IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION NO. 470/2011 (APL)

Yogiraj Vasantrao Surve,
aged about 35 years, Occupation:
Service, District Deputy Registrar,
Cooperative Societies, Akola

...APPLICANT.

VERSUS

1. State of Maharashtra,
   through its Police Station Officer,
   Ambazari Police Station, Nagpur.

2. Pravin Madhavrao Thute,
   aged 28 years, Occupation:
   Business, R/o: Manish Nagar,
   Wardha Road, Nagpur.

.. **NON-APPLICANTS**

Mr. Anil Mardikar, Advocate for the applicant.
Mr. T.A.Mirza, APP for non-applicant no.1.
Mr. W.G. Paunikar, Advocate (appointed) for non-applicant no.2.

CORAM: A.P.LAVANDE & A.B.CHAUDHARI,JJ
DATE OF RESERVING JUDGMENT : 7.2.2013
DATE OF PRONOUNCEMENT OF JUDGMENT: 28.2.2013

JUDGMENT (PER A.P.LAVANDE, J)

Heard Mr. Anil Mardikar, the learned counsel for the applicant, Mr. T.A.Mirza, learned APP for non-applicant no.1 and Mr. Paunikar, learned counsel (appointed) for non- applicant no.2.

2. Rule. Rule is made returnable forthwith and heard finally with the consent of the learned counsel for the parties and learned APP.

3. By this application, filed under Section 482 of the Code of Criminal Procedure, the applicant seeks the following reliefs.

i) Quash the Regular Criminal Case No. 1105/2011 at Annexure P-1 and the First Information Report vide Crime No. M-2/11 registered by non-applicant no.1 Police Station, Ambazari, Nagpur at Annexure P-3 being an abuse of process of law, in the interest of justice.

ii) Quash and set aside the order passed by the learned Chief Judicial Magistrate, Nagpur dated 18.6.11 at Annexure P-2 in Criminal Complaint Case No.

1105/2011.

iii) Stay the investigation in Crime No. M-2/2011, as also stay all further proceedings in Regular Criminal Case No. 1105/2011 and stay the arrest of the applicant in Crime No. M-2/2011 and R.C.C. No. 1105/2011, pending disposal of the present application, in the interest of justice.

4. Briefly, the case of the applicant is as under:

The applicant is presently working as District Deputy Registrar at Akola. From 2006 to 2009, the applicant was working as Deputy Registrar Cooperative Society, City-2,Nagpur. On 6.1.2009 Nagpur Friends Urban Sahakari Sanstha Maryadit, Nagpur (hereinafter referred to as "the Society") registered under the Maharashtra Cooperative Societies Act, 1960 (hereinafter referred to "the Act"), initiated proceedings under Section 101 of the Act. The said Society was not a Multi State Cooperative Society. The non-applicant no.2 had taken a loan of Rs. 50,000/- for business purpose in the year 2003 and he had not paid the entire loan amount and there was a subsisting liability of Rs. 32,842/-. Due notice was given to the non-applicant no.2.

On 17.4.2009, the non-applicant no.2 filed an application opposing recovery certificate under Section 101 of the Act and asserted that the claim was time barred. On 28.5.2009, the applicant issued recovery certificate, copy of which has been placed on record. The non-applicant no.2 did not challenge the said certificate under the Act. On 27.3.2011 the non-applicant no.2 lodged report with non-applicant no.1 alleging that the applicant had committed offences under Sections 109, 166, 219, 418, 422 and 406 of the Indian Penal Code. The non-applicant no.1 refused to register the First Information Report against the applicant for the said offences. On 18.4.2011, the non-applicant no.2 filed petition purporting to be under Section 156 (3) of the Code of Criminal Procedure which was registered as Regular Criminal Case No. 1105/2011 before the Chief Judicial Magistrate, Nagpur. On 18.6.2011 the learned Chief Judicial Magistrate, Nagpur passed an order directing investigation under Section 156(3) of the Code of Criminal Procedure. On the basis of the said order non-applicant no.1 registered offence vide Crime No. M-2/11 under Sections 109, 166, 219, 406 and 422 of the Indian Penal Code. The applicant has challenged the order dated

18.6.2011 and consequential First Information Report registered by the non-applicant no.1.

