

(2017) 09 BOM CK 0143
In the Bombay High Court
Case No : 497 of 2013

Mohammad Illiyas Mahammad Shafi, & Ors.

APPELLANT

Vs

Shaheen Parveen Ziaulmallan Khan, & Anr.

RESPONDENT

Date of Decision : 26-09-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 190](#), [Section 200](#), [Section 156\(3\)](#), [Section 202](#), [Section 204](#), [Section 20](#)

Citation : (2017) 09 BOM CK 0143

Hon'ble Judges : P.N. Deshmukh

Bench : SINGLE BENCH

Advocate : A.A.Naik, J.B.Kasat, S.D.Shirpurkar

Judgement

1. Both these petitions are decided by this common judgment and order in view of the fact that challenge in both these petitions is to impugned judgments dated 13th July, 2012 and 25th October, 2012 passed in Criminal Revision No.15 of 2012 and Criminal Revision No.30 of 2012, respectively, by learned Additional Sessions Judge Darwha, Distt.Yavatmal, thereby dismissing both the Criminal Revisions, filed against order dated 26th March, 2012, passed by learned Judicial Magistrate (F.C.) Darwha in R.C.C.No.145 of 2012, whereby learned Court of Magistrate had ordered to issue process against the petitioners for the offence punishable under Sections 406, 409, 417, 418, 420, 465, 467, 471, 477A, 166, 120B read with Section 109 of the Indian Penal Code.

2. Facts involved in the petitions can be briefly stated as under : Complainant Shahin Parveen is the teacher and petitioner nos.1 and 2 are the husband and wife. Petitioner No.1 was running Millat Education Society, while petitioner No.2 was running Mahila Bahuudeshiy Shikshan Prasarak Mandal, Talegaon (Deshmukh). Both education societies were running schools. Petitioner No.3 is their soninlaw, while petitioners in Criminal Writ Petition No.496 of 2013 were Education Officer, Yavatmal and Education Officer, Akola, respectively.

3. It is contended that respondent no.1 was appointed as Assistant Teacher to the school i.e. Hazrat Khawaja Moinuddin Chisti. Her post was sanctioned by the Education Department. In the year 2003 she was posted as Head Master. Petitioner nos.1 and 2 were causing interference in day to day functioning and affairs of the school. Therefore, she resigned from the post of Head Master on 30th June, 2005. Thereafter one Ejazbaig was appointed as Head Master. He was also harassed by the petitioner nos.1 and 2, therefore he also resigned. Thereafter petitioner no.3 was posted as Head Master of the said school in the year 2005-2006. Meanwhile marriage of daughter of petitioner nos.1 and 2 was performed with petitioner no.3. Thereafter petitioner Nos.1 to 3 prepared false documents, to gain financial benefits and administrative benefits to petitioner no.3. It is further alleged that petitioner no.3 was never appointed during the tenure of respondent no.1 as Head mistress and her signatures were forged on appointment order of petitioner no.3. It is also alleged that the seniority list was also fabricated in the year 2003-2004 so as to give financial benefits to petitioner no.3.

4. In a nutshell, it is the case of respondent no.1 that petitioner nos.1 and 2 by preparing false documents have given undue financial benefits to petitioner no.3 and petitioners in Writ Petition No.496 of 2013 who at the material time were posted in Education Department by not making any enquiry against the allegations made by respondent no.1, helped petitioner nos.1 to 3 (petitioners in Writ Petition No.497 of 2013) for committing such serious crimes. Thus, it is the case of respondent no.1 that petitioners in both these above numbered petitions had committed illegal acts and helped each other to extend benefits to petitioner no.3 and thus, filed complaint before the learned Judicial Magistrate (F.C.) Darwha on 17th August, 2010.

5. The learned Judicial Magistrate (F.C.), Darwha ordered an investigation into the allegations made by the respondent against the present petitioners by an order passed under Section 156 (3) of the Code of Criminal Procedure (hereinafter referred to as "the Code"). Pursuant to the said order passed by the learned Judicial Magistrate (F.C.), Darwha a thorough investigation was carried out into the allegations made by the present respondent against the present petitioners. Various documents were verified and even statements of witnesses were recorded. After completion of the investigation a report dated 15th July, 2011 came to be filed before the learned Judicial Magistrate (F.C.), Darwha Court by the Assistant Police Inspector, Darwha, in which it was clearly mentioned that there was no substance in the allegations made by the present respondent against the petitioners and that the complaint was filed by the respondent only due to a grudge which the respondent was nursing against the present petitioners as she was transferred from the school at Talegaon to the school at Kamptee. Even after the report dated 15th July 2011 was submitted by the Investigating agency in which it was clearly mentioned that there is no substance in the allegations made by the present respondent against the petitioners, even then the learned Judicial Magistrate (F.C.), Darwha passed an order dated 26th

March, 2012 and issued process against the present petitioners and others for the offences punishable under Sections 406, 409, 417, 418, 420, 465, 467, 468, 471, 477A, 166, 120(B) read with 109 of Indian Penal Code.

