



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 2679 OF 2009

1] D. M. Mehta,	]	
Aged 44 years, Occ: Business,	]	
R/o: 202, Vasant Gandhi gram Road,	]	
Juhu, Mumbai-400 049	]	..Petitioner

Versus

1] Niket Mehta,	]	
Residing at 12th Floor, Lilavati	]	
Hospital, Bandra Reclamation, Bandra	]	
(West), Mumbai-400 050	]	
	]	
2] State of Maharashtra	]	
through the Public Prosecutor, High	]	
Court, Bombay.	]	
	]	
3] The Senior Inspector of Police, Juhu	]	
Police Station,	]	
J. V. P. D. Scheme, Mumbai-400 049	]	..Respondents

Mr. Sanjeev Kadam a/w Mr.Jagdish Chaudhary & Mr. Niraw Shah i/b
Little & Co. for the Petitioner.

Ms. M. H. Mhatre, APP for Respondent Nos. 2 & 3.

**CORAM : A.S. GADKARI &
SHARMILA U. DESHMUKH, JJ.**

DATE : 7th September, 2023.

Judgment : (Per Sharmila U. Deshmukh, J.):

1. By the present Petition filed under Article 226 of the
Constitution of India read with Section 482 of Code of Criminal
Procedure, 1973, (“Cr.P.C.”), the Petitioner seeks quashing of

C.C.No.153/MISC/2008 pending before the Court of Additional Chief Metropolitan Magistrate, 22nd Court at Andheri, Mumbai and the Order dated 15th September, 2009 passed therein directing the Juhu Police Station to register the complaint and submit the report under Section 156(3) of Cr.PC.

2. Heard Mr. Sanjeev Kadam, learned counsel appearing for the Petitioner and Ms. M.H. Mhatre, learned APP for Respondent Nos. 2 & 3.

3. In spite of being duly served and having caused appearance, none appears for Respondent No.1 even on second call. Record indicates that on 31st August, 2023 also, none had appeared for Respondent No.1. As such, we have proceeded to hear the learned counsel appearing for the Petitioner and learned APP for the State. With the assistance of learned counsel for the Petitioner and learned APP, we have perused the entire record.

4. Mr. Kadam, learned counsel for the Petitioner submits that there is non-application of mind while passing the impugned order directing investigation for two reasons firstly without an affidavit supporting the application under Section 156(3), the Magistrate could not have entertained the application in view of the dictum of the Apex Court in the case of *Priyanka Srivastav & Ors. Vs. State of UP & Ors.*, reported in (2015) 6 SCC 287 and secondly due to non compliance of the provisions

of Section 154(1) and 154(3) of Cr.P.C. prior to filing of the application under Section 156(3).

5. Upon specific query by this Court as to whether the Respondent No 1 had approached the police authorities as mandated under Section 154(1) of the Cr.P.C., Mr. Kadam, on instructions, asserts that no such complaint was made to the police. In support of his contentions he relies upon the Full Bench decision of this Court in the case of *Panchabhai Popatbhai Butani & Ors. Vs. State of Maharashtra* reported in *2010 ALL MR (Cri) 244* and the decision of the Apex Court in the case of *Priyanka Srivastav & Ors. Vs. State of UP & Ors.*, reported in *(2015) 6 SCC 287*.

6. Learned APP submits that the Respondent State will abide by Order of this Court.

7. Considered the submissions and perused the papers with the assistance of learned counsel appearing for the parties.

8. By the impugned Order, the Magistrate has directed Juhu Police Station to register the complaint and submit report under Section 156(3) of Cr.P.C. The application seeks direction of investigation under the provisions of Section 156(3). Perusal of the Order indicates that the Magistrate considered the allegations in the complaint and observed that the allegation appears to be serious in nature relating to commission of cognizable offence and the matter is to be investigated. Before

considering whether the allegation discloses commission of cognizable offence, the Magistrate was required to address itself to the issue of prior applications under Section 154(1) and 154(3) of Cr.P.C. The provisions of Section 154(1) requires the person to give information to the police about the commission of cognizable offence and the police is normally bound to register the FIR if commission of cognizable case is made out. In the unlikely event, if an FIR is not registered the remedy of the aggrieved person is to resort to Section 154(3). If the superior officer does not take action under Section 154(3), then the person has the right to invoke the power of the Court under Section 156(3).

9. One of the grounds on which Mr. Kadam assails the impugned order is the absence of Affidavit in support of the application. It needs to be noted that the Apex court in the case of *Priyanka Srivastava* cited (supra) directed the additional requirement of filing an Affidavit duly sworn by the applicant in support of the application. The decision having being delivered in the year 2015 is inapplicable to the instant case as the impugned order has been passed in the year 2009 on an application filed in the year 2008. As such, the challenge on ground of absence of Affidavit is required to be negated.

