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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2974 OF 2023

Vinisha Sawant

Age: 43 years, Occ. Service
R/a.1203, Mangla Tower,
Plot no.84, Sector 15,
CBD Belapur, Navi Mumbai
Dist. Thane

.....Petitioner

Vs.

1. Mahendra Sawant
Age: 43 years, Occ.Service
R/a. 1203, Mangla Tower,
Plot No.84, Sector 15,
CBD Belapur, Navi Mumbai
Dist. Thane.

2. The State Of Maharashtra

.....Respondents

Mr. Advait Tamhankar, for the Petitioner.
Mr. Ajay Patil, for Respondent No.2-State.

CORAM : A. S. GADKARI AND
DR NEELA GOKHALE, JJ.

RESERVED ON : 20th SEPTEMBER, 2024.

PRONOUNCED ON : 07th OCTOBER, 2024.

JUDGMENT (Per Dr. Neela Gokhale, J) :-

- 1) Petitioner seeks quashing of FIR dated 2nd January 2023 bearing No. 1 of 2023 registered with the CBD Belapur Police Station, Navi Mumbai for offences punishable under Sections 379, 406, 409, 420, 465, 467, 497, 500 and 504 of the Indian Penal Code, 1860 ('IPC').

2) The Petition was admitted by Order dated 6th September 2023 and the Police were restrained from filing charge sheet in the matter during the pendency of the present petition.

Respondent No.1 is duly served. Despite service, none appeared for Respondent No.1 when taken up for hearing.

3) Brief facts of the case are as follows :

3.1) The Petitioner is wife of the Respondent No.1. Respondent No.1 filed a complaint before the Judicial Magistrate First Class, Vashi bearing M.A No. 469/2021 praying for registration of FIR against the Petitioner for the offences punishable under Sections 379, 406, 420, 465, 497, 500 and 504 read with Section 34 of the IPC. Alternatively, the Respondent No.1 sought issuance of process under Section 204 of the Cr. P C against the Petitioner and secure her presence to face charges under the aforesaid offence.

3.2) The learned Magistrate vide its Order dated 22nd November 2021 directed the police to conduct a preliminary inquiry to ascertain commission of a cognizable offence and submit its report within 30 days.

3.3) The Police submitted its Report dated 18th June 2022 to the trial Court. It was stated therein that the complaint to be an afterthought, filed only to counter the complaint lodged by the Petitioner against Respondent No.1 under Section 498-A of the IPC.

3.4) Subsequently, the Magistrate directed registration of FIR under Section 156(3) of the Cr. P C by its Order dated 19th December 2022 and

directed the Police to investigate the allegations made by the Respondent No.1. Pursuant to this Order, the subject FIR was registered for the offences as alleged.

3.5) The Petitioner filed a Revision Application assailing Order dated 19th December 2022 before the Sessions Court, Thane. The Sessions Court, by its Order dated 4th May 2023 observed that, while the Order passed by the Magistrate was erroneous, since the FIR was already registered, it was not jurisdictionally competent to quash the same. The Petitioner has thus assailed the FIR No. 1/2023 dated 2nd January 2023 registered with the CBD Belapur Police Station, Navi Mumbai by way of the present petition.

4) Mr. Advait Tamhankar learned counsel appears for the Petitioner and Mr. Ajay Patil, learned APP represents the State.

5) Although Mr. Tamhankar attacked the registration of the impugned FIR on various grounds on the facts of the case, the thrust of his argument was that since the Magistrate took cognizance of the complaint and directed an inquiry under Section 202 of the Cr.P.C, it was not open to the Magistrate to revert back to the pre-cognizance stage as the same being impermissible under the scheme of the Cr.P.C. He further submits that Order directing registration of FIR not only fails to consider the report of the Police but does not even mention the same which clearly indicates a total non-application of mind. He thus challenged the Order before the Sessions Court, Thane, which agreed with his submissions however, was rendered

powerless to set it aside considering that in the interregnum, the FIR was registered and the jurisdiction to quash the same was a prerogative of the High Court. Mr. Tamhankar also relied on various decisions of the Supreme Court and of this Court in support of his contentions, as under:

- (1) *Lalita Kumari v. Government of Uttar Pradesh & Ors.*¹
- (2) *Ramdev Food Products Private Limited v. State of Gujarat*²
- (3) *Manharibhai Muljibhai Kakadia & Anr. v. Shaileshbhai Mohanbhai Patel & Ors.*³
- (4) *Kailash Vijayvargiya v. Rajlakshmi Chaudhuri & Ors.*⁴
- (5) *Madhao and Another v. State of Maharashtra & Anr.*⁵
- (6) *Rameshbhai Pandurao Hedau v. State of Gujarat*⁶
- (7) *Devarapalli Lakshminarayana Reddy and Others v. V. Narayana Reddy and Others*⁷
- (8) *Vinubhai Haribhai Malaviya and Others v. State of Gujarat and Another*⁸
- (9) *Mohammad Ataullah v. Ram Saran Mahto*⁹
- (10) *Wasudeo s/o Mahadeo Masurkar v. Ashok s/o Motiramji Admane*¹⁰

¹ (2014) 2 SCC

² (2015) 6 Supreme Court Cases 439

³ (2012) 10 Supreme Court Cases 517

⁴ 2023 SCC OnLine SC 569; AIR 2023 SC (Cri) 905

⁵ (2013) 5 Supreme Court Cases 615

⁶ (2010) 4 Supreme Court Cases 185

⁷ (1976) 3 Supreme Court Cases 252

⁸ (2019) 17 Supreme Court Cases 1

⁹ (1981) 2 Supreme Court Cases 266

¹⁰ Criminal Application [APL] No.109 of 2015 with
Criminal Application [APL] No.209 of 2015 dtd. 20th January 2017.