5. On behalf of the non-applicant no.1 reply has been filed opposing the petition primarily on the ground that the application is premature and at this stage the applicant has no cause of action and it is only if the process is issued against the applicant, the applicant is entitled to resort to remedies available under the Code of Criminal Procedure.

6. Reply has also been filed on behalf of non-applicant no.2 stating that no case has been made out for interference in exercise of inherent powers under Section 482 of the Code of Criminal Procedure inasmuch as the applicant is entitled to file appropriate application only after issuance of the process. It has been further stated that power under Section 482 of the Code of Criminal Procedure must be exercised sparingly and cautiously.

7. Mr. Mardikar, learned counsel for the applicant submitted that filing of petition under Section 156(3) of the Code of Criminal Procedure is nothing but an abuse of process of the court as none of the offences alleged in the petition is made out against the applicant. He further submitted that actually no offence is made out against the applicant who was discharging quasi judicial function while considering the grant of recovery certificate under Section 101 of the Act. According to the learned counsel, probably in order to avoid deposit of half of the amount under the Award, the non-applicant no.2 filed the petition under Section 156 (3) instead of challenging the recovery certificate under Section 154 of the Act. According to the learned counsel, primarily two grounds were raised in the petition viz. i) the recovery proceeding under Section 101 of the Act was time barred and ii) the Society being a Multi State Society the applicant had no jurisdiction to issue certificate in terms of the Judgment of this Court in the case of Adarsh Ginning and Pressing Factory vs. State of Maharashtra, reported in 2008(1) Mh. L.J., 300. The learned counsel further submitted that the Society not being Multi State Society, the applicant was entitled to issue the certificate.

According to the applicant, the claim was not time barred claim and in any case, if aggrieved by the grant of the certificate, the non-applicant no.2 had effective remedy of challenging the same by filing Revision under Section 154 of the Act. According to the learned counsel, the learned Chief Judicial Magistrate did not even bother to see whether petition made out cognizable offence/s which were required to be investigated by the police. The learned counsel, therefore, submitted that the petition has been filed mala fide with a view to wreak vengeance against the applicant since the applicant had issued recovery certificate under Section 101 of the Act.

Mr. Mardikar, learned counsel for the applicant placed reliance on the following Judgments.

I) State of Haryana and others vs. Ch. Bhajan Lal & others.
AIR 1992 Supreme Court, 604.

II) Mr. Panchabhai Popotbhai Butani & others vs. State of Maharashtra and others.
2010 ALL MR (Cri.) 244.

8. Mr. Mirza, the learned APP submitted that the order under

Section 156(3) of the Code of Criminal Procedure has been passed by the learned Magistrate before taking cognizance and as such merely because the First Information Report is registered against the applicant, the applicant is not entitled to challenge the said First Information Report. Mr. Mirza, further submitted that it is only in the event of process being issued against the applicant after filing of the charge sheet, the applicant is entitled to challenge the proceedings against him. Mr. Mirza,placed reliance upon the following Judgments:

I) R.R.Chari vs. The State of Uttar Pradesh.
AIR (38) 1951 Supreme Court, 207.

II) Gopal Das Sindhi and others vs. State of Assam and another.
AIR 1961 Supreme Court, 986.

III) Mohd. Yousuf vs. Afaq Jahan (Smt.) and another.
(2006) 1 Supreme Court Cases, 627

9. Mr. Paunikar, learned counsel appointed for non-applicant no.2 adopted the submissions made by Mr. Mirza and submitted that unless the charge sheet is filed and process is issued against the applicant pursuant to the First Information Report registered against the applicant, the applicant is not entitled to challenge either the order

passed under Section 156 (3) of Cr.P.C. or consequential registration of First Information Report by non-applicant no.1.

