

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO. 177 OF 2024

- | | | | |
|----|---|---|---------------|
| 1. | Kiran Patel | } | |
| | Adult Indian Inhabitant, aged 70 years | } | |
| 2. | Rakesh Patel | } | |
| | Adult Indian Inhabitant, aged 52 years | } | |
| 3. | Vikram Patel | } | |
| | Adult Indian Inhabitant, aged 64 years, | } | |
| 4. | Lion Pencils Limited | } | |
| | A company incorporated as per | } | |
| | Provisions of The Indian Companies | } | |
| | Act, 1956. | } | |
| | All having address at Andrew Nagar, | } | |
| | Post Mira, District Thane-401104. | } | ...Applicants |

vs.

- | | | | |
|----|--|---|----------------|
| 1. | State of Maharashtra | } | |
| 2. | Tradewel Construction Corporation Pvt. | } | |
| | Ltd., A company incorporated as per | } | |
| | Provisions of The Indian Companies | } | |
| | Act, 1956 having address at, | } | |
| | F5-9A, Pinnacle Business Park, | } | |
| | Mahakali Caves, Andheri (E) | } | |
| | Mumbai-400093 | } | ...Respondents |

Mr. Girish Kulkarni, Sr. Advocate i/b. Adv. M. G. Shukla :-	Advocate for Applicants.
--	--------------------------

Mr. A. P. Mundargi, Sr. Advocate a/w. Mr. Pranav Bhadeka and Mr. Aditya Mithe i/b. Desai & Diwanji :-	Advocates for Respondent No.2.
Mr. A. S. Gawai :-	APP for Respondent-State.
Mr. Wankhade Manish, API	EOW, MBW.

CORAM : S. M. MODAK, J.

DATE : 13th AUGUST 2024

ORAL JUDGMENT :-

1. Heard learned Senior Advocate Mr. Kulkarni for the Applicants - Advocate for proposed Accused, learned Senior Advocate Mr. Mundargi for Respondent No.2 / Complainant and learned APP. The legality of the order dated 30th December 2023 passed by the Court of Additional Sessions Judge, Thane is challenged. The effect of this order is as follows :-

- (i) The order passed by the Court of Judicial Magistrate First Class, Court room No.5, Thane dated 14th March 2023 was set aside and Criminal Application was restored.
- (ii) It was restored for sending the matter for investigation under Section 156(3) of the Criminal Procedure Code [Cr.P.C.].

2. There is a dispute amongst both sides as to whether offence is *prima facie* disclosed and whether it need to be investigated under Section 156(3) of the Cr.P.C. However, there is consensus amongst both the Senior Advocates about not issuing the directions to the learned Magistrate to send the matter for investigation under Section 156(3) of Cr.P.C. Even learned Senior Advocate Mr. Mundargi in all his fairness has placed reliance on the observations in **Mikkilineni Venkateshwari and others vs. Tummula Nirmala and Another**¹. Similar issue was raised that is to say whether Sessions Judge can direct the learned Magistrate to take a particular course of action. The provisions of Section 398 of the Cr.P.C. are also referred. In paragraph No.8 it is observed :-

A perusal of the said Section shows that it is open to the Sessions Judge to direct a Magistrate to make further enquiry into any complaint, which has been dismissed under Section 203 of the Code. Directing the Magistrate under the impugned order by the learned Sessions Judge to take cognizance of the matter is certainly one step forward to the requisite enquiry to be conducted and leaves no discretion to the Magistrate to satisfy himself

1. 2001 SCC OnLine Andhra Pradesh 1578

about the truth or otherwise of the allegations. It becomes almost an empty formality for the Magistrate who has been directed to take cognizance of the offence. While remitting back the matter to the Court of Magistrate, the direction should have been left to consider the case afresh in the light of the observations made, if any *inter alia*, in the remand order. The contention of the learned senior Counsel in that view of the matter gains significance on bare perusal of the relevant provisions. Therefore, the impugned order requires modification to that extent only. The other conclusions drawn by the learned Sessions Judge in the impugned order are impeccable.

3. In nutshell the principle is Sessions Court cannot direct Magistrate to pass a particular order only. The issue has to be left open to the learned Magistrate and he can pass an appropriate order on the basis of observations of the Revisional Court. **So that part of the order from the operative part of the order needs to be set aside.**

Observations in the impugned order

4. Now question arises whether observations made by learned Additional Sessions Judge in the impugned order are warranted as per the facts or not. The learned Additional Sessions Judge **in paragraph**

No.23 observed as under :-

“Conspectus, the Ld. Magistrate has erred in holding that the Self Evidence Collection Procedure i.e. Complaint Procedure would be sufficient to address the necessity of inquiry into allegations and grievance so as to implicitly hold that the investigation under Section 156(3) of the Code of Criminal Procedure, 1973 was neither necessary nor warranted, when, manifestly, the Complaint Procedure is seemingly insufficient to address the grievance of alleged commission of criminal breach of trust by misusing credentials as well as articles of Applicant Company to the prejudice of Company itself, that too, by allegedly making false document clandestinely keeping it out of the sight of not only Applicant but also the Hon’ble High Court.”

