
(2013) 05 BOM CK 0001

In the Bombay High Court

Case No : Criminal Application No. 1091 of 2013

Ajit and Others

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 09-05-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 101

Hon'ble Judges : Naresh H. Patil, J;A.V. Nirgude, J

Bench : Division Bench

Advocate : N.S. Ghanekar, for the Appellant; S.G. Nandedkar, Additional Public Prosecutor for Respondent No. 1 and Shri. M.D. Gitte, Advocate, for the Respondent

Judgement

Naresh H. Patil, J.—Rule, returnable forthwith. By consent heard finally. The applicants pray for setting aside the order passed u/s 156(3) of the Criminal Procedure Code dated 19-1-2013 by the learned Judicial Magistrate, First Class, Beed and the First Information Report No. M.B./02 of 2013 registered with Peth Police Station Beed, for offence punishable u/s 4 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Section 166 of the Indian Penal Code.

2. The applicants state that the respondent No. 2 filed a complaint with the Magistrate bearing MCA No. 99 of 2013. The learned Magistrate passed an order dated 19th January 2013 and forwarded the complaint to the Deputy Superintendent of Police Beed for investigating the matter u/s 156(3) of the Code of Criminal procedure (for short, "the Code").

3. Substance of the complaint filed by respondent No. 2 is that the complainant is resident of Officer Colony Beed and he belongs to Scheduled Caste. The complainant was appointed on 4-1-1993 in Government Polytechnic as Carpenter. He is discharging his duties in the said capacity since January 2006 in Government Polytechnic Beed. It is alleged that the complainant has become eligible for getting promotion. However, the accused deliberately did not carry

out the process of promotion and failed to promote the complainant. This act of the accused, according to the complainant, is an offence punishable u/s 4 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, "Act of 1989"). The police registered the offence u/s 4 of the Act of 1989 and u/s 166 of the Indian Penal Code on 24th January 2013.

4. From the record forwarded by the Judicial Magistrate, First Class, Beed to the Registry of this Court by communication dated 12th April 2013 we have noticed that the learned Magistrate had observed in the order that the offence was cognizable hence matter was sent to the Deputy Superintendent of Police Beed for investigation u/s 156(3) of the Code. According to the communication received by the Registrar, High Court, the original copy of private complaint was sent to the concerned police for investigation u/s 156(3) of the Code. The First Information Report was registered for offence punishable u/s 4 of the Act of 1989 and u/s 166 of the Indian Penal Code.

5. The learned counsel appearing for the applicants submitted that from reading of the complaint it could be ascertained that no offence is disclosed to have been committed u/s 4 of the Act of 1989. The learned Magistrate has committed error in passing the order u/s 156(3) of the Code. The said order is erroneous and suffers from non application of mind. In the submission of the counsel u/s 4 of the Act of 1989 a person may be sentenced for a term which shall not be less than six months but which may extend to one year. Considering the classification made in respect of offences against other laws in Schedule First of the Code, it is clear that offence if punishable with imprisonment for less than 3 years or with fine only would be non cognizable one. The punishment for offence punishable u/s 166 of the Indian Penal Code is simple imprisonment for one year or fine or both. The said offence is also non cognizable one. Therefore, the complaint lodged for offence u/s 4 of the Act of 1989 and u/s 166 of the Indian Penal Code being non cognizable one the police could not have registered the First Information Report nor the learned Magistrate could have passed order u/s 156(3) of the Code.

6. The learned counsel for respondent No. 2 has supported the order passed by the Magistrate. Affidavit in reply is also filed on behalf of respondent No. 2. Reference was made to Section 20 of the Act of 1989 which refers to giving overriding effect of the provisions of the Act of 1989. Considering the provisions of Section 20 of the Act of 1989 it shall be held that Section 4 of the Act of 1989 is a cognizable offence. Therefore the police registered the offence on the order passed by the learned Magistrate. The learned counsel further submitted that as the complainant was not promoted by the accused they have committed offence u/s 4 of the Act of 1989.

7. The learned Additional Public Prosecutor has submitted that as the police received order from the Magistrate they were bound to register the offence and accordingly the police registered the offence.

8. We have perused the complaint and the record forwarded by the Court of the Judicial Magistrate, First Class, Beed. The record does not contain original complaint and the original order passed by the Magistrate. A copy of the order passed by the Magistrate incorporated below a simple copy of complaint including copy of Roznama and other miscellaneous documents are noticed.