(11) *Sharad Bansilal Modi & Ors. v. The State of Maharashtra & Anr.*¹¹

6) Mr. Patil justified the Order passed by the Magistrate and submitted that in any case the FIR discloses commission of a cognizable offence and hence the Petition be dismissed.

7) We have heard the counsels and perused the record with their assistance.

8) The only question that arises for our determination is, whether the Order passed by the Magistrate directing registration of FIR is legally tenable once having taken cognizance of the complaint and directing inquiry under Section 202 of the Cr. P.C.

8.1) At the outset, it may be noted that, the law regarding powers of the Magistrate under Section 156(3) of Cr. P.C. is quite well settled. Section 156 (3) falls in Chapter XII, under the caption: "Information to the Police and their powers to investigate"; while Section 202 of Cr.P.C. is in Chapter XV which bears the heading: "Of complaints to Magistrates". The power to order police investigation under Section 156 (3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post cognizance stage when the Magistrate is in seisin of the case. In the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be

¹¹ Criminal Writ Petition No.1541 of 2016 dated 20th December 2017.

invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3).

9) An order made under sub-section (3) of Section 156 of Cr.P.C., is 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 charge-sheet under Section 173. On the other hand, Section 202 of Cr.P.C. 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.

10) In the case in hand, the Magistrate by its Order dated 22nd November 2022 directed the concerned police station to conduct 'preliminary inquiry' to ascertain commission of a cognizable offence and submit a report within

30 days. This order itself is untenable in law. There is no provision in the Cr. PC vesting jurisdiction in the Magistrate to direct a 'preliminary inquiry'. The term 'inquiry' is defined in Section 2(g) of the Code which reads as under: –

“2(g). ‘inquiry’ means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.”

The Supreme Court in the decision of *Lalita Kumari (Supra)* held that 'inquiry' under the Code is relatable to a judicial act and not to the steps taken by the Police which are either investigation after the stage of Section 154 of the Code or termed as 'preliminary inquiry' and which are prior to the registration of FIR, even though, no entry in the General Diary is made. Thus 'preliminary inquiry' can be done only by the Police under certain situations to ascertain commission of a cognizable offence. It is not within the powers of the Magistrate to direct the Police to conduct a 'preliminary inquiry' having once taken cognizance. In this view of the matter, the Order dated 22nd November 2022 is itself not tenable in law.

11) Furthermore, once having taken cognizance of the complaint and adopted that path embodied in the Cr. PC, the Magistrate cannot switch back to the pre-cognizance stage and direct registration of FIR and investigation by the Police under Section 156(3) of the Code. Strangely, there is no whisper of directions already given in the Order of 22nd November 2022 in the Order dated 19th December 2022 of the Magistrate

directing investigation and submission of investigation report. There is even no mention of the Police Report dated 18th June 2022.

11.1) Be that as it may. Once the Police have reported that no cognizable offence is made out, there is nothing to be gained by again directing investigation by Police upon registration of FIR. As observed by the Supreme Court in the case of *Abhinandan Jha & Ors. v. Dinesh Mishra*¹², if the Magistrate agrees with the Police Report, he may accept it and close the proceedings. In the alternative, on the consideration of the Report, it will be open to the Magistrate to decline to accept the Report and proceed to take cognizance of the offence by issuing process, notwithstanding the contrary opinion of the Police in their Report. In that event, the Magistrate had two options namely, either to dismiss the complaint under Section 203 or to issue process under Section 204 of Cr.P.C. It appears from the Orders passed by the Magistrate that, the Magistrate is not clear regarding commission of a cognizable offence. In any case, it is incumbent upon the Magistrate to follow the scheme of the Cr.P.C. Having transgressed in the post-cognizance stage, it is impermissible for the Magistrate to suddenly back track to the pre-cognizance stage.

12) In view of the above discussion, we are inclined to quash the FIR No. 1/2023 dated 2nd January 2023 registered with the CBD Belapur Police Station, Navi Mumbai, lodged pursuant to the directions of the

¹² AIR 1968 SC 117

Judicial Magistrate First Class, 10th Court, Navi Mumbai by its impugned Order.

The Petition is allowed in terms of prayer clause (a).

13) Rule is accordingly made absolute.

(DR. NEELA GOKHALE, J.)

(A. S. GADKARI, J.)

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signed by
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