6. Learned Counsel Shri Akshay Naik for petitioners in both the petitions submitted that by passing order impugned, the learned trial Court had committed grave error by not considering the police report in which it is clearly mentioned that on carrying thorough investigation into the allegations levelled in the complaint, no substance was found in it. On the contrary, it was found that complaint was made only because respondent no.1 had grudge against the petitioners, as she was transferred from a School at Talegaon to other School at Kamptee. It is, therefore, contended that the impugned order is passed in mechanical manner and the learned Magistrate has even gone to the extent of saying that police did not investigate the matter in its correct perspective which observations, in fact, are stated to be sufficient to establish that the learned Magistrate had not considered various documents collected by the investigating agency as well as statements of witnesses recorded in connection with the alleged crime and passed order to issue process, though the material clearly establish that no offence at all is made out against the petitioners and that the allegations levelled are false and baseless.

7. Learned counsel for the petitioners has pointed out as to how the order impugned lacks any cogent reasons since not given in the impugned order and has submitted that once the investigation is ordered under Section 156(3) of the Code of Criminal Procedure and a report is received pursuant to that order, the learned Magistrate is bound to consider the report, and if at all the learned Magistrate disagrees with the investigation report filed by the police authorities, the Magistrate has to give cogent reasons for not relying upon the said report.

8. It is also contended that along with documents submitted with the police report, there were documents in respect of earlier Writ Petition No.1553 of 2011 filed by respondent no.1 which was disposed of on 5th July, 2011 by giving direction to hold enquiry, wherein she had made similar allegations of petitioners forging her signatures on various documents for extending financial benefits to petitioner no.3 in which petition, directions were issued to the Deputy Director of Education, Amravati Division, Amravati to enquire into and in pursuance to such order of holding enquiry complaint made by respondent no.1 was dismissed by said authority and said dismissal was an outcome of approach of respondent no.1 who in spite of directions issued by Deputy Director of Education, Amravati to remain present for the purpose of enquiry since conveyed said authority that she is not ready to cooperate with the above manner of investigation and as such will not remain present before the enquiry and did not attend nor extend cooperation by not providing her specimen signatures and finger prints and thus, no enquiry could be properly adjudicated and thus, the Officers concerned were left with no other alternative but to draw adverse inference against respondent no.1 and accordingly dismissed her complaint/representation.

9. Against dismissal of said complaint, respondent no.1 preferred second round of litigation by filing Writ Petition No.4433 of 2011 and same was withdrawn on 25th July, 2012. In the background of above facts, it is therefore submitted that, respondent no.1 herself is not interested in getting the allegations made in her complaint adjudicated through a proper channel and is interested only to harass the petitioners and for that reason had filed complaint on 17th August, 2010 wherein the learned Court of Magistrate passed order under Section 156(3) of the Code directing investigation to be done into the allegations in the complaint and on receipt of police report on 15th July, 2011 without considering it in its true perspective, and without assigning any reasons to not to accept it, on 26th March, 2012 ordered to issue process against petitioners which order is therefore stated to be bad in law and is prayed to be quashed and set aside.

10. Learned counsel for the petitioners in support of the petition has relied upon decisions in the cases of M/s. Pepsi Foods Ltd. and anr. ..vs.. Special Judicial Magistrate and ors. reported in 1998 SC 128, Mehmood Ul Raheman ..vs.. Khazir Mohammad Tunda and ors. reported in (2015) 12 SCC 420 and Madhao and anr. ..vs.. State of Mah. and anr., reported in (2013)5 SCC 615. It is, therefore, submitted on behalf of the petitioners that as there are no reasons stated in the order impugned for not accepting police report and on the contrary, since from the allegations made in the complaint as no offence, in fact, can be said to be made out by the petitioners or at the most, dispute of a Civil nature can be said to have been established for which police machinery is being misused, order passed by learned Judicial Magistrate issuing process against the petitioners is prayed to be quashed.