5. In **paragraph No. 18** the learned Additional Sessions Judge has disagreed with the observations of the learned Magistrate :-

“Mere delay in setting law in motion can no more be the sole determinative factor for holding the existence or non-existence of necessity of the proper mode of investigation”.

6. In **paragraph No.21** learned Additional Sessions Judge observed :-

[21] Considering the allegation of manipulation of the documents supposedly showing the surrender of the leasehold belonging to applicant to the prejudice of not only applicant's right but also the right of the other Directors, the grievance cannot be regarded as mere civil dispute for downplaying with the allegations, rather, the traces surrounding the alleged commission of offences are required to be found out upon expert investigation (contemplating professional interrogation, search, seizure and proper methodology of detection), which purpose can hardly be accomplished if the allegations are set at the mercy of Self Evidence Collection Procedure implied by the Complaint Procedure. This, indeed, has been the kernel of the judgment in the case of *XYZ V/s. State of Madhya Pradesh & Ors.* (referred supra).

Observations in the order by Judicial Magistrate First Class

7. It will also be relevant to see the observations of the learned Magistrate in his order dated 14th March 2023. The learned Magistrate has declined to order investigation under Section 156(3) of Cr.P.C. instead the matter was fixed for verification. (Page-240). It is true that after this order, verification was not recorded but the original Complainant has filed Revision before the Court of Additional

Sessions Judge, Thane. So even though the learned Magistrate has proceeded towards taking cognizance, the fact that verification is not recorded. It means the act of taking cognizance was not complete. The learned Magistrate while refusing investigation has given certain reasons. They are as follows :-

“Investigation under Section 156(3) is discretionary. Mere because cognizable offence is made out, it does not mean that order of investigation has to be passed. (It is erroneously typed as cannot be passed).” The learned Magistrate has considered the veracity in the elements in the Complaint and also considered inordinate delay on the part of Complainant while refusing the investigation. At the same time learned Magistrate thought it fit to conduct inquiry by himself. (Paragraph-5).

8. According to learned Senior Advocate Mr. Mundargi, these part of observations are not challenged by the proposed Accused. It is true that at that stage no adverse order was passed against the Accused persons. Now there is an adverse order passed against them and as such they can certainly agitate that the facts does not disclose commission of an offence.

9. On this background it will be relevant to consider the averments in Complaint which are necessary for deciding the issue in this Revision. With the help of both the Senior Advocates I have read the averments in the Complaint and the documents.

Admitted facts

10. Relationship in between the parties is admitted. Execution of deed of lease dated 30th June 2006 is admitted. What is disputed is deed of surrender of lease dated 15th April 2014. What is further disputed is the resolution passed in the meeting of Complainant Company - Tradewel Construction Corporation Pvt. (hereinafter to be referred as 'Tradewel') authorizing the Accused No. 1 - Kiran Patel to execute the deed of surrender on behalf of Tradewel. For easy understanding the facts are narrated as bellows:-

Facts

- (a) Lion Pencils Limited (hereinafter referred as 'Lion Pencils') is a owner of land bearing Survey No.260 (part) and new Survey No. 12 (part) admeasuring approximately 8 Acres, situated at village Mahajan Wadi Tal. and Dist. Thane.
- (b) They have leased out this land by way of registered lease deed

dated 30th June 2006 in favour of Tradewel. The consideration of Rs.3,00,00,000/-(Rupees Three Crore only) is mentioned in the lease deed which is as follows :-

- (i) Rs.1,20,00,000/- (Rupees One Crore Twenty Lakh only) by way of cheque.
- (ii) Lion Pencils became share holder in the Tradewel and Lion Pencils allotted shares of the value of Rs.1,80,00,000/- (Rupees One Crore Eighty Lakh only).
- (iii) Tradewel was put into possession of demised premises.

11. The Tradewel-Complainant is having certain grievances against Lion Pencils. They are as follows :-

- (i) The Lion Pencils entered into one deed of confirmation on 24th November 2008 with Neelkamal Realtors Suburban Pvt. Ltd. [‘Neelkamal’]. This was confirmation of joint venture agreement dated 2nd May 2006.
- (ii) Tradewel contend that by these documents their leasehold rights are violated and therefore right to carryon development on demised premises was violated.
- (iii) They got this information in the year 2013.
- (iv) In the month of July or August 2013 they received another information in respect of sale of flat by Neelkamal in favour of one flat purchaser.

- (v) The Tradewel contend that the demised premises is shown as a recreational ground by Neelkamal and by Lion.

