

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 463 OF 2014

Nandkishor Eknath Kothawade

Age 47, Occ: Business

R/o Sheetal Paradise,

Behind Satyam Sweets,

Govindnagar, Nashik.

... Applicant

versus

1. State of Maharashtra

(to be served through the learned Public

Prosecutor Office High Court, Bombay).

2. Dinesh Murlidhar Pingale

Age 38 years, Occ: Service,

R/o. Saivihar Row House No. 6,

Behind Bhole Mangal Karyalaya,

Ambad, Nashik.

... Respondents

Ms. Farzana Khan, i/b. Harshadd Palwe, for the Applicant.

Mr. Ajay Patil, A.P.P. for the Respondent-State.

**CORAM : A. S. GADKARI AND
SHYAM C. CHANDAK, JJ.**

**RESERVED ON : 1st DECEMBER, 2023.
PRONOUNCED ON : 8th JANUARY, 2024.**

JUDGMENT [PER:- SHYAM C. CHANDAK,J]

1) Present Application is filed under Section 482 of Code of Criminal Procedure, 1973 (“*Cr.P.C.*”, for short) seeking to quash and set aside the Order dated 12th February, 2014 passed in R.C.C. No. 1158 of 2013 by the learned Judicial Magistrate First Class, Court No.6, at Nashik

and F.I.R. being C.R.No.41 of 2014 dated 27th February, 2014, registered with *Ambad* Police Station.

1.1) Record of the Application reveals that, Ad-interim relief was granted on 9th June, 2014. The Rule was issued on 13th June, 2016, and the ad-interim relief was continued to operate as interim relief.

2) Heard Ms. Farzana Khan, learned Advocate for the Applicant and Mr. Ajay Patil, learned APP for Respondent No.1-State. Respondent No.2 is duly served. However, none appeared for Respondent No.2, when the matter taken up for final hearing.

3) Respondent No.2 has filed the R.C.C.No.1158/2013 (*old S.C.C. No.3680/2012 and hereinafter referred to as 'the complaint', for short*) wherein it is alleged that, in February 2011, all the seven Accused persons named therein induced Respondent No.2 to invest money in the business of the accused persons namely M/s. Shri Swami Samarth Investment, by giving false assurance that, out of the said investment he would get huge profit. Respondent No.2 fell prey to that assurance and invested total Rs.5,00,000/- in the said business of the Accused. Thereafter, sometime in the month of July 2011, Respondent No.2 asked the accused persons to give him his principal amount and the profit earned thereon by them. The accused persons avoided to return his money and his share in the profit. However, due to persistent demands made by Respondent No.2, in March 2012, Accused No.1 gave a cheque of Rs.14,40,000/- to Respondent No.2

towards the principal amount of Rs.5,00,000/- and the profit of Rs.9,40,000/-. The said cheque was dishonoured when presented for encashment. Respondent No.2, therefore, issued a statutory notice to Accused No.1 but, was in vain. Thereafter, Respondent No.2 demanded his money from the Accused but they refused to pay. Thus, the accused persons in furtherance of their common intention cheated Respondent No.2. Hence, he filed the said complaint.

4) After considering the complaint, initially, the then learned Judicial Magistrate, First Class did not find it necessary to issue directions to the police for investigation and by passing an Order below Exh.1 dated 29th November 2012, the learned Magistrate directed to “*put up (the case) for verification*”. Accordingly, Respondent No.2 was examined under Section 200 of Cr.PC. on 1st December, 2012.

4.1) On 14th October, 2013 the subsequent learned Magistrate noted that, “*the offence charged against the accused are under Secs.406, 420 etc. of I.P.C., hence, A.S. (Asstt. Superintendent) to register the case as ‘Regular Triable Case’, entry regarding institution register be changed, accordingly*”. On 12th February, 2014, the learned Magistrate passed the impugned Order, which is as under:

ORDER BELOW EXH. 1

“1. *Read the complaint. Perused the documents placed on record. It appears that, the complaint pertains to commission of serious and*

cognizable offence. It requires to be investigated by Police as per the guidelines in the case of Panchabhai vs. State of Maharashtra, Reported in 2010 (1) MLJ 421.

2. *Therefore, P.I. Ambad Police Station is directed to register F.I.R. against Accused and carry out the investigation and submit his report as per Section 156(3) of Cr.P.C.*

3. *Certified copy of the complaint be sent to Ambad Police Station for investigation for that purpose. Complainant is directed to file certified copies of complaint and documents filed with”.*

*s/d (Eng.)
(name)
Judicial Magistrate, First Class,
Court No.6, Nashik.*

4.2 Hence, the impugned F.I.R. being C.R. No.41 of 2014, came to be registered.

Submissions :

5) Learned Advocate for the Applicant submitted that, undisputedly, the erstwhile learned Magistrate had decided to examine the Respondent No.2 under Section 200 of Cr.P.C. and accordingly, his examination was subsequently recorded. It is the settled position of law that, once the Magistrate has examined the complainant as above, he is deemed to have taken the cognizance of the offences stated in the complaint. Thereafter, there is no scope to refer such complaint for

registration of the F.I.R., investigation and submission of report, as provided under Section 156 (3) of Cr.P.C., which course is available only at a pre-cognizance stage. Therefore the impugned Order and the consequent F.I.R. bearing C.R. No. 41/2014, are illegal. Hence, the same are liable to be quashed and set aside.