9. The First Schedule under Chapter 37 to the Code relates to classification of offences. Clause II of the First Schedule is relating to classification of offences against other laws which reads as under:

II CLASSIFICATION OF OFFENCES AGAINST OTHER LAWS

Offence Cognizable or noncognizable Bailable or non bailable By what Court triable. If punishable with death, imprisonment for life, or imprisonment for more than 7 years. Cognizable Nonbailable. Court of Session. If punishable with imprisonment for 3 years, and upwards but not more than 7 years. Ditto Ditto Magistrate of the first class. If punishable with imprisonment for less than 3 years or with fine only. Noncognizable Bailable Any Magistrate.

10. The order passed by the learned Magistrate as occurring in the record forwarded by the Magistrate reads as under:

ORDER

Heard. The alleged offence is cognizable, hence matter be sent to Dy. S.P. Beed to investigate the matter u/sec. 156(3) of Cr.P.C. returnable on 25.2.13.

Sd/- JMFC 19.1.13.

11. Perusal of the above mentioned provisions demonstrates that offences registered against applicants were of non-cognizable nature. The complainant and the police are not remedy-less as in Section 155 in Chapter XII of the Code, procedure has been prescribed which reads as under.

155. Information as to non-cognizable cases and investigation of such cases.:-

(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a noncognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the information to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding

that the other offences are non-cognizable.

12. Considering the substance of the complaint we are of the view that on allegation of failure to promote the complainant in service, no offence could be registered u/s 4 of the Act of 1989 and section 166 of the Indian Penal Code without following proper procedure enunciated u/s 155 of the Code. Even otherwise on merit of the complaint no offence is disclosed to have been committed by the applicants u/s 4 of the Act of 1989.

13. The complaint does not disclose prima facie sufficient material to be considered against the applicants for registration of offence u/s 166 of the Indian Penal Code.

14. The learned counsel for the applicants in support of his submissions has placed reliance on the following reported judgments.

(1) Alka A. Misra Vs. J.P. Shoke and Others,

(2) Arabinda Panda Vs. State of Orissa,

15. The learned counsel for the respondent No. 2 has placed reliance on reported judgment in Dilip Khedekar Vs. State of Maharashtra and Bhimerao Shriram More, and referred to the provisions of Section 20 of the Act of 1989.

16. Sections 4 and 20 of the Act of 1989 read thus:

4. Punishment for neglect of duties.--Whoever, being a public servant but not being a member of a Scheduled Caste or a Scheduled Tribe, wilfully neglects his duties required to be performed by him under this Act, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to one year.

20. Act to override other laws.--Save as otherwise provided in this Act, the provisions of this Act shall have effect notwithstanding anything inconsistent therein contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law.

17. We have perused the judgments cited supra. In a recent judgment delivered by Nagpur Bench of the Bombay High Court in Yogiraj Vasantrao Surve Vs. State of Maharashtra and Pravin Madhavrao Thute, it is observed in para 22 of the judgment thus:

22. We have noticed that in number of complaints filed u/s 190 read with Section 200 of the Code of Criminal Procedure or petition u/s 156(3) of the Code of Criminal Procedure, the Magistrates have been passing orders u/s 156(3) without even finding out whether the petition purporting to be u/s 156(3) Cr.P.C. discloses cognizable offences. The Magistrate before passing an order u/s 156(3) Cr.P.C. ought to satisfy himself/herself that the averments made in the complaint or petition filed u/s 156(3) disclose commission of cognizable offence and whether the prosecution would lie. Only in such an eventuality, it is permissible

for the Magistrate to direct investigation u/s 156(3) Cr.P.C. if he or she deems fit considering the facts and circumstances of the case. We, therefore, deem it appropriate to direct the Registrar (J) to circulate a copy of this Judgment to all the Principal District and Sessions Judges within the jurisdiction of Nagpur Bench, who shall, in turn, circulate the Judgment to all the Magistrates within their jurisdiction.

18. We have noticed in petitions coming before us that different practices are being followed by the learned Magistrates in respect of forwarding the copy of complaint and the order passed u/s 156(3) of the Code. The question would be as to whether after the Magistrate passes order u/s 156(3) of the Code, the original complaint along with original order signed by the Magistrate, is required to be forwarded to the police station. We find that forwarding of these original documents to the police would not be essential and proper. In the case of *Madhu Bala Vs. Suresh Kumar and others*, , the Apex Court observed that when the complaint disclosing cognizable offence is made before the Magistrate, he may take cognizance upon same u/s 190(1)(a) of the Code and proceed with the same in accordance with provision of Chapter XV. The other option available to the Magistrate in such a case could be to send the complaint to the appropriate police station u/s 156(3) of the Code for investigation. Para 8 of the judgment in *Madhu Bala*'s case reads as under:--