Filing of Writ Petition

12. It resulted into filing of Writ Petition No. 6444 of 2014. They have asked for injunction against Mira Bhyander Municipal Corporation from issuing Occupancy Certificate. They got interim relief on 11th November 2014. However, subsequently Tradewel and Lion entered into consent terms on 30th June 2015. Execution of these consent terms is not disputed. As per the consent terms, Lion has paid certain consideration to Tradewel and the area of demised premises was reduced. New rent is fixed. Accused No.1-Kiran was Director of Tradewel. There were shares purchased by the Lion. These shares were resold to Tradewel. These are some of the terms agreed mutually. Still the Complainant has sought certain grievances about these terms. They are as follows :-

- (a) The Complainant was never disclosed about the alleged deed of surrender dated 15th April 2014.
- (b) Their contention is *in fact* the consent terms were executed on 30th June 2015. So Lion and Accused No.1 - Kiran ought

to have informed them when *in fact* deed of surrender was executed on 15th April 2014.

- (c) That is why they say that fraud is committed on them.

Knowledge of surrender deed

13. This was disclosed to them on 27th February 2019 (Paragraph No. 6.5.2) when they were desirous of planning construction by using 30,000/- FSI. That is how they have filed Complaint on 19th June 2019 (Paragraph-11) with Police. The Complaint was inquired by the Economic Offence Wing. After inquiry they concluded that no offence is disclosed. They have inquired with Complainant as well as Accused persons. The Complainant as per the letter dated 14th February 2022 was informed about non-disclosure of the offence (Page-220).

Filing of private Complaint

14. On this background, the Tradewel filed private Complaint thereby alleging commission of offences under Sections 403, 406, 420, 467, 468, 471, 472 r/w. Section 120-B and Section 34 IPC. There are four Accused persons. They are (a) Accused No. 4 – Lion Pencils Ltd. (b) Accused Nos.1 to 3 are the Directors.

The Accused - Rakesh was supplied with the report given by the

API, ACP, Economic Offence Wing dated 15th December 2022. It is on Page No. 260. This information was called as per Right to Information Act.

15. As stated above the learned Magistrate has refused to order investigation. Both the learned Senior Advocates has taken me through the various averments in the Complaint and the documents. When the learned Magistrate has come to the conclusion to record verification, he has not formed an opinion that offence is disclosed. His findings are as follows :-

“It is necessary to ascertain as to whether the contentions made in the petition/complaint constitute any offence. It if constitute some offence then necessary to decide as to whether the matter needs to be referred to Police for investigation as provided in section 156(3) of the Code of Criminal Procedure or needs to proceed further as provided in section 200 of the Code of Criminal Procedure.”

16. However, he thought that investigation under Section 156(3) is not required. Whereas learned Additional Sessions Judge came to conclusion that it is required. Learned Senior Advocate Mr. Kulkarni

has relied upon the observations in case of **Smt. Mona Pawar vs. Hon'ble High Court of Judicature of Allahabad through its Registrar & Others**². It is in respect of expunging of certain remarks made by Single Judge of the High Court against judicial officer who has passed the order.

17. Those remarks were expunged. The appellant judicial officer directed the Application under Section 156(3) of the Code be registered as a Complaint. It was a case under Section 376 of Indian Penal Code. Local Police Station refused to register the complaint against father-in-law. The learned Magistrate / Appellant exercised judicial discretion and it was not found to be arbitrary. High Court of Allahabad has criticized the conduct of the Judge being lady Judicial Officer. But this judgment is mere on the point of limitations while criticizing the conduct and discretion of judicial officer.

Whereas the learned Senior Advocate Mr. Mundargi relied upon observations in the following judgments :-

(i) **XYZ vs. State of Madhya Pradesh and others**³ and

2. 2011 (3) SCC 496

(ii) **Mohd. Salim vs. State**⁴.

Hon'ble Supreme Court in case of XYZ interpreted the meaning of word 'may' as discretionary but added a word of caution and observed this discretion shall not be exercised arbitrarily and must be guided by judicial reasoning.

18. In case of **Mohd. Salim**, High Court of Delhi has elaborated the scope of inquiry by the Magistrate once a private Complaint is filed.

There can be two modes :-

- (a) On facts and circumstances, if the Magistrate feels that, no investigation by the Police is required and case can be proved by the Complainant without assistance of the Police, he may take cognizance and proceed under Section 200 of the Cr.P.C.
- (b) When the assistance of the investigating agency is necessary and cause of justice is likely to suffer in absence of investigation by Police, then Magistrate ought to order Police investigation.