6) Learned APP for the Respondent-State fairly submitted that, considering the facts of the case, appropriate Orders may be passed in the interest of justice.

7) In the case of *Tula Ram vs. Kishore Singh*, [(1977) 4 SCC 459], cited by learned counsel for the Applicant, the Hon'ble Supreme Court observed that, the question as to what is meant by taking cognizance is no longer *res integra* as it has been decided by several decisions of the Apex Court. Then reference was made to the decision in the case of *R.R. Chari vs. State of Uttar Pradesh*, [1951 SCR 312], wherein the Apex Court observed that, "Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence".

7.1.) In the case of *Smt. Mona Panwar vs. The Hon'ble High Court of Judicature at Allahabad through its Registrar and others*, [(2011) SCC 3 496], the Hon'ble Supreme Court held that, "..... A Magistrate can under Section 190 of the Code before taking cognizance ask for investigation by the police under Section 156(3) of the Code. The Magistrate can also issue

warrant for production, before taking cognizance. If after cognizance has been taken and the Magistrate wants any investigation, it will be under Section 202 of the Code. The phrase “taking cognizance of” means cognizance of offence and not of the offender. Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint or on a police report or upon information of a person other than a police officer. Before the Magistrate can be said to have taken cognizance of an offence under Section 190(1)(b) of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding under Section 200 and the provisions following that Section. However, when the Magistrate had applied his mind only for ordering an investigation under Section 156(3) of the Code or issued a warrant for the purposes of investigation, he cannot be said to have taken cognizance of an offence. Taking cognizance is a different thing from initiation of the proceedings. One of the objects of examination of complainant and his witnesses as mentioned in Section 200 of the Code is to ascertain whether there is prima facie case against the person accused of the offence in the complaint and to prevent the issue of process on a complaint which is either false or vexa-

tious or intended only to harass such person. Such examination is provided, therefore, to find out whether there is or not sufficient ground for proceeding further.

7.2) Recently, in *Vinubhai Haribhai Malaviya vs. The State of Gujarat*, [AIR 2019 SC 5222], in para 51, the Hon'ble Supreme Court has held that, “....*The direction for investigation by the Magistrate under Section 202, while dealing with a complaint, though is at a post-cognizance stage, it is in the nature of an inquiry to derive satisfaction as to whether the proceedings initiated ought to be furthered or not.*”. Considering the decision in the case of *Vinubhai* (supra), in the case of *Paraji Sheshrao Madan vs. State of Maharashtra* (AIR Online 2020 Bom. 3123), this Court observed that, “when Order of investigation is made under Section 202 of Cr.P.C., such Order is made after taking cognizance of the matter and after making such Order, the Magistrate cannot make Order under Section 156(3) of Cr.P.C. It is made clear that Order of investigation made under Section 202 of Cr. P.C. is not of the nature of further investigation as contemplated under Section 173(8) of Cr.P.C.”

8) In view of the settled position of law, we have carefully considered the subject complaint and Orders passed therein as noted above and we noticed that, before proceeding against the accused, the erstwhile learned Magistrate wanted to ascertain as to whether there is substance in the complaint to proceed further with the case or not. Therefore, by taking

judicial notice of the allegations in the complaint *i.e.* taking cognizance of the complaint, the learned Magistrate directed to “*put up (the case) for verification*” *vide* Order below Exh.1 dated 29th November, 2012. Then, said learned Magistrate examined the Respondent No.2 under Section 200 of Cr.P.C., and by an Order passed below Exh.1 on 3rd July, 2013, directed the Respondent No.2 “*to take immediate steps to move the matter ahead*”. This subsequent Order indicates that, the learned Magistrate wanted the Respondent No.2 to produce some more material to record his satisfaction before proceeding further in the case and against the accused. However, it indicates that, the Respondent No.2 did not comply this Order. Hence, in the Order below Exh.1 dated 3rd September, 2013, the learned Magistrate observed that, “*In spite of Order dated 3rd July, 2013 no steps taken, keep for Order*”. From all this noted above, it is evident that, since inception the erstwhile learned Magistrate was intending to proceed with the complaint under ‘Chapter XV’ and not under ‘Chapter XII’ of Cr.P.C. This approach of the learned Magistrate looks defensible in the light of the contents of the complaint. However, without taking note of this cautious method of the said learned Magistrate, the subsequent learned Magistrate passed the impugned Order, which finally led to registration of the impugned F.I.R. This is wholly in contrast to the scheme of the Cr.P.C. which, in the above circumstances, provides for inquiry/investigation under Section 202 only and not investigation under Section 156 (3) thereof.

9) In view thereof, the impugned Order dated 12th February, 2014 passed in R.C.C. No. 1158/2013, by the learned Judicial Magistrate, First Class, Court No.6, at Nashik and the impugned F.I.R. bearing C.R. No.41 of 2014 dated 27th February, 2014, registered with *Ambad* Police Station are liable to be quashed and accordingly are quashed and set aside.

9.1) The Criminal Application No. 463 of 2014 is allowed in the above terms. Rule is accordingly made absolute.

(SHYAM C. CHANDAK, J.)

(A. S. GADKARI, J.)