

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 597 OF 2023

Padmashree Dr. Vitthalrao Vikhe Patil
Sahakari Sakhar Karkhana Limited
At Pravaranagar, Tq. Rahata, Dist.
Ahmednagar,
Through : its authorized officer
Tejas Bhaskarrao Sadaphal,
Age 41 years, Occ. Service
R/o. Rahata, Tq. Rahata, Dist.
Ahmednagar.

... Petitioner

VERSUS

- 1) The State of Maharashtra.
- 2) The Deputy Superintendent of Police
Shirdi, Tq. Rahata, District
Ahmednagar.
- 3) The Police Inspector,
Loni Police Station, Loni,
Tq. Rahata, Dist. Ahmednagar.
- 4) Dadasaheb Kushabapu Pawar,
Age 48 years, Occ. Nil.
R/o. Tambhere, Kolhar Road
Pawar Vasti, Tambhere,
Tq. Rahuri, Dist. Ahmednagar.
- 5) Balasaheb Kerunath Vikhe,
Age 62 years, Occ. Agriculture,
R/o. Loni (Bk) Tq. Rahata,
Dist. Ahmednagar

... Respondents

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Advocate for the Petitioner : Mr. V.D. Hon, Senior Advocate i/b Mr. A.V. Hon.
Public Prosecutor for Respondent Nos. 1 to 3 : Mr. D.R. Kale
Advocate for Respondent No. 4 & 5 : Ms. P. S. Talekar i/b Talekar and
Associates

WITH
CRIMINAL WRIT PETITION NO. 615 OF 2023

1) Shri. Dadasaheb Kushabapu Pawar,
Age 48 years, Occ. Agriculture,
R/o. At post Tambhere, Kolhar Road,
Pawar Vasti, Tambhere, Tq. Rahuri,
Dist. Ahmednagar.

2) Balasaheb Kerunath Vikhe,
Age 63 years, Occ. Agriculture,
R/o. At Post Loni (Bk), Tq. Rahata,
Dist. Ahmednagar.

... **Petitioners**

VERSUS

1) The State of Maharashtra,
Through The Superintendent of Police
Ahmednagar.

2) The Deputy Superintendent of Police,
Shirdi, Tq. Rahata, Dist. Ahmednagar.

3) The Police Inspector, Loni Police
Station, Tq. Rahata, Dist. Ahmednagar

... **Respondents.**

...

Advocate for Petitioners : Ms. P.S. Talekar i/b Talekar and Associates
Public Prosecutor for Respondents : Mr. D.R. Kale

CORAM : **MANGESH S. PATIL &
ABHAY S. WAGHWASE, JJ.**

RESERVED ON : **21.04.2023**
DECIDED ON : **28.04.2023**

COMMON JUDGMENT : (PER : MANGESH S. PATIL, J.)

Heard the learned Senior Advocate Mr. Hon in Criminal Writ Petition No. 597/2023 and Ms. Talekar in Criminal Writ Petition No. 615/2023 as also the learned Public Prosecutor Mr. Kale.

2. Rule in both the Criminal Writ Petitions. It is made returnable forthwith. Learned Public Prosecutor waives service for the respondent Nos. 1 to 3 and learned advocate Ms. Talekar for the respondent Nos. 4 and 5 in

the former petition. Learned Public Prosecutor waives service for all the respondents in latter petition. Both the matters arise out of the same set of facts, one seeks quashment of the order passed by the Magistrate under Section 156(3) of the Code of Criminal Procedure whereas the other petition seeks implementation of the self-same order expeditiously. Hence this common judgment.

