



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

Criminal Application (APL) No. 832 of 2023

- (1) Indrajeet S/o Pralhad Motwani,
aged about 40 years, Occu. : Business,
- (2) Sumit S/o Manohar Ahuja,
aged about 31 years, Occu. : Business,
- (3) Manoharlal S/o Gopichand Balwani,
aged about 56 years, Occu. : Business,
R/o. Sindhi Colony, Guru Nanak Ward,
Circle No. 3, Bhandara,
Tq. and Distt. Bhandara.
- (4) Jitendra S/o Bhimandas Motwani,
aged about 34 years, Occu. : Business,
- (5) Devanand S/o Pralhad Motwani,
aged about 44 years, Occu. : Business,
- (6) Pralhad S/o Chuhadmal Motwani,
aged about 65 years, Occu. : Business,

Applicant nos. 1, 2 and 4 to 6 are
R/o. Near Zulelal Temple, Guru Nanak
Ward, Hinganghat, Tq. Hinganghat,
Distt. Wardha.

... Applicants

... Versus ...

- (1) The State of Maharashtra,
through P.S.O. Hinganghat Police
Station, Distt. Wardha.
- (2) Santosh Singh S/o Jagdish Singh
Gautam
Aged about 50 years, Occu. : Business
R/o Tahsil Ward, Hinganghat,
Distt. Wardha.

... Non-Applicants

Mr. Firdos Mirza, Advocate for the applicants
Mrs. M. H. Deshmukh, APP for the State/non-applicant no. 1
Mr. M. B. Naidu, Advocate for non-applicant no. 2

CORAM : ANIL L. PANSARE J.

DATED : 12-9-2023

ORAL JUDGMENT

Rule. Rule made returnable forthwith. With consent, the application is heard finally.

2. At the outset, learned counsel for the applicants submits that he is not pressing the challenge to the impugned order dated 3-5-2023 passed by learned Judicial Magistrate First Class, Hinganghat granting permission to the investigating agency to carry out further investigation in Crime No. 785/2021 but seeks liberty to challenge the same before the appropriate Court in accordance with law.

3. The challenge has been restricted to the judgment dated 21-1-2023 passed by learned Additional Sessions Judge, Hinganghat in Criminal Revision Application No. 17/2022 and consequential order dated 25-4-2023 passed by learned Judicial Magistrate First Class (Court No. 3), Hinganghat in OMC No. 11/2022.

4. The learned Judicial Magistrate First Class (Court No. 3), Hinganghat vide order dated 21-3-2022 had rejected the application filed by non-applicant no. 2 under Section 156(3) of the Code of

Criminal Procedure, 1973 (for short “the Code”). The non-applicant no. 2 had preferred revision under Section 397 of the Code challenging the aforesaid order before the Sessions Court.

5. The Sessions Court vide impugned order dated 21-1-2023 has partly allowed the revision and remanded the application back to the learned Judicial Magistrate First Class (Court No. 3), Hinganghat for consideration afresh. Consequently, the learned Magistrate vide impugned order dated 25-4-2023 has allowed the application filed by the non-applicant no. 2 under Section 156(3) of the Code.

6. Learned counsel for the applicant has invited my attention to the judgment passed by the Hon’ble Apex Court in the case of ***Raghu Raj Singh Rousha Vs. Shivam Sundaram Promoters Pvt. Ltd. and anr. [(2009) 2 SCC 363]*** wherein the facts were identical. The Metropolitan Magistrate therein had rejected the application filed by respondent therein under Section 156(3) of the Code. The respondent before the Supreme Court had challenged the said order before the High Court under Section 397 of the Code. The High Court has reversed the finding and remanded the application back to the learned Metropolitan Magistrate. The Supreme Court has, while setting aside the order passed by the High Court, dealt with the scope of Section 397 read with Section 401 of the Code and held thus :

“11. One of the questions which arises for consideration is as to whether the learned Magistrate has taken cognizance of the offence. Indisputably, if he had taken cognizance of the offence and merely issuance of summons upon the accused persons had been postponed, in a criminal revision filed on behalf of the complainant, the accused was entitled to be heard before the High Court.

