

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 5001 OF 2022

Amber A. Majid Patel

...Petitioner

Versus

The State of Maharashtra and Ors.

...Respondents

WITH

INTERIM APPLICATION (ST) NO. 7139 OF 2024

IN

CRIMINAL WRIT PETITION NO. 5001 OF 2022

Farhad Yakub Patka

...Applicant

In The Matteer Between

Amber Majid Patel

...Petitioner

Versus

State of Maharashtra and Ors.

...Respondents

....

Mr. Subhash Jha a/w Ms. Praveena Venkatraman, Priti Singh, Ritesh Kesarwani and Kunal Jadhav i/by Law Global Advocate for the Intervenor.

Mrs. M. M. Deshmukh, Addl.PP for Respondent No.1-State.

Mr. Firoz Usman a/w Umair Irshad, Advocate for Petitioner.

PSI, S.B. Ithape, (Pairavi Officer), Azad Maidan Police Station is present.

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

DATE : 10th APRIL 2024

P.C.:-

1. The petitioner has invoked the powers under Article 226 of the Constitution of India seeking writ of mandamus or any other writ to

respondent for registering the FIR for offences under Section 420, 465, 467, 468, 471, 120-B of the Indian Penal Code, 1860.

2. The contentions of petitioner is as under:-

(i) The petitioner was the wife of Farhad Yakub Patka. Their marriage was performed on 12th May 1991. Out of wedlock, she has six children. Two of them are married. Marriage was dissolved on 18th July 2016.

(ii) After the marriage, the petitioner stayed with Mr.Farhad Yakub Patka in the joint family. Mr.Farhad Patka had doubts in his minds about the validity of his marriage with petitioner. Deed of divorce was prepared and the petitioner was induced to execute the deed on 18th July 2016 before notary.

(iii) Even after the divorce, Mr.Patka had forcible physical relations with petitioner. She lodged the FIR vide C.R. No.215 of 2016 on 22nd July 2016 with Agripada Police Station, Mumbai against Mr.Farhad Patka for offences under Sections 376, 377, 323, 504, 506 (ii) of the Indian Penal Code, 1860.

(iv) The present husband of petitioner was acquainted with Mr.Javed Akhtar Khan, the Advocate of Mr.Farhad Patka in Criminal Application No.950 of 2018 filed in the High Court. Mr. Javed Akhtar Khan met husband of the petitioner and informed him that Mr. Farhad Patka had made an offer to allow the petitioner to meet her children and on she filing affidavit of no objection for quashing C.R. No. 215 of 2016 which is

subjected matter of Criminal Application No.950 of 2018 filed in the High Court. The petitioner refused to accept the offer.

(v) On 7th August 2020, Mr.Javed Akhtar Khan filed copy of forged/false affidavit executed by petitioner which had been annexed with praecipe filed by him in Criminal Application No. 950 of 2018.

(vi) On 13th August 2020, Mr. Javed Akhtar Khan sent a PDF file of the praecipe filed by him before this Court for circulation of the papers and proceedings of the Criminal Application No.950 of 2018 to be kept urgently on 17th August 2020. To the surprise of the petitioner, there was copy of affidavit purportedly executed by the petitioner which was enclosed and filed earlier.

(vii) Mr.Javed Akhtar Khan instructed the petitioner's husband that the petitioner should confirm and accept the said affidavit and allow the complaint to be quashed.

(viii) The petitioner denied having executed affidavit. This Court passed an order dated 17th August 2020 instructing the petitioner to file affidavit. The petitioner complied the order and filed affidavit on 28th August 2020.

(ix) Vide order dated 8th September 2020, this court instructed applicant in Criminal Application No.950 of 2018 to file affidavit-in-reply. Time was sought for filing reply. Affidavit was not filed.

(x) The petitioner had not consented nor signed/executed any affidavit filed in Criminal Application No.950 of 2018 in this Court and nor has

affixed her thumb impression on it.