3. The facts leading to the filing of these petitions can be summarized as under :

(a) The petitioner is a Co-Operative Society duly registered under the provisions of the Maharashtra Co-Operative Societies Act, 1960, running a sugar factory (hereinafter referred to as 'the sugar factory'). It had availed of the loan and states to have distributed it to the farmers for development and improvement in cultivation of sugarcane. The loan scheme was described as '*basel dose loans*'. It was a scheme floated by the Government for waiver of loan taken by the farmers. The sugar factory had taken the loan from two nationalized banks for passing on the benefits of the scheme to its more than 12000 members. It is being alleged by the clients of Ms. Talekar that the loans were obtained under the garb of its distribution to the farmers as '*basel does*' for sugarcane cultivation. However, it was not actually distributed to the farmers. One of her two clients is a shareholder of the sugar factory. They allege that the office bearers of the sugar factory cheated the farmers who were its members by availing the loan facility from the two nationalized banks but never forwarded the benefit to them. These loans were raised by the sugar factory between the years 2005 and 2009. The audit report of the sugar factory mentioned about such loan in its debts and liabilities during the period 2005 and 2009. The sugar factory had to refund this amount of loan in the year 2014-2015 together with interest at the rate of 6% p.a. It is thus alleged that the sugar factory had obtained the money under the loan waiver scheme in 2009 without being entitled to, used it for several years and had illegally incurred the monetary liability of

6% interest while repaying it and this would constitute misappropriation.

(b) On the ground that the police were not registering crime Ms. Talekar's clients filed Criminal Writ Petition No. 1223/2019 seeking directions for registration of F.I.R. and its investigation.

(c) By the order dated 10.10.2019 in Criminal Writ Petition No. 1223/2019 this Court recorded observation that though the Commissioner for Co-operation had expressed a view that criminal action needed to be taken but it was not initiated. The public prosecutor made a statement that the investigation would be conducted by the officer of the rank of Deputy Superintendent of Police and further undertook to submit a report within 15 days. It further observed that since it was a time of change of roaster instead of keeping the matter part-heard it recorded the observation that pursuant to the investigation to be made as submitted by the learned prosecutor, if it was found that the sugar factory and the bank officers by making false representation had secured the benefit of the scheme, on the statement of the petitioner No. 2 therein who is one of the two clients of Ms. Talekar the police would register a crime and take further action.

(d) The sugar factory put up a challenge to that order in Special Leave Petition (Criminal) Diary No(s). 37823/2019. The Supreme Court passed following order on 04.11.2019 :

“ Issue notice on the special leave petition as well as on the prayer for interim relief returnable within three weeks.

In the meantime, we request the investigating officer to carry on the investigation. It shall be open for the investigating officer to decide on the basis of the material collected during investigation as to whether the charge-sheet shall be filed under Section 173(2) Cr.P.C. or to file report closing the matter.”

(e) Pursuant to these directions the matter once again was taken up before the Supreme Court which passed following order on 29.11.2019 :

“ On 4th November, 2019, while issuing notice, the following order was passed :

“ Permission to file special leave petition is granted.

Applications for exemption from filing certified copy of the impugned judgment and exemption from filing O.T. are allowed.

Issue notice on the special leave petition as well as on the prayer for interim relief returnable within three weeks.

In the meantime, we request the investigating officer to carry on the investigation. It shall be open for the investigating officer to decide on the basis of the material collected during investigation as to whether the charge-sheet shall be filed under Section 173(2) Cr.P.C. or to file report closing the matter.”

Pursuant to the above order, the State has filed additional documents wherein the Investigation Officer has filed a report indicating that no criminal case is made out.

In view of the above, this petition has become infructuous. The special leave petition is accordingly dismissed as having become infructuous.

In case the respondents have any objection to the report, they may take appropriate action in accordance with law.

Pending application, if any, also stands disposed of.”

(f) The Criminal Writ Petition No. 1223/2019 was again taken up on 02.03.2020 and by noticing both the above orders of the Supreme Court following order was passed :

“4. The learned counsel for the petitioners brought to notice of this Court that even after giving of direction to register the crime, by this Court and Apex Court, the crime was not registered. The learned counsel for the petitioners submitted that though the crime was not registered, some report was prepared by the police and it was submitted in

the Hon'ble Apex Court in aforesaid proceeding. The learned counsel for petitioner submitted that such report could not have been filed in any Court as the crime was not in fact registered. Learned counsel submitted that though in the order dated 29.11.2019 liberty is given to present petitioners to challenge that report, the report cannot be challenged as the petitioners will not get any opportunity to challenge that report as that report cannot be filed under Section 173 of the Code of Criminal Procedure. The learned counsel then submitted that in view of these circumstances, the petitioner wants to file application for clarification in Hon'ble Supreme Court.