8. From a combined reading of the above provisions it is abundantly clearly that when a written complaint disclosing a cognizable offence is made before a Magistrate, he may take cognizance upon the same u/s 190(1)(a) of the Code and proceed with the same in accordance with provisions of Chapter XV. The other option available to the Magistrate in such a case is to send the complaint to the appropriate Police Station u/s 156(3) for investigation. Once such a direction is given under sub-section (3) of Section 156 the police is required to investigate into that complaint under sub-section (1) thereof and on completion of investigation to submit a "police report" in accordance with Section 173(2) on which a Magistrate may take cognizance u/s 190(1)(b) - but not under 190(1) (a). Since a complaint filed before a Magistrate cannot be a police report in view of the definition of complaint referred to earlier and since the investigation of a "cognizable case" by the police u/s 156(1) has to culminate in a police report the complaint as soon as an order u/s 156(3) is passed thereon - transforms itself to a report given in writing within the meaning of Section 154 of the Code, which is known as the First Information Report (FIR). As u/s 156(1) the police can only investigate as cognizable "case", it has to formally register a case on that report.

19. In the case of *Samaj Parivartan Samudaya and Others Vs. State of Karnataka and Others*, The Apex Court observed in para 26 thus:

26. Section 154 Cr.P.C. places an obligation upon the authorities to register the FIR of the information received, relating to commission of a cognizable offence, whether such information is received orally or in writing by the officer in charge of a police station. A police officer is authorised to investigate such cases without

the order of a Magistrate, though, in terms of Section 156(3) Cr.P.C. the Magistrate empowered u/s 190 may direct the registration of a case and order the police authorities to conduct investigation, in accordance with the provisions of Cr.P.C.. Such an order of the Magistrate u/s 156(3) Cr.P.C.. is in the nature of a pre-emptory reminder or intimation to the police, to exercise their plenary power of investigation under that section. This would result in a police report u/s 173, whereafter the Magistrate may or may not take cognizance of the offence and proceed under Chapter XVI Cr.P.C.. The Magistrate has judicial discretion, upon receipt of a complaint to take cognizance directly u/s 200 Cr.P.C., or to adopt the above procedure (Ref. Gopal Das Sindhi v. State of Assam; Mohd. Yousuf v. Afaq Jahan and Mona Panwar v. High Court of Judicature of Allahabad.)

20. In case the Magistrate resorts to exercise of jurisdiction to pass order in terms of Section 156(3) of the Code then, the Magistrate can forward a true copy or certified copy of the complaint to the police along with the communication made by the Registrar or authorized officer of the Court intimating the order passed by the Magistrate u/s 156(3) of the Code. This could facilitate the Magistrate to retain the original record with the court which could be used for various purposes in future.

21. In the case at hand, it is informed by the learned counsel appearing for the applicants that except certified copy of the Roznama, the applicants could not get copies of either of the complaint or the order passed by the Judicial Magistrate, First Class Beed u/s 156(3) of the Code, as both these original documents were forwarded by the Magistrate to the concerned police station. It would be appropriate that the original record of the Court is retained by the Court itself. The same would be useful for exercise of powers by the Magistrate which are incidental, implied in respect of the subject complaint for the purposes of issuing further directions and monitoring the police investigation (Ref: Sakiri Vasu Vs. State of U.P. and Others,). By an order dated 8th April, 2013 we had directed the Registrar (Judicial) to call for report from the Judicial Magistrate and accordingly the same is received. We have perused the same. In the facts of the case and considering the submissions advanced, we find that this is a fit case to exercise jurisdiction u/s 482 of the Code of Criminal Procedure. We are of the opinion that the learned Magistrate has committed error in passing the impugned order u/s 156(3) of the Code of Criminal Procedure. In the facts of the case we are of the view that, filing of the impugned complaint amounts to abuse of process of law and the Court.

ORDER

(A) The order dated 19-1-2013 passed by the learned Judicial Magistrate, First Class, Beed u/s 156(3) of the Criminal Procedure Code in Misc. Criminal Application No. 99 of 2013 and the First Information Report No. MB 2/2013 registered at Peth Police Station Beed, u/s 4 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and section 166 of the Indian Penal Code are quashed and set aside.

(B) We direct that in case the Magistrate passes order u/s 156(3) of the Code of Criminal Procedure then the original complaint and order passed by the Magistrate shall be retained with the same Court.

(C) The Magistrate shall forward a true copy or certified copy of the complaint along with the communication of the order passed by the Magistrate u/s 156(3) of the Code of Criminal Procedure, to the concerned police station.

(D) The Registrar (Judicial) of this Court is directed to forward copy of this order to all the Principal District & Sessions Judges in the State of Maharashtra for bringing to the notice of all the Judicial Magistrates, the view adopted by this Court.

(E) The Rule is made absolute in the above terms.