12. Section 397 of the Code empowers the High Court to call for records of the case to exercise its power of revision in order to satisfy itself as regards correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior court. Sub-section (2) of Section 397 of the Code, however, prohibits exercise of such power in relation to any interlocutory order passed in any proceeding.

13. Whereas Section 399 of the Code deals with the Sessions Judge's power of revision, Section 401 thereof deals with the High Court's power of revision. Sub-section (2) of Section 401 of the Code reads thus:

"401. (2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence."

21. In *Mohd. Yousuf* whereupon reliance has been placed by Mr. Jaspal Singh, this Court made a distinction between a pre-cognizance stage and post-cognizance stage. It was opined that an order under sub-section (3) of Section 156 of the Code need not be passed when the Magistrate intends to take cognizance. Extensively referring to the decisions in *Gopal Das Sindhi v. State of Assam* and *Supdt. and Remebrancer of Legal Affiars v. Abani Kumar Banerjee* as also other decisions, it was held that in those cases cognizance had not been taken.

22. Here, however, the learned Magistrate had taken cognizance. He had applied his mind. He refused to exercise his

jurisdiction under Section 156(3) of the Code. He arrived at a conclusion that the dispute is a private dispute in relation to an immovable property and, thus, police investigation is not necessary. It was only with that intent in view, he directed examination of the complainant and his witnesses so as to initiate and complete the procedure laid down under Chapter XV of the Code.”

7. Learned counsel for non-applicant no. 2 submits that in the present case, the learned Magistrate has not applied the mind but has rejected the application on the ground that application filed by the non-applicant no. 2 was not supported by the affidavit in terms of law laid down in the case of ***Priyanka Srivastava and ors. Vs. State of U.P. and ors. [AIR 2015 SC 1758]*** and therefore, the rulings will not be applicable.

8. I do not find any substance in the aforesaid submission. Perusal of the impugned order indicates that the learned Magistrate has considered in detail the case of the complainant (non-applicant no. 2) and has found that though incident has occurred on 4-9-2021, he has filed the application on 7-1-2022. The Magistrate has further found that Crime No. 785/2021 is already registered for the same incident for the offence punishable under Sections 143, 147, 148, 149, 324, 323, 452, 294 and 506 of the Indian Penal Code on the basis of the report lodged by the complainant (non-applicant no. 2). The

findings have been rendered by the learned Magistrate after having detail analysis of the case put forth by the non-applicant no. 2. It is thus evident that the Magistrate has applied his mind while rejecting the application.

9. The Hon'ble Supreme Court in unequivocal terms has held that in the revision filed against the order passed by the learned Magistrate rejecting the application filed under Section 156(3) of the Code, the revisional Court is bound to give an opportunity to the accused of being heard in terms of Section 401(2) of the Code, if the order of rejection is passed after applying the mind. The Supreme Court has accordingly remanded the matter back to the High Court to consider the revision afresh by impleading accused as party - non-applicant. The same course will have to be followed here.

10. In view of the above, the applicant has made out a case. Resultantly, following order is passed.

ORDER

- (i) The application is partly allowed.
- (ii) The judgment and order dated 21-1-2023 passed by the Additional Sessions Judge, Hinganghat in Criminal Revision Application No. 17/2022 and the order dated 25-4-2023 passed by the

Judicial Magistrate First Class (Court No. 3), Hinganghat in OMC No. 11/2022, are quashed and set aside.

(iii) Criminal Revision Application No. 17/2022 is restored on the file of the Additional Sessions Judge, Hinganghat, who shall consider the application in the light of the ratio laid down by the Hon'ble Supreme Court in the case of ***Raghu Raj Singh Rousha Vs. Shivam Sundaram Promoters Pvt. Ltd. and anr.*** (supra) by permitting the present applicants (original accused) to be joined as party non-applicant No. 2 in the revision and further shall decide the revision in accordance with law.

(iv) The applicants are given liberty to challenge the order dated 3-5-2023 before the appropriate Court by filing appropriate proceedings, which if filed, shall be considered on its own merits.

(v) The parties i.e. applicants and non-applicant no. 2 shall appear before the Additional Sessions Judge, Hinganghat on 16-10-2023.

(vi) The application is disposed of in above terms.

(Anil L. Pansare, J.)

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