(xi) The petitioner had not signed on the register of the notary. The affidavit does not contain any identification nor any proof of any photo identification. The petitioner hired the services of M/s. Square Forensic Advisors Pvt. Ltd.

(xii) Report dated 16th August 2021 was received concluding that the signature on the forged affidavit has not been signed by the petitioner.

(xiii) Mr. Patka is forcibly trying to usurp the rights of the petitioner in the flat by pressurizing her to quash the complaint bearing C.R. No. 215 of 2016.

(xiii) Mr. Farhad Yakub Patka and Mr. Javed Akhtar Khan had acted in connivance to file fabricated affidavit, claiming that the petitioner had agreed, signed and affixed her thumb impression on it and falsely stating that the petitioner had agreed the condition mentioned therein giving consent for quashing the FIR and transfer flat to petitioner.

(xiv) The petitioner filed the complaint with Azad Maidan Police Station on 18th June 2021. On 7th February 2022, the petitioner made complaint to Commissioner of Police, Mumbai to take appropriate action against the accused.

(xv) The FIR was not registered. The petitioner approached the notary and informed him about the fabricated affidavit and that she has not signed the affidavit. The notary inspected the affidavit and informed that his signature

is false. He executed affidavit and gave it to the petitioner for filing it in the proceedings.

3. Learned Advocate for the petitioner submitted that, in spite of complaints to the police, the FIR has not been registered. The offence is of serious nature. The accused had filed false affidavit of consent for quashing the proceedings. The affidavit was not executed by the petitioner. The notary has not notarized affidavit. Investigation is required to be conducted. Cognizable offences were made out. Bar under Section 195 of Cr.P.C. is not attracted as the affidavit was fabricated and then tendered before the Court. It was the duty of the police to take cognizance of the complaint when the offence of forgery and cheating were made out. Police ought to have taken serious note of the fact that the affidavit was filed in the proceedings in the High Court.

4. Learned Advocate for petitioner has relied upon the following decisions:

- (i) Iqbal Singh Marwah and Anr. Vs. Meenakshi Marwah and Anr.¹
- (ii) Dhananjay Kumar Vs. State of Chhattisgarh²;

5. Intervention Application viz. Interim Application (ST) No.7139 of 2024 is preferred by Mr. Farhad Yakub Patka seeking intervention in

¹ AIR 2005 SC 2119

² 3 Cra/573/2017

Criminal Writ Petition No.5001 of 2022.

6. Learned Advocate for petitioner in Writ Petition No.5001 of 2022 urged preliminary objections about maintainability of intervention application. It is submitted that the intervenor is the proposed accused in the complaint lodged by petitioner. The petitioner is seeking directions to register the FIR. At this stage, the intervenor has no audience and cannot intervene in the proceedings. The police machinery is required to register the FIR when the complaint makes out cognizable offence. The proposed accused is not entitled for hearing before the registration of FIR. The intervention application may be rejected.

7. Learned Advocate Mr. Jha appearing for intervenor submitted that, the intervenor had preferred Criminal Application No.950 of 2018 challenging the FIR dated 22nd July 2016 registered with Agripada Police Station vide C.R. No.215 of 2016. The petitioner in this petition is claiming that, the affidavit filed on her behalf in Criminal Application No.950 of 2018 is fabricated. In these circumstances, the intervenor may be heard and any order passed in this application will have bearing on the order passed in Criminal Application No. 950 of 2018. Direction to register the FIR may not be granted without affording opportunity to the intervenor. The person, against whom relief is sought, is entitled to be heard.

8. Mr. Jha has relied upon the following decisions:-

- (i) Makkapati Nagaswara Sastri Vs. S. S. Satyanarayan³;
- (ii) Divine Retreat Centre Vs. State of Kerala and Ors.⁴;
- (iii) Bahar Uddin Vs. Board of Revenue and Ors.⁵.