5. In view of order made by the Hon'ble Apex Court on 29.11.2019 which is quoted above and aforesaid submission made by the learned counsel for petitioner, this Court is giving time to the petitioner."

(g) Pursuant to such statement made on behalf of Ms. Talekar's clients, the matter was again taken up to the Supreme Court in Miscellaneous Application No. 1592/2020 in SLP (Crl.) No. 10053/2019 with following prayers :

"A) Clarify that in view of the liberty granted in the final order dated 29.11.2019 in Special Leave Petition (Cri.) No. 10053 of 2020 by this Hon'ble Court, that the challenge to the police report dated 20.11.2019 vide amendment to the Criminal Writ Petition No. 1223 of 2019 pending before the Hon'ble High Court is tenable under Section 482 of Cr.PC.

B) Pass any other order or directions as this Hon'ble Court deems fit and proper."

The Supreme Court disposed of that application on 30.09.2020 with following order :

*" The Court is convened through Video Conferencing.
Having heard the learned counsel appearing for the parties and carefully perusing the material available on*

record, we find no merit in the Interlocutory Application No. 77587 of 2020 filed by Respondent No. 1 seeking clarification of Order dated 29.11.2019 passed by this Court.

The Interlocutory Application is, accordingly, dismissed.

Miscellaneous Application also stands disposed of.”

(h) Both the parties were again heard by this Court in Criminal Writ petition No. 1223/2019 and by noticing all the earlier orders mentioned herein above passed in that Criminal Writ Petition and the three orders of the Supreme Court, following order was passed on 07.12.2020 :

“13. The aforesaid order made by the Hon’ble Supreme Court shows that the proceeding filed to challenge the order made by this Court was disposed of by the Hon’ble Supreme Court by observing that the Investigating Officer has filed report indicating that no case is made out and so petition itself had become infructuous. In the same order, the Hon’ble Supreme Court has expressed that if the respondents have objection to the report, appropriate action may be taken in accordance with law.

14. In view of the relief which was claimed in the present matter, the order made by this Court on 10.10.2019 and the aforesaid order of the Hon’ble Supreme Court dated 29.11.2019, this Court has no other alternative but to hold that nothing remains in the present matter. The submissions made by Ms. Talekar, learned counsel for the petitioners that this Court may direct the petitioners to go either to the Sessions Court to challenge the report or allow her to challenge the report in this Court, cannot be accepted by this Court.

15. The observations made by this Court at principal seat in Surinder Mohan Arora (supra) can be of no help to the petitioners in the present matter in view of the circumstances of the present matter and the aforesaid order passed by the Hon’ble Supreme Court. In the result, the writ petition stands disposed of as infructuous. All the

applications filed in the writ petition and pending are also disposed of.”

(i) Faced with the situation, the original petitioners that is Ms. Talekar's clients filed Criminal Miscellaneous Application No. 8/2022 in the Court of the Judicial Magistrate First Class, Court No. 2, Rahata with following caption :

“CLAIM : Challenge to report dated 20.11.2019 submitted by the Deputy Superintendent of Police, Shirdi before the Hon'ble Supreme Court of India”

Following prayers were made in that application :

“A) To reject the report dated 20.11.2019 prepared by the Dy. Superintendent of Police, Shirdi, Tq. Rahata, District Ahmednagar.

B) To direct the Investigating Officer to conduct fresh investigation more particularly after complying the provisions of Code of Criminal Procedure.

C) To grant any other relief to which the petitioners are entitled to.”

(j) The learned Magistrate passed a detailed order in Criminal Misc. Application No. 8/2022 on 31.03.2023, the operative part of which reads as under :

“1. The Deputy Superintendent of Police, Shirdi or Police Inspector, Loni Police Station, as the case may be, is directed to register F.I.R. and further investigate into the matter properly vide S. 156(3) of Cr.P.C. in accordance with law.

2. Copy of complaint (Exh.1) and this order be forwarded to the concerned police station and Dy. S.P., Shirdi at the earliest.

3. Concerned clerk to comply the order promptly.

4. Cri.M.A. No. 8/2022 is disposed of.”

(k) By way of these two separate Criminal Writ Petitions the sugar factory is putting up a challenge to this Order passed by the Magistrate whereas the original petitioners, clients of Ms. Talekar are seeking its expeditious implementation.