10. We however find considerable force in the second ground of challenge mounted to the impugned Order and application. The issue of

requirement of prior applications under Section 154(1) and Section 154(3) before invoking power of the Magistrate under Section 156(3) is no longer *res integra* and has been settled by Full Bench decision of this Court in *Panchabhai Popatbhai Butani* (supra). The questions in reference considered by the Full Bench were (i) whether in absence of a complaint to the police, a complaint can be made directly before a Magistrate and (ii) whether without filing a complaint within the meaning of Section 2(d) and praying only for an action under Section 156(3) a complaint before the Magistrate was maintainable.

11. The Full Bench answered the reference in paragraph No.64 as under:

“Question No.(i)

Whether in absence of a complaint to the police, a complaint can be made directly before a Magistrate ?

Answer

Normally a person should invoke the provisions of Section 154 of the Code before he takes recourse to the power of the Magistrate competent to take cognizance under Section 190 of the Code, under Section 156(3). Atleast an intimation to the police of commission of a cognizable offence under Section 154(1) would be a condition precedent for invocation of powers of the Magistrate under Section 156(3) of the Code. We would hasten to add here that this dictum of law is not free from exception. There can be cases where

noncompliance the provisions of Section 154(3) would not divest the Magistrate of his jurisdiction in terms of Section 156(3). There could be cases where the police fail to act instantly and the facts of the case show that there is possibility of the evidence of commission of the offence being destroyed and/or tampered with or an applicant could approach the Magistrate under Section 156(3) of the Code directly by way of an exception as the legislature has vested wide discretion in the Magistrate.

“Question No.(ii)

Whether without filing a complaint within the meaning of Section 2(d) and praying only for an action under Section 156(3), a complaint before a Magistrate was maintainable ?

Answer

A Petition under Section 156(3) cannot be strictly construed as a complaint in terms of Section 2(d) of the Code and absence of a specific or improperly worded prayer or lack of complete and definite details would not prove fatal to a Petition under Section 156(3), in so far as it states facts constituting ingredients of a cognizable offence. Such Petition would be maintainable before the Magistrate.”

12. The exposition of law by the Full Bench supports the argument of Mr. Kadam that before taking recourse to the powers of Magistrate under Section 156(3) the remedy of Section 154(1) and Section 154(3) is required to be invoked. As the Full Bench has struck a note that the same is not an absolute proposition of law without any exception, we

have carefully perused the complaint to satisfy ourselves whether any exceptional circumstances exist to justify departure from the requirements of Section 154 of Cr.P.C. Perusal of the complaint in the present case indicates that the procedure as prescribed under Section 154(1) and 154(3), which is normally *sine qua non* for filing of an application under Section 156(3) before the Magistrate, was not complied with. We find specific assertion in paragraph No.19 of the complaint that, the Complainant does not have confidence that if he gives complaint to the police directly, then the same will be investigated without an Order of this Court. There is no justifiable reason for this apprehension and in our view, the same does not constitute an exceptional circumstance. The Full Bench held that the dictum of law is not free from exception. There can be cases where the non-compliance with provisions of Section 154(3) would not divest the Magistrate of his jurisdiction in terms of Section 156(3). By way of illustration, the Full Bench has observed that those cases where the police fail to act instantly and the facts of the case show that there is possibility of the evidence of commission of offence being destroyed and/or tampered with. The illustration is by way of an example and as such, is illustrative and not exhaustive. However, the same would demonstrate that it is only in exceptional cases that the jurisdiction of the Magistrate can be invoked

directly.

13. In the present case, the only reason of non compliance of the provision of Section 154(1) of Cr.PC. is that the complainant does not have confidence that if he gives complaint to the police, the same will be investigated. In our opinion, by no stretch of imagination this can constitute an exception as envisaged by the Full Bench of this Court in the case of *Panchabhai Popatbhai Butani* (supra).

14. On overall consideration of the averments made in the application filed under Section 156(3) of Cr.PC read in the light of the decision of the Full Bench of this Court, the application under Section 156(3) filed directly with the Magistrate without invoking the provisions of Section 154 of the Code is not maintainable as no justifiable exceptional case is made out in the application. The Magistrate has failed to take into consideration the settled law on the subject before proceeding to pass the impugned Order dated 15th September, 2009.

15. Resultantly, Petition succeeds. C.C.No.153/MISC/2008 and the impugned Order dated 15th September, 2009 are hereby quashed and set aside. Rule is made absolute in the aforesaid terms.

(SHARMILA U. DESHMUKH, J.)

(A. S. GADKARI, J.)