9. It is pertinent to note that, intervenor has preferred Criminal Application No.950 of 2018 challenging the FIR No. 215 of 2016 and the consequential proceedings. The complainant therein has claimed that false affidavit was relied upon in the said proceedings purportedly affirmed by complainant and that the said affidavit was not signed by her. The complainant has preferred the present petition viz. Criminal Writ Petition No. 5001 of 2022 for initiating action against the applicant in Criminal Application No.950 of 2018 and Advocate Mr.Javed Akhtar, who had purportedly submitted the said affidavit. Without adjudicating on the rights of the proposed accused intervening in the petition seeking writ of mandamus for registration of FIR, in the factual matrix of this case would indicate that intervention could be allowed to the intervenor. Both the matters were heard simultaneously. Hence, we permit the intervenor to intervene in this petition.

10. Mr. Jha submitted that the petition is frivolous. The relief sought in this petition may not be granted. The petitioner may resort to alternate

3 (1981) 1 SCC 62

4 (2008) 3 SCC 542

5 (1984) SCC OnLine ALL 717

remedy. Vide order dated 27th June 2023, Criminal Application No.950 of 2018 and Criminal Writ Petition No. 5001 of 2022 were directed to be tagged together. Subsequently, vide order dated 8th January 2024, it was directed that Criminal Application No. 950 of 2018 be placed before the appropriate Bench as per roster. The applicant through his Advocate filed praecipe with the Registrar seeking direction for tagging both the matters. As per Administrative order, both the matters were directed to be tagged and categorically both the matters were assigned to this Bench. Material on record would indicate that, the affidavit was prepared by the petitioner herself. Despite the fact that, the Criminal Application No.950 of 2018 was filed in 2018. There was no substantial progress.

11. The intervenor contends that, the Advocate Mr. Javed Akhtar Khan informed the intervenor that he had received call from Mr. Firoz Tinwala, who was the husband of the petitioner stating that, they were desirous of settling the matter and that the petitioner is ready to sign consent affidavit. Advocate Mr. Javed Akhtar Khan sent a voice note recording of conversation between husband of petitioner and him. The intervenor was also desirous of closing the matter. Mr. Firoz Tinwala called Advocate Mr. Javed Akhtar Khan on numerous times to take instructions from the applicant. Mr. Javed Akhtar Khan had informed Mr. Firoz Tinwala that he would prepare the affidavit and send it to him for signatures of petitioner. Mr. Tinwala had

handed over the affidavit of the petitioner notarized by notary on 21st July 2020 for filing in the said proceedings. There was lockdown on account of covid-19. Praecipe was filed before the High Court on 30th July 2023 for circulation of the matter stating that complainant had executed affidavit signifying her consent for quashing the matter. Advocate Mr.Javed Akhtar Khan sent to Mr. Tinwala to screen shot of the physical filing on 30th July 2020, the mentioning praecipe on 31st July 2023 and the e-mail sent to the Bombay High Court on 3rd August 2023. Advocate Javed Akhtar Khan further informed him that copy of the affidavit had also been sent to the Court. Despite Mr. Javed Akhtar Khan had sent the token to Mr.Tinwala following up with him regarding update on the matter. On 7th August 2022, copy of the praecipe was sent to Advocate Tinwala. On 14th August 2022, Advocate Mr. Javed Khtar Khan received e-mail from the Court stating that matter is listed before the Bench with VC Link. Details were sent to Mr.Tinwala. On 17th August 2022, Advocate Mr.Javed Akhtatar Khan asked Mr.Firoz Tinwala if the petitioner had joined the meeting. It was informed that, they were not able to connect. The intervenor has screen shot of the whats-app chats between both the Advocates. During V.C. hearing, the petitioner did complete volt face and said that the affidavit was forged. After the petitioner filing the affidavit, the petitioner alleged that Advocate Mr.Javed Akhtar Khan and intervenor had forged the affidavit.

