THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH : NAGPUR

CRIMINAL WRIT PETITION NO.460 OF 2008

1. Narayandas s/o Hiralalji Sarda,
Aged about 67 years,
Occupation – Business,
R/o. 139, Wardhman Nagar,
Nagpur, Tahsil & District :
Nagpur.

2. Harikishan s/o Ratanlalji Sarda,
Aged about 57 years,
Occupation – Business,
R/o. 84, “Sardakunj”
Central Avenue, Nagpur
Tahsil & District : Nagpur.

3. Kamal Kishore s/o Narayandasji Sarda,
Aged about 44 years,
Occupation – Business,
R/o. Agneya Apartment, Tikekar Road,
Dhantoli, Nagpur, Tahsil & District -
Nagpur. .. Petitioners

.. Versus ..

1. The State of Maharashtra,
through Police Station Officer,
Ganeshpeth, Nagpur,
Tahsil & District : Nagpur.

2. Shri Govindlal s/o Bansilalji Sarda,
Aged about 69 years,
Occupation – Business,
R/o. 84, "Sardakunj"
Central Avenue, Nagpur
Tahsil & District : Nagpur. .. Respondents

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Mr. R.M. Daga, Advocate with Mr. M.P. Khajanchi, Advocate for the Petitioners,

Mr. D.M. Kale, APP for Respondent no.1/State,

Mr. Shyam Dewani, Advocate for Respondent no.2.

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CORAM : K.J. ROHEE & A.P. BHANGALE, JJ

DATED : AUGUST 14, 2008

ORAL JUDGMENT : (PER : K. J. ROHEE, J)

1. Rule. Returnable forthwith. Heard finally by consent of parties.

2. By this petition under Articles 226 and 227 of the Constitution of India, the petitioners seek to quash order dated **25.7.2008** passed by Judicial Magistrate, First Class, Court No.1, Nagpur in Regular Criminal Complaint Case No.2462 of 2008, Govindlal s/o Bansilal Sarda .vrs. Narayandas s/o

Hiralalji Sarda and others.

3. The facts which give rise to the present petition are as under :

The petitioners and respondent no.2 are close relatives. It is alleged that Plot No.84 situated at Central Avenue, Nagpur was allotted by Nagpur Improvement Trust to respondent no.2 in the year 1959 on lease for a period of 30 years. Besides respondent no.2 nobody had any right to the said plot. On 21.2.2008 respondent no.2 lodged a written report at Police Station, Ganeshpeth (Nagpur) against petitioner nos.1 and 2 alleging therein that they executed Release Deed on 11.3.1985 by forging the signature of respondent no.2. They also moved application before Nagpur Improvement Trust by forging the signature of respondent no.2. They mislead Nagpur Improvement Trust by cheating with intent to deprive respondent no.2 of his valuable immovable property. Respondent no.2 claimed in the report that he came to know about the illegalities committed by petitioner nos.1 and 2 through a public notice published in the

newspaper on 18.1.2008, whereby petitioner nos.1 and 2 claimed right in the property of respondent no.2.

4. On 24.2.2008 the Duty Officer of Police Station, Ganeshpeth (Nagpur) informed the son of respondent no.2 that the matter is of civil nature; that NC No.64/2008 was entered and that respondent no.2 may approach the Court.

5. On 21/22.7.2008 respondent no.2 filed a complaint before Judicial Magistrate, First Class, Court No.1, Nagpur against the petitioners. It was registered as Regular Criminal Complaint Case No.2462/2008. Respondent no.2 prayed for a direction to Police Station Officer, Police Station, Ganeshpeth (Nagpur) to investigate the matter by registering crime and in the alternative to take cognizance of the offences punishable under Sections 406, 420, 468, 506-B r/w 34 of the Indian Penal Code and to punish the petitioners.

6. On 25.7.2008 Judicial Magistrate, First Class, Court No.1, Nagpur passed an order directing that the complaint be sent to Ganeshpeth Police Station for investigation. He directed the Investigating Officer to register offence and to

submit report accordingly. The present writ petition is filed on 1.8.2008 challenging the said order. On the same day the said order was stayed only to the extent it directed to register offence.

7. Preliminary submissions were filed on behalf of respondent no.2. According to respondent no.2 the petition itself is not tenable; that the impugned order is revisable; that an alternate remedy is available to the petitioners and that the extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India cannot be invoked. It was also pointed out that the impugned order has already been given effect to inasmuch as the police authorities registered Crime No. M-02/2008 punishable under Sections 406, 420, 468, 506(B) r/w 34 of the Indian Penal Code on 31.7.2008. Thus, the interim order granted by this Court on 1.8.2008 became infructuous and as such the petition is liable to be dismissed.

