APP opposed the said request.

32. Since the order in question is in force from 21st March, 2023, the same is extended for a period of four weeks from today.

(R. M. JOSHI)
Judge

dyb