12. Mr. Jha submitted that, this is not the case to issue writ of mandamus directing registration of FIR. The petitioner has remedy for filing private complaint. The police have rightly not taken cognizance of complaint. The assertion in the petition are based on the disputed question of facts.

13. Mr. Jha has relied upon the following decisions:-

- (i) Sakiri Vasu Vs. State of Uttar Pradesh and Ors.⁶
- (ii) D. Venkatasubramaniam and Ors. Vs. M.K. Mohan Krishnamachari and Anr.⁷
- (iii) Sudhir Bhaskarrao Tamble Vs. Hemant Yashwant Dhage and Ors.⁸
- (iv) M. Subramaniam and Anr. Vs. S. Janaki and Anr.⁹
- (v) State of Punjab Vs. Davinder Pal Singh Bhullar and Ors.¹⁰

14. From the factual matrix as stated above, it is apparent that the petitioner is the original complainant in C.R. No. 215 of 2016 which is under challenge in Criminal Application No. 950 of 2018. The grievance of the petitioner is that during the course of the hearing of Criminal Application No. 950 of 2018 affidavit of consent purportedly signed by her was submitted by the Advocate of the applicant in the said proceedings. Petitioner denied being author of the said affidavit. From the factual matrix

6 (2008) 2 SCC 409

7 (2009) 10 SCC 488

8 (2016) 6 SCC 277

9 (2020) 16 SCC 728

10 (2011) 14 SCC 770

brought on record by the intervenor it is apparent that, the claim of the petitioner is based on the disputed questions of facts. Criminal Application No. 950 of 2018 was heard on merits and without considering the said affidavit. The petitioner had contended that she has filed complaints to the police authorities but the cognizance is not taken. Petitioner is at liberty to file private complaint seeking appropriate remedy. We are not inclined to direct the respondent to issue writ of mandamus, directing the police to register the FIR.

15. In the case of ***Sakiri Vasu Vs. State of U.P. and Ors.*** (supra), the High Court should discourage writ petitions or petitions under Section 482 of Cr.P.C. where alternative remedies under Section 154(3) read with 36 or Section 156(3), 200 of Cr.P.C. have not been exhausted. Section 156(3) Cr.P.C. is wide enough to include all such powers in Magistrate which are necessary for ensuring proper investigation and it includes the power to order registration of FIR and of ordering proper investigation.

16. In the case of ***M. Subramaniam and Anr. Vs. S. Janaki and Anr.*** (supra), it is observed that, writ petition cannot be the first recourse seeking direction from High Court for filing of FIR, unless the above remedies are first exhausted.

17. In the case of ***Sudhir Bhaskarrao Tambe Vs. Hemant Yashwant Dhage and Ors.*** (supra) it is held that, if the High Courts entertain such

writ petitions, then they will be flooded with such writ petitions and will not be able to do any other work except dealing with such writ petitions. The complainant can avail alternate remedy to approach Magistrate under Section 156 (3) of Cr.P.C.

18. In the case of *Lalita Kumari Vs State of Uttar Pradesh*¹¹ the Apex Court has held that, the police ought to have cognizance of the complaint if the cognizable offence is made out. However, in the present case the police have not taken cognizance of complaint. Petitioner is seeking direction to register the FIR.

19. In the light of factual matrix of this case, we are not inclined to issue directions sought by the petitioner. She can however, resort to remedy of filing private complaint seeking appropriate relief.

ORDER

- (i) Criminal Writ Petition No. 5001 of 2022 is rejected and disposed off.
- (ii) The petitioner is at liberty to file private complaint seeking appropriate relief.
- (iii) In view of disposal of Criminal Writ Petition, Interim Application (ST) No.7139 of 2024 stands disposed off.

(N. R. BORKAR, J.)

(PRAKASH D. NAIK, J.)

¹¹ (2014) 2 SCC 1