IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.397 OF 2020

Wasim Ishaque Shaikh & Anr. .. Petitioners
v/s.
Aileen Darabshaw Mistry, D/o. Late Ketty Darabshaw Mistry & Anr. .. Respondents

WITH

CRIMINAL WRIT PETITION NO.398 OF 2020

Wasim Ishaque Shaikh & Anr. .. Petitioners
v/s.
Zahurahmed Ebrahim Seedat & Anr. .. Respondents

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Mr. Shoaib I. Menon, a/w. Mr. Ibrahim Memon, for the Petitioners.

Mr. Altaf Khan, for Respondent No.1.

Mr. Arfan Sait, APP, for the State/Respondent.

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CORAM : R.G. AVACHAT, J.

RESERVED ON : 2 FEBRUARY 2023.

PRONOUNCED ON : 28 FEBRUARY 2023.

JUDGMENT:-

Rule returnable forthwith. Heard finally with the consent of the parties.

2. The challenge in these writ petitions, under Article 227 of the Constitution of India, is to the orders dated 6 December 2019, passed by Additional Sessions Judge, Greater Mumbai, in Criminal Revision Application No.8 of 2019 and Criminal Revision Application No.9 of 2019. Vide orders impugned herein, the orders dated 16 February 2018, passed by the Court of Metropolitan Magistrate, rejecting the applications under Section 156(3) of Cr.P.C. (C.C.No.35/M/2017 and C.C.No.38/M/2017, respectively) are set aside with a direction to Senior Police Inspector, Dr. D.B. Marg Police Station to register crime for offences punishable under Sections 406, 420, 465, 467, 468, 471 r/w 34 of IPC and Section 53 of Maharashtra Regional and Town Planning Act, 1966 (M.R. & T.P. Act) and investigate the same.

3. For the sake of convenience, the pleadings in Writ Petition No.398 of 2020 are being referred to. The facts giving rise to present writ petition, are as follows:

Petitioner No.1 is partner of M/s. Sarah Construction. The Petitioners are in the business of building and construction. The land, bearing Survey No.3/190, situated at Tardeo Division, Mumbai, belonged to one Mr. Salimbhai Patel and six others. These owners of the land entered into a development agreement with the Petitioners on 20 February 2008. There was an old building on the land Survey No.3/190. Respondent No.1 was one of the tenants therein. He had occupied room no.4, admeasuring 1210 sq. ft. carpet area. The Petitioners entered into negotiations with all the tenants of the said building, including Respondent No.1. Pursuant to the negotiations, Respondent No.1 executed irrevocable consent on 5 November 2008. It was agreed that Respondent No.1would be allotted a flat admeasuring 1210 sq. ft. in the new building to be constructed. Respondent No.1 agreed to shift in the transit accommodation. As such, he voluntarily participated in the scheme of redevelopment. An agreement for permanent alternate accommodation was executed on 22 July 2010. It has been duly registered. On completion of the redevelopment work, Respondent No.1 has been given possession of Flat No.504, admeasuring 1210 sq. ft. carpet area. According to the Petitioners, the development scheme was implemented in terms of relevant of the Development Control Rules (DCR).

4. Respondent No.1 filed a written complaint dated 27 July 2017 against Petitioner No.2 Firm and its partners. It is alleged therein that the property was developed under the provisions of DCR 33 (7). The Respondent was agreed to be given Flat No.401. He was, however, put into possession of Flat

No.504. After having occupied the flat, it was realised that it was lesser in area than one he occupied in the old building. The Petitioners had agreed to give him flat, admeasuring 1210 sq.ft. The Respondent experienced that there was shortage of water supply. Water was not supplied by Corporation. Water tankers were availed. Water was dirty, stinky and, that too, not supplied daily and regularly. The Respondent, therefore, started insisting the Petitioners to provide amenities and give him occupation certificate issued by the Corporation. The Petitioner forwarded one deed for cancellation and one fresh agreement for permanent alternate accommodation and insisted to execute the same. The Respondent (original Applicant), therefore, sought legal advice. After going through the fresh agreement for permanent alternate accommodation, his Advocate informed that under the said redevelopment scheme, the Petitioners have claimed benefit of compensatory FSI, as provided under Regulation 35(4). The Respondent was entitled for 35% of such fungible FSI over and above 1210 sq.ft. carpet area. In the fresh agreement, however, the area of the flat was considerably reduced to 605 sq. ft. carpet area, including proportionate fungible FSI. The Respondent, therefore, obtained certain documents under Right to Information Act. He received irrevocable consent dated 19 March 2015, allegedly executed by him. According to the Respondent, he never gave such consent. His signature thereon has been forged. The said consent was submitted to the office of M.B.R. & R. Board by the Petitioners. As such, the Petitioners committed various offences. He, therefore, made a written complaint/FIR on 27 July 2017 to the Senior Inspector of D.B. Marg, Police Station and 7 others authorities, including the Commissioner of Police, Greater Mumbai, and even the Chief Minister. Since the Inspector, D.B. Marg Police Station and even the Commissioner of Police did not take cognizance of his FIR, he filed application under Section 156(3) Cr.P.C. along with all the relevant documents, including his affidavit.