19. I have read the observations therein also. In nutshell the word 'may' appearing in Section 156(3) in Cr.P.C. is interpreted. It indicates discretion to the learned Magistrate either he may take cognizance or

3. 2022 SCC OnLine SC 1002

4. 2010 SCC OnLine Del 1053

he may order investigation by the Police prior to taking cognizance. Now which mode the learned Magistrate will follow depends upon the facts and circumstances. It is very well true that Revisional Court cannot direct Magistrate to follow up a particular mode at the same time the Revisional Court can make its observations on the basis of facts and circumstances.

20. If considered from that perspective, I agree with the learned Additional Sessions Judge. The averments in the Complaint, documents and the opinion of the Police given in the Report dated 15th December 2022 if considered I am of the opinion that *prima facie* cognizable offence is disclosed. I will give my reasons :-

- (i) When consent terms were executed on 30th June 2016 Lion Pencils and it's Directors Accused Nos. 1 to 3 have never disclosed about deed of surrender dated 15th April 2014. In fact Accused No. 1 has signed the consent terms. It is also true that he has signed the deed of lease on behalf of Lion Pencils. He was very much aware about the deed of lease. It was expected from him to disclose about the deed of surrender when consent terms were executed on 13th June 2016.
- (ii) The Lion Pencils comes with the case about deed of surrender. This deed, no doubt, is registered one and when the Police have

inquired, they found that it was a genuine deed. From the Economic Offence Wing Report dated 15th December 2022 it reveals that the Police have inquired with the Directors of the Tradewell as well as with the Directors of Lion Pencils. The bone of contention is minutes of the meeting dated 15th April 2014 and authority letter issued in favour of Accused No. 1 – Kiran. The Economic Offence Wing in their Report have given several reasons thereby supporting execution of deed of surrender. Ultimately, if there is an authority letter in favour of Accused No. 1, he ought to have produced that authority letter before the Police.

- (iii) He claims that the minutes of the meeting were passed by the Directors of the Complainant and they have altered those minutes. Be that as it may. When he has signed the deed of surrender, he ought to have possess the resolution and the authority letter.
- (iv) He signed the deed of surrender in dual capacity one as a Director of Lion Pencils and another as an authorized representative of Tradewell. The Tradewell disputes holding of such meeting dated 15th April 2014. The Police have come to conclusion that no such minutes are there.
- (v) After this conclusion, there are two aspects One - Complainant says that no meeting has taken place. If it is so, is it expected from them to produce minutes? Second when Lion Pencils says

that there was a meeting, it was expected from them to produce those minutes and authority letter. However, it seems that Police are misguided. They have referred seven meetings but none of them is dated 15th April 2014. It cannot be because Tradewel contend that meeting was not held on that date.

- (vi) Police have pointed out certain lacuna in the documents produced by Tradewel. What is important is documents collected by the Police from Lion Pencils. Unfortunately none of them were collected. So, if there is no authority letter followed by the minutes, certainly the Complainant has got a right to make a grievance. Because it is the said deed of surrender, on the basis of which Lion Pencils says that Tradewel, being a lessee, has surrendered their leasehold rights.
- (vii) If deed of surrender and consent terms are taken together, we may find that they are contradictory to each other. Because consent terms has bifurcated the leasehold rights into two parts :-
 - (a) For which Tradewel was paid with consideration and
 - (b) The area for which their lease hold rights were confirmed. Whereas the deed of surrender records surrender of entire lease hold rights.
- (viii) If it is so, it cannot be said that this will be the only civil wrong.

21. No doubt, Complainant has filed the Suit and they have lost in obtaining interim injunction, the civil remedies are different and if

there is concealment of facts and manipulation, certainly criminal law can be set in motion. So the learned Sessions Judge was right in holding that *prima facie* offence is disclosed. Similarly on account of delay the Court cannot non-suit the Complaint.

22. Certainly, the direction to proceed under Section 156(3) cannot be sustained. So, that part of order needs to be set aside.

23. It is true that it is only the Directors of Lion Pencil can tell about the disputed meeting and the authority letter. The Complainant can only say and produce contemporary documents to show meeting has not taken place in respect of those documents. So, the inquiry before the Magistrate under Section 202 of the Cr.P.C. is limited. The Complainant is not having access to documents relied upon by the accused. They are possessed by accused. They cannot be collected during an inquiry under Section 200 and 202 of the Code. Whereas there is wide scope for investigation by the Police. Issue of limitation does not come in the way considering the nature of offences alleged. These are my *prima facie* observations. With these observations, I am inclined to pass following order :-

ORDER

- (i) Revision is partly allowed.
- (ii) The matter is remanded to the Court of Judicial Magistrate First Class, Court No.5, Thane.
- (iii) The trial Court is at liberty to pass appropriate order on the basis of observations made hereinabove.

[S. M. MODAK, J.]

KISHOR
VISHNU
KAMBLE

Digitally signed
by KISHOR
VISHNU
KAMBLE
Date:
2024.08.21
19:02:45 +0530