

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1215 OF 2023

Ahmed Saber Kazee

...Petitioner

Versus

State Of Maharashtra And Anr

...Respondents

Mr. Atul Damle, Senior Advocate i/by Mr.Sandesh More Advocate
for Petitioner.

Ms. K. T. Hivrale, APP for Respondent-State.

PSI Vikrant Patil, Shivaji Park Police Station is present.

**CORAM : PRAKASH D. NAIK &
N. R. BORKAR, JJ.**

DATE : 27th MARCH 2024

P.C.:-

1. The petitioner is original complainant in FIR dated 1st May 2019 registered with Shivajinagar Police Station, Mumbai vide C.R. No. 65 of 2019 for offences under Sections 406, 418, 465, 476, 468, 471 read with 34 of the Indian Penal Code, 1860.

2. The petitioner is aggrieved by order dated 2nd March 2022 passed by learned Additional Chief Metropolitan Magistrate, 5th Court, Dadar, Mumbai. The order indicate that 'Abate summary is granted as prayed' as accused is reportedly dead.

3. On completing investigation, the Investigating Officer had submitted final report before the Court stating that, the offence is made out against Ayooob Hashim Mohamedy. There is no evidence against the accused Chetan Shah, Shirish Dixit, Sunil Kadam and Nilesh Jani and their names are dropped from prosecution. It is further stated that, the accused Ayooob Hashim Mohamedy has expired on 21st February 2022 and case against the said accused stands abated. The case may be classified with abated summary. The report concluded with the statement that provision is made for further investigation under Section 173(8) of Cr.P.C.

4. Affidavit is filed by P.S.I. Vikram Patil dated 17th June 2023 stating that, after completion of investigation final abate summary was submitted to learned Magistrate 5th Court, Dadar, Mumbai. Although, final abate summary report was submitted on 2nd March 2022, inadvertently it was stated that, investigation is temporarily stayed and investigation under Section 173(8) of Cr.P.C. is pending. It is inadvertently stated that investigation continues under Section 173(8) of Cr.P.C. The report filed by police mentions that there was evidence against Ayub Hashim Mohammady, who is dead. The report also states that, against others, there is no evidence. The Investigating Officer is required to file before the Court, a summary report if the evidence is not available against accused. The case would abate against person, who is dead but if there is no evidence against

other accused, appropriate report has to be placed before the Court for its approval and complainant is required to be heard by issuing notice. The Investigating Officer has committed error. The learned Magistrate has mechanically allowed the prayer of abating the case, without noticing that FIR was also registered against other accused.

5. Learned Magistrate however failed to consider that, order is required to be passed in respect to the accused against whom summary was filed on the ground that, there was no evidence against the accused. Order merely indicate that, the abate summary is granted which would be in respect to the accused, who is dead.

6. Learned Advocate for petitioner submitted that, petitioner has prayed for setting aside the said order as well as for issuing directions to transfer the investigation.

7. It is pertinent to note that, it is for the learned Magistrate before whom the summary report is filed to issue appropriate direction. Firstly, the learned Magistrate has not dealt with the report in respect to the other accused. Even if, the said report is accepted, the complainant was required to be heard and needs to be permitted to file protest petition. The order reflects no application of mind. Though, the case would abate against the person, who was dead, the order indicate that the summary is granted to the case on the ground of abatement.

8. Considering the aforesaid circumstances, we pass the following order:-

ORDER

(i) Order dated 2nd March 2022 passed by learned Additional Chief Metropolitan Magistrate, 5th Court, Dadar, Mumbai in FIR No. 65 of 2019 is set aside.

(ii) Matter is remitted back to the Court of learned Additional Chief Metropolitan Magistrate, 5th Court, Dadar Mumbai to consider the matter afresh.

(iii) The complainant shall appear before the learned Additional Chief Metropolitan Magistrate, 5th Court, Dadar, Mumbai on 15th May 2024 at 10:30 a.m..

(iv) Learned Additional Chief Metropolitan Magistrate, 5th Court, Dadar Mumbai after hearing the complainant and prosecution shall pass appropriate Order.

(v) Writ Petition stands disposed off.

(N. R. BORKAR, J.)

(PRAKASH D. NAIK, J.)