4. It would be appropriate to note at this stage that the learned Magistrate also assigned reasons in the order for refusing to grant the prayer clause ‘A’ and ‘B’ and expressly mentioned that she was passing the order having jurisdiction to pass such order under Section 156(3) of the Code of Criminal Procedure and on the ground that what the Supreme Court had directed was to carry out investigation and the order of this Court for registration of F.I.R. was not set aside and that the Supreme Court had issued direction for investigation and not for conducting any enquiry and therefore an in depth investigation was required.

5. Mr. Hon would vehemently submit that it is a gross abuse of the process of law to allow such an order to stand as is passed by the Magistrate in the teeth of the earlier observations of this Court as well as the Supreme Court. He would submit that the approach of the Magistrate in allowing the original petitioners to put up a challenge to the report that was submitted before the superior courts by making distinction between investigation and enquiry is not sustainable. The order of this Court dated 07.12.2020 had reached finality and was never challenged by Ms. Talekar’s clients. Even if the Supreme Court had granted liberty to them to challenge the report of the investigating officer, their conduct in approaching the Magistrate under the pretext of putting up a challenge to the report and the impugned order refusing to allow the challenge to be put up but still issuing directions under Section 156(3) of the Code of Criminal Procedure is nothing but circumventing the observations of this Court in the order dated 07.12.2020.

6. Mr. Hon would point out that in paragraph No. 14 of the order dated 07.12.2020, a specific request of Ms. Talekar permitting her clients to put up a challenge to the report of the investigating officer either before the Sessions Court or even before this Court was expressly rejected. The impugned order nowhere takes into consideration such express refusal of this Court to put up a challenge to the report. Therefore, even for this reason the impugned order is *void ab initio* besides being illegal. The learned Magistrate had no jurisdiction to sit over the facts and issue any direction under Section 156(3) of the Code of Criminal Procedure once the issue was expressly concluded by this Court.

7. Mr. Hon would further submit that the original petitioners are taking up a politically motivated cause. Another member Mr. Arun Punjaji Kadu and one another, based on similar set of allegations had approached the Principal Seat of this Court in Criminal Writ Petition No. 1356/2018. This Court had disposed of the Criminal Writ Petition as withdrawn by noticing that the F.I.R. was already registered by the order dated 11.11.2019. For the self-same relief the original petitioners are prosecuting this matter to settle the political score. He would further submit that as has been held in the matter of **Lalita Kumari Vs. Government of Uttar Pradesh; (2014) 2 Supreme Court Cases 1**, there could be investigation even before registration of F.I.R. and the police have power to close the matter even before such registration if it occurs to them that there was no sufficient ground to investigate.

8. Preempting the argument of Ms. Talekar, Mr. Hon would refer to the decision in the matter of **Dhariwal Tobacco Products Limited and others Vs. State of Maharashtra and another; (2009) 2 Supreme Court Cases 370**, to point out that availability of alternative remedy of filing a revision under Section 397 of the Code of Criminal Procedure cannot be a ground for this Court to refuse to exercise the powers under Section 482 of the Code of Criminal Procedure.

9. Mr. Hon further relied upon the decision in the matter of **Vijay Kumar Ghai and others Vs. State of West Bengal and others; (2022) 7 Supreme Court Cases 124**. He submitted that the conduct of various members like the original petitioners and Arun Punjaji Kadu and another to seek self same relief one at the Principal Seat and the other at this bench of the High Court, based on exactly the same set of allegations is nothing but a forum shopping and this Court cannot allow this to happen. Mr. Hon would lastly, rely upon the observations of the Supreme Court in the matter of **Suresh Kankra Vs. State of UP and another; 2022 LiveLaw (SC) 35**. He would submit that the learned Magistrate is not conscious of the consequences of passing the impugned order which travels contrary to the observations of this Court and that of the Supreme Court and is liable to be quashed.

10. Ms. Talekar tendered across the Bar affidavit in reply of her clients which was taken on record. She would raise objection to the locus of the sugar factory to put up a challenge to the order. She would submit that it being a Co-Operative Society, it was necessary for it to preserve and protect interest of its members and cannot suffer for the misdeeds of its office bearers. When her clients are seeking to protect the interest of the members, it was improper on the part of the sugar factory to take such a stand.