5. Learned Metropolitan Magistrate, vide his order dated 16 February 2018, refused to issue direction under Section 156(3) of Cr.P.C. and even rejected the said application.

6. The Respondent, therefore, challenged the said orders in revision, being Revision Application No.9 of 2019. The learned Additional Sessions Judge allowed the revision application with following observations:

> "17. After considering the above documents, it prima facie shows that when first agreement for permanent alternate accommodation executed in the month of July, 2010 area given to the applicant is of 1210 sq. ft. in Occupants Irrevocable Consent dated 05.11.2008, which is admitted by the applicant, it also mentioned alternate

> area of 1210 sq.ft. will be given to him so, he gave irrevocable consent for development of the property. However, the applicant came to know that when draft Deed Cancellation alongwith draft agreement of permanent alternate accommodation is supplied to him, he obtained the documents and he came to know that Occupants Irrevocable Consent dated 19.03.2015 was forged. He specifically contented that this occupants irrevocable consent is forged documents and it not appears his signature. The preparation of forged documents and cheating as well as committing criminal breach of trust are a cognizable offence, then, it needs to take cognizance by the police and as police have not taken cognizance, applicant approached to the Court. It also prima facie shows that respondent developer has committed an offence under Section 53 of MR & TP Act."

7. Heard. Learned Advocate for the Petitioners would submit that it is in fact a civil dispute. Arbitration proceedings are in progress. There is non-compliance of directions given by the Apex Court in Priyanka Srivastava & Another vs. State of U.P. & Others.

According to learned Advocate, the application for relief under Section 156(3) was not supported by an affidavit. For the offence punishable under Section 53 of M.R. & T.P. Act., a complaint is required to be lodged by competent authority under the said Act. The Respondent and one another tenant have only raised the issue. All other tenants did not have any objection.

The Respondent has been in possession of a flat admeasuring 1199 sq. ft. Clause 15 of permanent alternate accommodation agreement dated 22 July 2010, executed between the Petitioners and the Respondent suggest that the Respondent agreed and gave his consent to amendment, modification, alternation, change in the sanction plan of the said new flat of the building upon a condition that the proposed amendment, modification, alternation, change shall not affect the area of the said new flat.

According to him, learned Additional Sessions Judge overlooked all the documents placed on record in support of the Petitioners' case. Learned Advocate would further submit that irrevocable consent letter dated 19 March 2015 does not bear signature of any of the partners of Petitioner No.2 firm. Comparison of the Respondent's signature appearing thereon and his admitted signatures would indicate the said consent was given by the Respondent himself. According to learned Advocate, the redevelopment was made in terms of MHADA Rules and Regulations. The Respondent was, in fact, entitled for a flat of very less area in redeveloped building. He has still been given a flat of the area almost equivalent to the flat he possessed in the old building. Learned Advocate reiterated that it is a case of civil dispute. The learned Magistrate was right in dismissing the application. He, therefore, urge for setting aside the order passed by the revisional court. Learned Advocate relied on the following authorities :

(i) Yogiraj Vasantrao Surve vs. State of Maharashtra And Anr.[1]

(ii) Devidas S/o. Waman Shinkar & Others vs. The State of Maharashtra & Anr.[2]

(iii) Devarapalll Lakshminarayana Reddy & Ors. vs. V. Narayana Reddy & Others.[3]

(iv) Priyanka Srivastava & Another vs. State of U.P. & Others.[4]

(v) Rameshbhai Pandurao Hedau vs. State of Gujarat.[5]

8. Learned Advocate for the Respondent would, on the other hand, submit that the Petitioners, with a view to get benefit of Rule 33(7), forged certain documents. The irrevocable consent letter dated 19 March 2015 is one of such documents. The Respondent, therefore, filed FIR to the Inspector, D.B. Marg Police Station and even Commissioner of Police as well. Since the authorities did not take cognizance, he filed the application under Section 156(3) of Cr.P.C. A copy of the affidavit filed in support of the said application was placed on record along with some other documents. Relevant DCR Rules have also been brought to the

1 2013 ALL MR (Cri.) 2059.
2 2017 (9) CPMH 212.
3 1976 AIR 1672= 1976 SCR 524.
4 (2015) 6 SCC 287.
5 AIR 2010 SC 1877.

notice of this Court to submit that the Petitioners availed 35% of fungible FSI. Since it was a redevelopment scheme of a residential building, the Petitioners were entitled to the said additional FSI free of cost. The Petitioners were not entitled to sell the same or utilise the same for sale component. Learned Advocate relied on the judgment of Apex Court in case of *M. Krishnan vs. Vijay Singh And Another*[6], wherein it has been observed:

> "4. Despite referring to various judgments of this Court relating to the interpretation and scope of Section 482 of the Code and the indictment that the High Court should be slow in interfering with the proceedings at the initial stage, the learned Single Judge of the High Court passed the impugned order. The High Court appears to have been impressed by the fact that as the nature of the dispute was primarily of a civil nature, the appellant was not justified in resorting to the criminal proceedings."