11. Learned counsel for respondent no.1, supported the impugned order and advanced submissions on two counts. Learned counsel by referring to the copy of complaint on record as Annexure "A" submits that as per endorsement made on the complaint itself by the learned Magistrate on 17th August, 2010 same is established to be presented on that day which was ordered to be registered as criminal complaint No.145 of 2010 and by further endorsement learned Magistrate by endorsing as "put up for verification", had taken cognizance as required under Section 190 of the Code of Criminal Procedure. It is therefore, submitted that as learned trial Court on the day of presentation of complaint itself, has passed order to put up the same for verification, has on the same day taken cognizance as contemplated under Section 190 of the Code. It is therefore contended that since the learned Court of Magistrate has chosen to adopt said procedure, it was not open for the Magistrate to pass order under Section 156(3) of the Code. It is, therefore, contended that since challenge in this petition is to order under Section 156(3) of the Code, passed by the learned Magistrate on 26th March, 2012, petitions are liable to be dismissed on this ground itself in view of the fact that on 17th August, 2010 itself learned Magistrate had taken cognizance directing to put up the complaint for verification which order is not impugned in this petitions. It is therefore submitted that petitions are liable to be dismissed on this count alone.

12. Learned counsel for respondent no.1 while submitting on merits of the case has contended that all the grounds put forth by petitioners are duly considered by the revisional court and found that complaint prima facie establishes ingredients of the alleged offences and also that the petitioners had failed to point out any illegality or impropriety in the order of the learned trial Court and has dismissed the revision. In fact, it is contended that while issuing process against petitioners, the learned Magistrate had given cogent reasons on considering entire material on record like complaint itself, verification statement of complainant, her witnesses and other statements recorded by police and thus, on denying that respondent no.1 had any grudge against the petitioners, petitions are prayed to be dismissed.

13. Learned counsel for respondent no.1 in the set of present facts and submissions has relied upon the cases of Devarapalli Lakshminarayana Reddy and ors. ..vs.. Narayana Reddy and ors. reported in AIR 1976 SC 1672, National Bank of Oman ..vs.. Barakara Abdul Aziz and anr., reported in (2013)2 SCC 488 and Gangadhar Janardan Mhatre ..vs.. State of Mah. and ors. reported in (2004)7 SCC 768.

14. Learned Additional Public Prosecutor for respondent no.2 adopted submissions advanced on behalf of respondent no.1 and prayed for dismissal of petitions.

15. Having considered submissions advanced as aforesaid and particularly, with regards to the arguments of respondent no.1 that since on the day of presentation of complaint on 17th August, 2010 the learned Magistrate by passing order, to put up complaint for verification, has taken cognizance and as such, had no recourse available to him thereafter to pass order under Section 156(3) of the Code, said submissions as advanced are required to be dealt with first to satisfy if order passed under Section 156(3) of the Code needs interference. With regard to the first limb of argument advanced on behalf of respondent no.1 it is necessary to state that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal Court. It is not a mechanical process or matter of course. By now, it is well established that to set the process of criminal law in motion against a person is a serious matter. Though no formal or speaking or reasoned orders are required at the stage of Sections 190/204 of the Code, there must be sufficient indication in the order of the application of mind by the Magistrate to the facts constituting commission of an offence and the statements recorded under Section 200 of the Code so as to proceed against the offender. Chapter XV of the Code deals with further procedure for dealing with "Complaints to Magistrate". Under Section 200 of the Code, the Magistrate, taking cognizance of an offence

on a complaint, shall examine upon oath the complainant and the witnesses, if any, present and the substance of such examination should be reduced to writing and the same shall be signed by the complainant, the witnesses and the Magistrate. Under Section 202 of the Code, the Magistrate, if required, is empowered to either inquire into the case himself or direct an investigation to be made by a competent person "for the purpose of deciding whether or not there is sufficient ground for proceeding". If, after considering the statements recorded under Section 200 of the Code and the result of the inquiry or investigation under Section 202 of the Code, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he should dismiss the complaint, after briefly recording the reasons for doing so or if, in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, the Magistrate has to issue process under Section 204(1) of the Code for attendance of the accused. This procedure as contemplated under Chapter XV of the Code, deals with complaints before Magistrate. In the instant case, the only ground put forth on behalf of respondent no.1 to establish that prior to passing impugned order under Section 156(3) of the Code, learned Magistrate on 17th August, 2010 i.e. on the date of presentation of complaint itself, had taken cognizance is therefore not at all convincing as merely by endorsing upon complaint as "Put up for verification", by itself is not sufficient to hold that by passing such order Court has applied its mind or found reasons, sufficient to take cognizance.