11. Ms. Talekar would also submit that the proposed accused have no right of insisting for any hearing even before registration of the crime. The order impugned by the sugar factory issues directions under Section 156(3) and even before it is obeyed by registering the F.I.R., the challenge being put up by the sugar factory is premature. She would rely upon following decisions :

- (1) **Union of India Vs. W.N. Chadha; 1993 SCC (Cri) 1171.**
- 2) **Samaj Parivartan Samudaya Vs. State of Karnataka; (2012) 7 Supreme Court Cases 407.**

(3) **Anju Chaudhary V. State of Uttar Pradesh and another;**
(2013) 6 Supreme Court Cases, 384.

(4) **HDFC Securities Limited and others Vs. State of Maharashtra and another;** (2017) 1 Supreme Court Cases 640.

12. As was anticipated by Mr. Hon, Ms. Talekar would submit that the order passed under Section 156(3) of the Code of Criminal Procedure is revisable under Section 397 of the Code of Criminal Procedure as has been held in the matter of **Avinash s/o Trimbakrao Dhongade Vs. State of Maharashtra and another;** (2015) 3 A.I.R. Bom R (Cri) 901. She would submit that without availing of such alternate suitable remedy the sugar factory is not entitled to approach this Court under Section 482 of the Code of Criminal Procedure.

13. Ms. Talekar would submit that in the peculiar facts and circumstances of the case and having noticed that the investigating officer having not considered the documents filed by her clients has issued the directions under Section 156(3) of the Code of Criminal Procedure by following the decision in the matter of **Sakiri Vasu vs State of U.P. and others;** (2008) 2 Supreme Court Cases 409. A Magistrate has wide powers under Section 156(3) to direct investigation in an appropriate case. The learned Magistrate has elaborately discussed the facts and has recorded the observation regarding commission of a cognizable offence and having done so has merely followed the directions in the matter of **Lalita Kumari and Anju Chaudhary (supra).**

14. We have considered the rival submissions and perused the record. In our considered view, the facts presented before us are peculiar. The law governing the fact situation has been crystallized in the judgments referred to by both the sides and we sincerely feel that it is not necessary for us to touch every aspect of the law.

15. In our considered view, the observations of this Court in paragraph No 14 of the order dated 07.12.2020 are decisive of the matter. At the cost of repetition, it is necessary to note that the original petitioners that is clients of Ms. Talekar had approached this Court by filing Criminal Writ Petition No. 1223/2019 seeking registration of F.I.R. against the persons liable for commission of the crime regarding the alleged misappropriation and cheating allegedly indulged into by the office bearers of the sugar factory. By the order dated 10.10.2019 this Court had accepted the statement made by the learned Public Prosecutor that investigation would be made by an officer of the rank of the Deputy Superintendent of Police and the progress report would be submitted within 15 days. It was, therefore, observed in paragraph No. 9 of that order that depending upon the investigation that was to be carried out the police would register a crime and take further action. That order was taken to the Supreme Court and in order dated 04.11.2019 the Supreme Court observed that the investigation would go on and it was open for the investigating officer either to file a charge-sheet under Section 173(2) of the Code of Criminal Procedure or to file a closure report. Subsequently, the investigating officer filed a closure report before the Supreme Court stating that no criminal case was made out. By the order dated 29.11.2019 holding that the Special Leave Petition had become infructuous it was disposed of but with observation that the respondents therein that is the original petitioners may raise objection to the closure report in accordance with law.

16. On 02.03.2020, the original petitioners took up the writ petition before this Court with an argument that in spite of the directions of this Court and that of the supreme Court crime was not being registered. Without registering the crime some report was prepared by the police and was submitted before the Supreme Court as mentioned herein above. It

was also submitted that the report could not have been filed without registering the crime. A submission was also made that though a liberty was granted by the Supreme Court in the order dated 29.11.2019 to challenge the report, it could not be challenged as that report was not filed under Section 173 of the Code of Criminal Procedure. In the light of such circumstances, the learned advocate for the original petitioners sought time to approach the Supreme Court by filing an application for clarification of its order dated 02.03.2020.