10. The first question which arises for consideration is whether the petition purporting to be under Section 156(3) of the Code of Criminal Procedure discloses cognizable offence/s against the applicant warranting registration of First Information Report by the Officer In-charge of the concerned Police Station. The second question which arises for consideration is, whether the applicant is entitled to challenge the order passed under Section 156 (3) and First Information Report registered pursuant to the order passed under Section 156(3) of the Code of Criminal Procedure by the learned Magistrate.

11. In the case of R.R.Chari (supra), the three Judge Bench of the Apex Court held that if the Magistrate applies his mind not for the purpose of proceeding under subsequent sections but orders investigation under Section 156(3) of the Code of Criminal Procedure, he cannot be said to have taken cognizance of the offence. The Apex

Court further held that in the case of a cognizable offence, the Magistrate takes cognizance when the police have completed their investigation and come to the Magistrate for issuance of process. Another three Judge Bench of the Apex Court in the case of Goapl Das Sindhi (supra) has taken similar view.

12. In the case of Mohd. Yousuf (supra), the Apex Court held that if the Magistrate passes order under Section 156(3) of the Code of Criminal Procedure, it is only for the purpose of enabling the police to start investigation and once the order under Section 156(3) is passed by the learned Magistrate, the Officer In-charge of the Police Station is duty bound to register First Information Report, regarding cognizable offence disclosed by the complaint inasmuch as the Police Officer could take further steps contemplated in Chapter XII of the Code Criminal Procedure only thereafter. The Full Bench of this Court in the case of Panchbhai Popatbhai Butani (supra) has referred to the Judgment of the Apex Court in the case of Mohd. Yousuf.

13. No doubt, in view of the clear ratio laid down by the Apex Court in the aforesaid cases, at the stage of passing an order under Section 156(3) of the Code of Criminal Procedure, the learned Magistrate does not take cognizance. However, it is axiomatic that before ordering investigation under Section 156(3), the petition filed simplicitor under Section 156(3) or the complaint filed under Section 190 read with Section 200 of the Code of Criminal Procedure must disclose cognizable offence/s. If the petition or complaint does not disclose commission of cognizable offence/s, it is difficult to hold that the learned Magistrate can still pass the order under Section 156(3) of the Code of Criminal Procedure inasmuch as such an order can be passed only if at least one cognizable offence is made out either in the petition or complaint. In other words, the disclosure of commission of cognizable offence/s is a sine qua non for issuing the order under Section 156 (3). In the present case, a bare reading of the petition (styled as complaint) filed under Section 156(3) of Cr.P.C. discloses that no offence even prima facie has been made out against the applicant. Indisputably, the applicant was exercising quasi judicial function while considering the

grant of recovery certificate under Section 101 of the Act. Admittedly, the non-applicant no.2 was heard before issuance of the certificate. In this factual background, the only remedy available to the non-applicant no.2 was to challenge the said order under the Act. However, instead of resorting to any remedy under the Act, initially the non-applicant no.2 chose to file report before the non-applicant no.1 which was rightly not registered by the non-applicant no.1. The learned Magistrate ought to have found out whether the petition discloses commission of cognizable offence/s by the applicant before passing the order under Section 156 (3). From a bare reading of the petition purporting to be under Section 156(3) of Cr.P.C., it is evident that the non-applicant no.2 was challenging the said certificate primarily on two grounds namely jurisdiction and limitation.