8. We have heard Mr. R.M. Daga, Advocate with Mr. M.P. Khajanchi, Advocate for the petitioners, Mr. D.M.

Kale, APP for respondent no.1/State and Mr. Shyam Dewani, Advocate for respondent no.2.

9. At the outset, Mr. Daga, the learned counsel for the petitioners, invited our attention to the impugned order, which reads as under :

> *"Perused complaint and documents. Heard learned Advocate for complainant. Having regard to facts and circumstances of case it reveals that the complaint required detail investigation by police machinery to take cognizance of offence. Hence, complaint be sent to Ganeshpeth Police Station for investigation. Concern I.O. is directed to register offence and file/submit report accordingly."*
>
> *Issue letter accordingly.*
>
> *R/on 20.08.2008.*
>
> *Sd/-*
> *(S.N. Tiwari)*
> *J.M.F.C.*
> *Court No.1, Nagpur*
> *25/07/2008*

10. Mr. Daga vehemently urged that a perusal of the order itself would show that the learned Magistrate perused the complaint and documents and also heard counsel for the complainant (R-2). Having regard to the facts and circumstances of the case, the learned Magistrate thought that detail investigation was required. He, therefore, sent the complaint for investigation to the Police. Mr. Daga submitted that this shows that the Magistrate applied his mind and took cognizance of the offence. In such circumstances, the only course which was open to the Magistrate was under Section 202 of the Code of Criminal Procedure, either to inquire into the case himself or direct an investigation to be made by the Police Officer for the purpose of decide whether or not there is sufficient ground for proceeding. Instead of doing that, the learned Magistrate directed the Investigating Officer to register offence and to submit his report. According to Mr. Daga this was not permissible for the learned Magistrate. The impugned order is, therefore, illegal and requires to be quashed and set aside.

11. In support of his submission, Mr. Daga relied on the following cases :

(i) In Kishun Singh and others .vrs. State of Bihar, (1993) 2 SCC 16, it is held that :

> *"Even though the expression 'take cognizance' is not defined, it is well settled by a catena of decisions of this Court that when the Magistrate takes notice of the accusations and applies his mind to the allegations made in the complaint or police report or information and on being satisfied that the allegations, if proved, would constitute an offence decides to initiate judicial proceedings against the alleged offender he is said to have taken cognizance of the offence .....*
>
> *Mere application of mind does not amount to taking cognizance unless the Magistrate does so for proceeding under Sections 200/204 of the Code."*

In the above case, the only question which was dealt with by the Apex Court was whether a writ can be issued to the police authority to register FIR. This question does not

arise in the present writ. As such the said case would not be applicable to the facts of the present case.

(ii) In Aleque Padamsee and others .vrs. Union of India and others, (2007) 6 SCC 171, it is held that :

> *"The correct position of law, therefore, is that the police officials ought to register the FIR whenever facts brought to their notice show that cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in Section 190 read with Section 200 of the Code."*

(iii) Maksud Saiyed .vrs. State of Gujarat and others, (2008) 5 SCC 668,

> *"Wherein the investigation as per order under Section 156(3) of the Code of Criminal Procedure/JMFC and the complaint was quashed under Section 482 of the Code of Criminal Procedure by the High Court and it was confirmed by the Apex Court. In para no.15 of the said judgment, the observations made in para no.28 of Pepsi Foods Ltd. .vrs.*

Special Judicial Magistrate (1998) 5 SCC 749 were referred to :

> *"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."*

12. According to Mr. Daga, the learned Magistrate should have proceeded under Section 202 of the Code of Criminal Procedure and not under Section 156(3) of the Code of Criminal Procedure. The impugned order is, therefore,

illegal and needs to be quashed.

13. Mr. Dewani, the learned counsel for respondent no.2, on the other hand, submitted that the perusal of the impugned order does not show that the learned Magistrate took cognizance of the offence merely because he perused the complaint and the documents and heard counsel for the complainant/R-2. Mr. Dewani, submitted that the learned Magistrate did not examine the complainant/R-2 on oath which indicates that the learned Magistrate did not take cognizance of the offence. It is thus a pre-cognizance stage wherein the Magistrate has got power to order an investigation under Section 156(3) of the Code of Criminal Procedure. Mr. Dewani further submitted that there is nothing wrong in the Magistrate directing the investigating officer to register offence and to submit report. In support of these submissions, he relied on the following cases :

(i) In D.L. Reddy and others .vrs. V.N. Reddy and others, AIR 1976 SC 1672, it is held that :

"This raises the incidental question : What is meant by "taking cognizance of an offence" by the Magistrate within the contemplation of Section 190 ? 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 © 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.

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 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. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be 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). It may be noted further that an order made under sub-section (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.