Learned Advocate ultimately urged for dismissal of the writ petition.

9. Considered the submissions advanced. Perused the pleadings, documents and the authorities relied on.

True, arbitration proceedings are in progress. This Court has to restrict itself from making any observations about the

6 (2001) 8 Supreme Court Cases 645

merits of the matter on civil side. It is true that post issuance of irrevocable consent by the Respondent dated 5 November 2008, registered agreement for permanent alternate accommodation dated 22 July 2010 was executed between him and the Petitioners. As per the terms of the agreement, the Petitioners agreed to give the Respondent a flat admeasuring 1210 sq. ft. in the new building. There are other documents to indicate that the Petitioners were entitled for 35% of fungible FSI. The concerned Rule 35(4) relied on behalf of the Respondent suggests that considering the nature of the old building being residential one, such additional FSI was provided for free. The developer was not entitled to sell the same. Needless to mention that these observations shall not influence any of the authorities dealing with the matter on civil side, including these arbitration proceedings. Suffice it to say that the alleged forged irrevocable consent, if considered, that could be disadvantageous to the Respondent and beneficial to the Petitioners.

10. The present petition is deserves to be allowed for the following reasons:

The relevant provisions of the Code of Criminal Procedure first need to be adverted to:

> "154. Information in cognizable cases.—(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf:
> ………...
> …………
> (2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.
> (3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

11. Admittedly, the Respondent made a written complaint-cum-FIR dated <u>27 July 2017</u> to Senior Inspector of D.B. Marg Police Station, Commissioner of Police, Greater Mumbai and other authorities. It was the written complaint-cum-FIR addressed to those authorities simultaneously. In short,

copies of the complaint dated 27 July 2017 were forwarded to Commissioner of Police, Senior Inspector of Police and other authorities named therein. Phraseology of Section 154(3) undoubtedly indicate that the person aggrieved by refusal on the part of Officer In charge of a Police Station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post to the Superintendent of Police concerned. As such, Section 154(3) comes into play only after Officer In charge of the concerned Police Station refuses to record the information given to him. Admittedly, nothing of that sort has happened in the present case. The Respondent, admittedly, forwarded his complaint dated 27 July 2017 to D.B. Marg Police Station and Commissioner of Police at one and the same time. As such, if it is taken that the Officer In charge of the D.B. Marg Police Station refused to record the information given by the Respondent then the Respondent has not taken recourse to Section 154(3) of the Code of Criminal Procedure.

12. In case of *Priyanka Srivastava* (supra), it has been observed in para 26 and 27 as under:-

> "26. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the code. A litigant at his own whim cannot invoke the authority of the Magistrate. A

principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellows citizens, efforts are to be made to scuttle and curb the same.

27. In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores. <u>We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed.</u> The warrant for giving a direction that an the application under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same

> can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."

13. In case of *Sakiri Vasu vs. State of UP & Ors.*[7], it has been observed in para 11 and 26 as under:-

> "11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 Cr.P.C., then he can approach the Superintendent of Police under Section 154(3) Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156 (3) Cr.P.C. before the learned Magistrate concerned. If such an application under Section 156 (3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.
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> 26. If a person has a grievance that his FIR has not been

7 (2008) 2 Supreme Court Cases 409

> registered by the police station his first remedy is to approach the Superintendent of Police under Section 154(3) Cr.P.C. or other police officer referred to in Section 36 Cr.P.C. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section 156(3) Cr.P.C. instead of rushing to the High Court by way of a writ petition or a petition under Section 482 Cr.P.C. Moreover he has a further remedy of filing a criminal complaint under Section 200 Cr.P.C. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?"

14. Admittedly, there is non-compliance of Section 154(3) of Cr.P.C. The Apex Court in Priyanka Srivastava's case has observed that for taking recourse to Section 156(3) Cr.P.C., compliance of Section 153(4) and 154(3) is the condition precedent. Since such compliance is not there, the order passed by Additional Sessions Judge in Revision Application No.9 of 2019 is liable to be set aside.

15. In the result, the petition (Writ Petition No.398 of 2020) succeed. The order impugned in the petition is set aside.

16. For the aforesaid reasons, Writ Petition No.397 of 2020 also succeeds.

17. In the result, both petitions succeed. The orders impugned therein are hereby set aside.

(R.G. AVACHAT, J.)