14. Insofar as to the point of limitation is concerned, in our view the only remedy available to the non-applicant no.2 was to challenge the order before the authorities under the Act, if aggrieved. Similar is the case in respect of jurisdiction. If the non-applicant no.2 was aggrieved

by the recovery certificate issued by the applicant on any ground, he ought to have resorted to appropriate proceedings to challenge the certificate. Instead of resorting to the remedy available under the Act, the non-applicant no.2 chose to file report before the non-applicant no.1 and having failed to get the First Information Report registered against the applicant, approached the Magistrate under Section 156(3) of the Code of Criminal Procedure. Moreover, since the applicant was exercising the quasi judicial function while issuing certificate under Section 101 of the Act, the criminal action initiated against the applicant on the grounds stated in the petition, is unsustainable in law. Such a course, if permitted, would shake the confidence of the authorities exercising judicial and quasi judicial function and expose the judicial and quasi judicial authorities to unwarranted criminal actions. If a party is aggrieved by the order passed by a judicial or quasi judicial authority, appropriate remedy for such a aggrieved person is to resort remedy available under a particular statute or to approach this Court depending upon the facts and circumstances of the case. If criminal action is permitted against persons exercising judicial or quasi judicial function

they would be exposed to vexatious criminal proceedings at the instance of disgruntled persons who are aggrieved by the orders passed or actions taken against them by such authorities. Such a course can never be countenanced. Moreover, under Section 162 of the Act, no suit, prosecution or other legal proceeding is maintainable against the Registrar or any person subordinate to him or acting on his authority in respect of anything in good faith done, or purported to be done by him under the Act. Therefore, the applicant is not liable to be prosecuted for issuing recovery certificate under the Act in good faith.

15. In the case of State of Haryana vs. Bhaja Lal (supra), the Apex Court in para no.108 has referred to seven types of cases in which the High Court can exercise powers under Article 226 of the Constitution of India or inherent power under Section 482 of the Code of Criminal Procedure to quash the First Information Report or complaint. The Apex Court has further clarified that they are only illustrative and not exhaustive. They are as follows:

1. Where the allegations made in the First Information

Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceedings against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/ or where there is a specific provision in the code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
7. Where a criminal proceeding is manifestly attended with mala fide and/ or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengenance on the accused and with a view to spite him due to private and personal grudge.

16. In the present case, in our considered view, the guidelines 1 and 7 mentioned above are clearly attracted and, therefore, the impugned order passed under Section 156(3) of the Code of Criminal Procedure and consequent registration of First Information Report deserves to be quashed. At the cost of repetition, we state that if the non-applicant no.2 was aggrieved by the certificate issued by the applicant on the ground that it was in respect of time barred claim or that the applicant had no jurisdiction to issue the certificate, the applicant

ought to have resorted to remedy available under the Act.

17. In the case of Panchabhai Popotbhai Butani (supra), the Full Bench answered the following two questions:

I) Whether in the absence of a complaint to the police, a complaint can be made before a Magistrate?

II) Whether without filing a complaint within the meaning of Section 2(d) and praying only for an action under Section 156(3), a complaint before a Magistrate was maintainable?

The Full Bench answered question no.2 as follows:

"A Petition under Section 156(3) cannot be strictly construed as a complaint in terms of Section 2(d) of the Code and absence of a specific or improperly worded prayer or lack of complete and definite details would not prove fatal to a petition under Section 156(3), in so far as it states facts constituting ingredients of a cognizable offence. Such petition would be maintainable before the Magistrate."

18. The Full Bench held that a petition under Section 156(3)

cannot be strictly construed as a complaint in terms of Section 2(d) but a petition under Section 156(3) is maintainable provided it states facts constituting ingredients of a cognizable offence. Thus, sine qua non for filing a petition under Section 156(3) of Cr.P.C. is commission of cognizable oiffence. In the present case, we have already held that the petition filed by non-applicant no.2 does not disclose any cognizable offence having been committed by the applicant. It is axiomatic that once the order under Section 156(3) is passed, the In-charge in Police Station is bound to register the First Information Report and carry out further investigation in terms of Chapter XII of the Code of Criminal Procedure. Therefore, in case a petition purporting to be under Section 156(3) of Cr.P.C. is filed which does not disclose commission of cognizable offence, it is difficult to accept the submission that the person against whom First Information Report is registered, is not entitled to challenge the order passed under Section 156(3) and consequential registration of First Information Report. It would be a different matter, if the petition filed under Section 156(3) discloses cognizable office and in such eventuality the person against whom First Information Report is

lodged, may not be entitled to challenge the order passed under Section 156(3) and consequential registration of First Information Report inasmuch as since the commission of cognizable offence is disclosed it is within the jurisdiction of the Magistrate to direct investigation in terms of Section 156(3) of the Code of Criminal Procedure.