In the instant case the Magistrate did not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding; but only for ordering an investigation under Section 156(3). He did not bring into motion the machinery of Chapter XV. He did not examine the complainant or his witnesses under Section 200, Cr. P. C. which is the first step in the procedure prescribed under that Chapter. The question of taking the next step of that procedure envisaged in Section 202 did not arise. In stead of taking cognizance of the offence, he has, in the exercise of his discretion, sent the complaint for investigation by police under Section 156."

(ii) In Suresh Chand Jain .vrs. State of M.P. And another, (2001) 2 SCC 628 and Mohd. Yousuf .vrs. Afaq Jahan (Smt) and another, (2006) 1 SCC 627, it is held that :

"Any judicial Magistrate, before taking

cognizance of the offence, can order investigation under Section 156(3) CrPC. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so."

(iii) In Laxminarayan Vishwanath Arya .vrs. State of Maharashtra and others, 2008 Cri.L.J. 1, it is held that :

"Section 154 of the Code requires a police officer in charge of police station to reduce in writing every information relating to the communication of cognizable offence. In his default to act, the aggrieved party normally should approach the Superintendent of Police of the concerned area, who, if satisfied that the complaint discloses commission of cognizable offence may direct the police officer, subordinate to him, to investigate the same in accordance with law. This is the administrative remedy to an aggrieved complainant, while he could take recourse to the procedure of requesting the Magistrate empowered to take

cognizance under Section 190 of the said offence and pray that a direction be issued for investigation of the complaint as contemplated under Section 156(3) of the Act.

The limited scope of powers available to a learned Magistrate under Section 156(3) of the Code do not admit any ambiguity. Their scope is limited and is restricted to the extent that wherever a Magistrate is satisfied without taking cognizance ensuring compliance of Section 154(3) the police should investigate the matter, it could pass directions or order in terms of Section 156(3). Further control of investigation or methodology to be adopted during the investigation is beyond the jurisdiction or empowerment of a learned Magistrate under the scheme of these provisions."

14. If the above legal principles are applied to the present case, it would be revealed that in the present case, the learned Magistrate did not proceed to take cognizance of the offence inasmuch as he only perused the complaint and

documents and heard complainant/R-2 and did not examine the complainant on oath. The learned Magistrate was of the opinion that it was necessary to have detailed investigation by the police into the allegations made in the complaint. The learned Magistrate, therefore, directed the police to register offence and to submit report. Thus the impugned order is under Section 156(3) of the Code of Criminal Procedure and the order cannot be said to be illegal.

15. As regards tenability of the writ petition challenging the direction of the learned Magistrate to investigate under Section 156(3) of the Code of Criminal Procedure, it was submitted by Mr. Dewani that such a writ petition cannot be entertained in exercise of the extraordinary jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India. Mr. Dewani pointed out that the said order is revisable and thus effective alternate remedy is available. As such filing of writ petition is not appropriate remedy. In support of this submission, Mr. Dewani relied on ***B.S. Khatri .vrs. State of Maharashtra and another, 2004 (1) Mh.L.J. 747 (Bombay),***

wherein the Court dealt with the Writ Petition challenging the order passed by the learned Magistrate directing the investigation under Section 156(3) of the Code of Criminal Procedure. In the said case, it was held by the Division Bench as under :

> *"We have also noted above that several efficacious alternate statutory remedies under the Criminal Procedure Code are available to the petitioners to challenge the order under section 156(3). Without availing them the petitioners have rushed before this Court, claiming exercise of its extraordinary jurisdiction under Article 226. In our opinion, therefore, there is no need to exercise this jurisdiction to quash merely the complaint and order under section 156, Criminal Procedure Code requiring investigation into complaint by the police. The petitions are therefore liable to be dismissed".*

In our view, the above case directly hits the tenability of the present writ petition.

16. It was also pointed out by Mr. Dewani that it was wrong on the part of the police to say that the matter relates to civil dispute so as to avoid taking cognizance by police. In this respect, Mr. Dewani pointed out that there are specific allegations in the complaint which make out the offences punishable under Sections 420, 406, 468 & 506-B of the Indian Penal Code. We refrain from making any comment on this submission since the learned Magistrate has directed the police to investigate into the matter.

17. Mr. Daga, the learned counsel for the petitioners, submitted that the petitioners would surrender before the Magistrate on 21.8.2008 and prays that till then protection from arrest may be extended to them. In view of the fact that the allegations about fraud, forgery and cheating have arisen out of private complaint, we think it expedient to grant protection to the petitioners from arrest till 21.8.2008 as prayed for.

18. In the result, we are of the considered view that the writ is not tenable and on merits also it is liable to be

dismissed. We, therefore, pass the following order :

O R D E R

The petition is dismissed. Protection to the petitioners from arrest is granted till 21.8.2008. Rule discharged.

(A.P. BHANGALE)
JUDGE

(K.J. ROHEE)
JUDGE

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