16. In the light of above facts, law in the case of Mehmood Ul Rehman cited (supra) can usefully be made applicable, wherein the Hon'ble Apex Court has held that the process must not be issued in a mechanical manner or as a matter of course, but order issuing process should reflect application of mind of the learned Magistrate in taking cognizance and has further held that though no formal or speaking or reasoned orders is required at the stage of Ss. 190/204 of the Code, there must be sufficient indication in the order that the Magistrate is satisfied that : (1) the facts alleged in the complaint constitute an offence, and (ii) these facts when considered along with the statements recorded under S.200 of the Code and the result of inquiry or report of investigation under S.202 of the Code, if any, *prim facie* make the accused answerable before the criminal Court. In absence of any such indication in the order, High Court under S.482 the Code is bound to invoke its inherent power in order to prevent abuse of power of criminal court since, to be called to appear before criminal court as an accused is a serious matter affecting one's dignity, selfrespect and image in society, process under S.204 of the Code must not be made a weapon of harassment.

17. In the light of observations of the Hon'ble Apex Court, bare perusal of order passed by the learned Magistrate on the day of presentation of complaint on its first page directing to put up the case for verification thus, in no manner indicates application of mind by him and as such by no reason can be construed to be the order taking cognizance, as has been submitted by respondent no.1.

18. In the case of Devarapalli Lakshminarayana Reddy (supra) relied by

respondent No.1, the Hon"ble Apex Court while considering the question as to what is meant by "taking cognizance of an offence" by the Magistrate as contemplated under Section 190 of the Code., in para no.14 of its judgment has observed thus :

" 14. This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in clauses (a)(b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking , when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If, instead of proceeding under Chapter XV, he, has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence."

19. In view of the pronouncement as afore said also, therefore by no stretch of imagination it can be said that on the date of presentation of complaint and by making an endorsement on it to place it for verification, Magistrate on that day cannot be said to have taken cognizance as put forth on behalf of respondent no.1 and in view of findings as aforesaid thus, it cannot be said that having taking cognizance on the day of presentation of complaint on 17th August, 2010, the learned Magistrate was precluded from taking recourse to Section 156(3) of the Code.

20. Section 156(3) occurs in Chapter XII, under the caption: "information to the Police and their powers to investigate", while Section 202 is in Chapter XV which bears the heading "Of complaints to Magistrate". The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Sec.202(1). The two operate in distinct spheres at different stages. The first is exercisable at the precognizance stage, the second at the postcognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Sec.156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But once if he takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the precognizance stage and avail of Section 156(3). It may be noted further that an order made under subsection (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police

to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or chargesheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding." Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him."

21. In view of above stated procedure available under the Code and on considering case of respondent no.1 of learned Magistrate, to have taken cognizance on 17th August, 2010 on the date of filing of complaint does not stand for any reason as there is nothing to establish that the Magistrate by passing such an endorsement on date of presentation of complaint has examined the complainant or his witnesses under Section 200 of the Code which is first step in the procedure required to be complied with under Chapter XV of the Code. Thus, question of taking next step under Section 202 of the Code did not arise at all and in fact, it is thus found that the learned Magistrate instead of taking cognizance of the offence has, in the exercise of its discretion sent the complaint for investigation by police under Section 156(3) of the Code. In the circumstances, there are sufficient reasons to hold that endorsement made on complaint, to place it for verification, on the date of its presentation, cannot be an order, taking cognizance of case.

22. In view of discussion as aforesaid, thus it is now necessary to consider submissions of petitioners that the order impugned is passed mechanically, without application of mind and is without any sufficient reasons put forth to not to accept the police report. It is material to note that whenever Magistrate disagrees with the police report, he has to state the reason as to how he disagreed with the same and on what material. This is necessary because, the judicial authority is bound to act in conformity with the rules of principles of fairness and natural justice. In the instant case, since the Magistrate has directed the police enquiry or investigation under Section 156(3) of the Code, it implies that the Court was not prima facie satisfied with the allegations made in the complaint and has therefore passed said order to investigate. In that view of the matter, on receipt of police report, the learned Magistrate is duty bound to at least indicate in its order as to on what material he is relying before taking cognizance and issuing process against the accused as it cannot be kept out of mind that taking cognizance of an offence is a serious matter and by doing so the court is implicating the citizen for an offence, directing him to face the trial, which affects his right and reputation.