19. In reply filed by non-applicant no.2, reliance has been placed upon the Judgment of the learned Single Judge of this Court in the case of Pavankumar Bhurmalji Ostwal and others vs. State of Maharashtra and another reported in 2008(6) Mh.L.J., 691. In the said case, the learned Single Judge has held that if an order is passed under Section 156(3) of the Code of Criminal Procedure in criminal complaint, persons, against whom First Information Report is registered, are not entitled to challenge the order because they are not accused and their liberty is not affected. In the said case, learned Single Judge held that the application filed by the applicant under Section 482 Code of Criminal Procedure was not maintainable. In the cases of of B.S.Khatri vs. State of Maharashtra reported in 2004(1) Mh.L.J., 474 and Narayandas

Hiralalji Sarda and others vs. State of Maharashtra and another reported in 2009(2)Mh.L.J. 426, two different Division Benches have held that against an order passed under Section 156 (3), revision is maintainable. As such, a person against whom investigation has been ordered under Section 156(3), is entitled to challenge the said order by filing revision. In any case, the aforesaid Judgment of learned Single Judge would not advance the case of non-applicant no.2 inasmuch as we have already held that the petition filed under Section 156(3) does not disclose commission of any cognizable offence by the applicant. It is difficult to accept the contention of the learned APP and learned counsel for non-applicant no.2 that even if the petition does not disclose commission of cognizable offence under Section 156(3) of the Code of Criminal Procedure and if an order is passed by the learned Magistrate directing investigation, the person against whom First Information Report is registered, is not entitled to challenge the order passed under Section 156(3) of the Code of Criminal Procedure and consequential registration of First Information Report. Needless to mention that the registration of First Information Report against a person, affects his

liberty inasmuch as under Section 41 of Cr.P.C., if the Officer In-charge of the Police Station or the Investigating Officer is entitled to arrest such person even without an order from the Magistrate. Therefore, in our considered view, the Judgment in the case of Pavankumar Ostwal (supra) does not advance the case of the non-applicant no.2.

20. In view of the above, we are of the considered view that initiation of the proceeding against the applicant by non-applicant no.2 by filing petition under Section 156(3) of the Code of Criminal Procedure is patently mala fide and with an ulterior motive for wreaking vengeance since the applicant had issued certificate under Section 101 of the Act. As stated above, the applicant cannot be prosecuted for his act done in good faith while discharging quasi judicial function in terms of Section 162 of the Act. Therefore, in our opinion, the order passed under Section 156(3) of the Code of Criminal Procedure and consequential registration of First Information Report against applicant deserve to be quashed and set aside.

21. In the result, Rule is made absolute in terms of prayer clauses (i) and (ii) with costs quantified at Rs. 5000/- (Rupees five thousand only) to be paid by the non-applicant no.2 to the applicant.

22. We have noticed that in number of complaints filed under Section 190 read with Section 200 of the Code of Criminal Procedure or petitions under Section 156(3) of the Code of Criminal Procedure, the Magistrates have been passing orders under Section 156(3) without even finding out whether the petition purporting to be under Section 156(3) Cr.P.C. discloses cognizable offence/s. The Magistrate before passing an order under Section 156(3) Cr.P.C. ought to satisfy himself/ herself that the averments made in the complaint or petition filed under Section 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 under Section 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.

With the above directions, the application stands disposed of.

JUDGE **JUDGE**

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