17. Admittedly, the Miscellaneous Application No. 1592/2020 preferred by the original petitioners seeking clarification was dismissed by the Supreme Court finding that there was no merit in the application. As can be noticed from the prayer made in that application (*supra*), the prayer clause therein was seeking clarification as to if a challenge to the police report dated 20.11.2019 pursuant to the liberty granted by the Supreme Court was tenable under Section 482 of the Code of Criminal Procedure.

18. In view of rejection of this application seeking clarification, this Court dismissed the Criminal Writ Petition No. 1223/2019 by the order dated 07.12.2020 by noting all the aforementioned facts and circumstances and the previous orders passed by this Court as well as the Supreme Court. In paragraph No. 14 of the order dated 07.12.2020 a request made by Ms. Talekar on behalf of the original petitioners seeking permission to go before the Sessions Court or even before this Court for challenging the report was expressly turned down. In view of such peculiar state of affairs, as we have observed herein above, to our mind, these observations in paragraph No. 14 seal the fate of the matter.

19. Irrespective the powers of a Magistrate under Section 156(3) read with provisions of Section 190(1) of the Code of Criminal Procedure as has been interpreted in the matter of **Anju Chaudhary** (*supra*), in our considered view taking into account the orders passed by this Court and the Supreme Court, the learned Magistrate ought not to have exercised

the powers under Section 156(3) of directing a crime to be registered and investigated.

20. True it is that the learned Magistrate has taken pains to examine the facts and even the law laid down in the matter of **Sakiri Vasu (supra)**. But the learned Magistrate otherwise could have been justified in making such observations and issuing the directions, but for the express refusal of this Court in paragraph No. 14 of the order dated 07.12.2020 (supra) in granting any liberty to the petitioner to put up a challenge to the report of the investigating officer. It is necessary to note that the stand of the petitioners before this Court in Criminal Writ Petition No. 1223/2019 when the matter was taken up on 02.03.2020 was that though the liberty was granted to them by the Supreme Court in the order dated 29.11.2019 to challenge the report to be filed by the investigating officer, since it was not a report under Section 173 of the Code of Criminal Procedure they would not get any opportunity to put up a challenge and wanted to seek a clarification by moving appropriate application in the Supreme Court which request was expressly turned down.

21. Having invited rejection of the Miscellaneous Application seeking clarification from the Supreme Court in the fact situation of the matter, coupled with express refusal of this Court in paragraph No. 14 of the order dated 07.12.2020 had put at rest all the controversy.

22. The learned Magistrate has taken pains in deciphering the report of the investigating officer and has also taken note of the orders passed by this Court and the Supreme Court and relied upon the case law exploring the powers in the Magistrate to issue a direction under Section 156(3) of the Code of Criminal Procedure. However, she has clearly overlooked the express refusal of this Court permitting the original petitioners to put up any challenge to the report preceded by their failed attempt to seek clarification from the Supreme Court. Had she noticed these two circumstances, in our view, the learned Magistrate would not have

exercised the powers under Section 156(3) of the Code of Criminal Procedure. The error goes to the root of the jurisdiction of the learned Magistrate and is *void ab initio*.

23. Again, the observation of the learned Magistrate that this Court had also directed registration of FIR, is also perverse. In the order dated 10.10.2019 the Court had merely directed to register FIR if it was found by the Investigating Officer about commission of crime and not otherwise.

24. Since we have demonstrated as to how the impugned order passed by the Magistrate dated 31.03.2023 issuing direction under Section 156(3) is *void ab initio*, in our considered view the question of *locus standi* of the petitioners and even availability of alternate remedy under Section 397 of the Code of Criminal Procedure will have no bearing.

25. The Criminal Writ Petition No. 597/2023 is allowed. The order passed by the Judicial Magistrate First Class, Court No. 2, Rahata in Criminal Misc. Application No. 8/2022 dated 31.03.2023 is quashed and set aside.

26. The Criminal Writ Petition No. 615/2023 is dismissed.

27. The Rule is made absolute in above terms.

(ABHAY S. WAGHWASE, J.)

(MANGESH S. PATIL, J.)

mkd/-