23. In the case of M/s. Pepsi Foods Ltd. cited (supra), in para no.28 the Hon''ble Apex Court has held thus:

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

24. In the background of above requirement of law, bare perusal of order impugned would reveal that same is passed mechanically without considering the police report when it is clearly mentioned therein that, there is no substance in the allegations made in the complaint and the same, on investigation, were found to be raised by respondent no.1 having grudge against the petitioners who had transferred her from one place to another. Order further reveals that none of the various documents referred by the police in its report are considered in it, as it is silent in that respect. In other words, there are no reasons put forth by the learned Magistrate for not relying upon the police report which is contrary to the settled law that once the investigation is ordered under Section 156(3) of the Code and a report is received pursuant to that order, the learned Magistrate is bound to consider the report, and if it at all the learned Magistrate disagrees with the investigation report filed by the police authorities, the Magistrate has to give cogent reasons for not relying upon the said report.

25. Bare perusal of order issuing process reveals that while passing the same, learned Magistrate had relied upon contents of the complaint only, without assigning any reason for not accepting the police report except for a bare observation that the complaint was sent for police investigation but it appears that police did not investigate the offence in correct perspective. The learned Magistrate though had further observed that in fact, the complaint ought to have sent to the economic offences branch for its investigation, had not passed any such directions for further investigation in the complaint by such branch but by not relying upon the police report, passed order that there is no substance in the police report and issued process finding that complainant was appointed as an Assistant Teacher in the year 2000 and was promoted as a Headmaster in the year 2003 and till the year 2004 though petitioner no.3 was serving on periodical

basis and though there is no name of said petitioner in the pay bill of July, 2004 or in September, 2006 nor his name is mentioned in the seniority list of 1st July, 2004, and he was given increment, twice as per the enquiry held by petitioner no.1 (in Cri.W.P.No.496/2013), who in fact had not considered, that date of appointment of complainant was not 1st July, 2002 but it was 2nd September, 2000 and thus found petitioners in both the petitions to have gained unlawfully by cheating the Government officials having handsingloves with each other, who at the material time were working as a public servant and had aided petitioners (in Cri.W.P.No.497/2013) in commission of present crime, inspite of knowing that petitioner nos.1 to 3 have misappropriated government amount to extend financial benefits to petitioner no.3.

26. From the above stated contents of impugned order it is thus, found that the learned Magistrate while issuing process had considered facts narrated in the complaint alone, without considering the police report and fact of noncooperation on the part of respondent no.1 during the investigation carried out by police as respondent no.1 refused to provide her specimen signatures finger prints specimen, required for the purpose of investigation and in fact for noncooperation as aforesaid, even the enquiry which was initiated as per directions of this Court passed in W.P.No.1553 of 2011 could not be complete as in the said enquiry, also respondent no.1 refused to give her fingerprints and specimen signatures for the purpose of verification and for that reason did not remain present before the Deputy Director of Education who thus, dismissed the complaint by drawing adverse inference.

27. Impugned order also lacks of findings of order passed by this Court in W.P.No.1553 of 2011 on the basis of which above enquiry was initiated and of withdrawal of petition being W.P.No.4433 of 2011 by respondent no.1, filed by her challenging dismissal of her complaint by Deputy Director of Education. In that view of the matter, order impugned, on the face of it, appears to be without proper appreciation of facts, material on record and as such suffers from vice of nonapplication of mind and is thus, bad in law.

28. Since Magistrate had not accepted the police investigation report, or if he had disagreed with the same, it was necessary to state reasons for disagreeing with it and was further required to pass directions for further investigation by the team of Officers from the economic offence branch. However, neither of these orders are passed by the learned Magistrate before not accepting the police report and have passed the impugned order.

29. It is true that at that stage that the Magistrate need not enumerate all the evidence in detail but still it is his duty to indicate based on what materials he has implicated the accused. Since this aspect of the matter is lacking in the order, the Magistrate's order suffers from the vices of nonconformity with the rules of principles of fairness and natural justice.

30. For the said reasons, orders impugned in the petitions are liable to be set

aside by remanding the case back to the Magistrate to pass a reasoned order. Accordingly, matter is sent back for reconsidering the case even at this stage, to order reinvestigation, of the matter for more cogent and reliable material for taking cognizance of the case.

31. In the result , the order impugned is set aside. The matter is remitted back to the Magistrate for passing fresh orders in the light of observations made herein above. Rule is made absolute in the above terms.