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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.3851 0F 2017

Mrs. Laxmi Mukul Gupta @ Lipi aged
about 48 years.
Of Bombay adult Indian Inhabitant
Residing at 1-A, Ground floor,
Madhav Niwas, Dr. N.R. Karode
Lane, Opp.S.V. Road,
Borivali (W), Mumbai-400 092. …Petitioner

Versus

1) The State of Maharashtra
Through Borivali Police Station,
to be served through Public
Prosecutor,
High Court, (A.S.), Bombay.

2) Kanhaiyalal B. Gupta
3) Smt. Geeta Kanhaiyalal Gupta
Both Adults Indian Inhabitant
Residing at 1505, Pushp Vinod-4, S.V.
Road, Next to McDonald, Borivali
(W), Mumbai 400 092.

4) Mr. Jayesh Vinubh,
Occ: Builder, Indian Adult Inhabitant
Having registered office at 401,
Court Chamber, S.V. Road, Borivali
(W), Mumbai-400 092 and office
Pushp Vinod-4, S.V. Road, Next to Mc
Donald, Borivali (W),
Mumbai-400 092. ...Respondents

.....

Mr. A.M. Saraogi for the Petitioner.
Mr. V.V. Gangurde, APP for the Respondent No.1-State.
Mr. A.H. Ponda i/b. Mr. Sunil D'souza for the Respondent No.4.
Mr. Amarendra Mishra for the Respondent Nos.2 and 3.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

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JUDGMENT RESERVED ON: 14/11/2017
JUDGMENT PRONOUNCED ON:19/1/2018

JUDGMENT:-

The Petitioner herein, who is the complainant in C.C. No.113/SW/2017 has challenged the order dated 4th August 2017 whereby the learned Metropolitan Magistrate, 26th Court, Borivali, Mumbai, has allowed the application filed by the Respondent Nos.2,3 and 4 herein to permit them to intervene in an application under Section 156(3) of the Code of Criminal Procedure (for short 'Cr.P.C.').

2. Heard Mr. Saraogi, the learned counsel for the Petitioner, Mr. Ponda, the learned counsel for the Respondent No.4, Mr. Mishra, the learned counsel for the Respondent Nos.2 and 3 and Mr. V.V. Gangurde, the learned APP for the Respondent No.1-State. Perused the records and considered the submissions advanced by the learned counsels for the respective parties.

3. The Petitioner herein had filed an application under Section 156(3) of the Cr.P.C. with a prayer to direct the Senior Inspector of Borivali Police Station to register a FIR against the Respondent Nos.2,3 and 4 and two others for the offences punishable under Sections 420,

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354 (b), 355, 382, 387, 467, 468, 450, 452, 506(II), 120(b) r/w. 34 of the IPC. The Respondent Nos.2, 3 and 4 filed an application dated 26th May, 2017 wherein they claimed that the averments /allegations made in the said application are false and frivolous. The Respondents claimed that they would expose the falsehood of the Petitioner and assist the court in arriving at just and proper decision. These Respondents therefore, urged that they should be heard in the application under Section 156(3) of the Cr.P.C.

4. A perusal of the impugned order reveals that it was contended before the learned Magistrate that the accused has right to be heard in an application under Section 156(3) Cr.P.C. and in support of such contention, reliance was placed on the decision of this Court in ***Nitin Yeshwant Patekar Vs Maria Luiza Quadros 2016 ALL M.R. (Cri) 2969 BOI.*** Relying upon the said decision, the learned Magistrate held that the Respondent Nos.2,3 and 4 /prospective accused are entitled to intervene in the matter.

5. At the outset, it may be mentioned that in ***Nitin Patekar*** (supra) an application was filed under Section 156(3) of Cr.P.C. The attorney of the prospective accused had also filed an application

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seeking leave to intervene in the matter. The learned Magistrate had dismissed the said intervention application and had allowed the application under Section 156(3) of Cr.P.C. and directed the concerned police officer to register the FIR. The prospective accused had challenged the said order in revision. It was contended that the learned Magistrate ought to have heard them in the matter. The learned Sessions Judge held that the Application did not disclose commission of cognizable offence and while setting aside the order passed under Section 156(3) of Cr.P.C., the learned Sessions Judge, observed that the Magistrate ought to have allowed the intervention application as there is no prohibition in law in hearing the parties. The Applicant -complainant had challenged the said order before this Court (Panjim Bench). The learned Single Judge of this Court had confirmed the findings of the learned Sessions Judge that the application did not disclose cognizable offence. In paragraph 11, the learned Single Judge had made a passing reference to the findings recorded by the learned Sessions Judge about the issue of intervention. A plain reading of this decision (***Nitin Patekar, (Supra))*** would indicate that this Court had neither endorsed the view of the learned Sessions Judge nor expounded such proposition. Hence, the statement in the impugned order that "*the Hon'ble High Court held that there is no bar to hear the*

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Respondent at the time of considering application under Section 156(3)" is totally erroneous and misconceived.

6. Now coming to the merits of the matter, Section 154(1) Cr.P.C. casts a duty on the concerned police officer to register FIR when information discloses a cognizable offence. When the police officer fails to discharge this primary responsibility, Section 156(1) Cr.P.C. empowers the Magistrate to order investigation of a cognizable case. At this pre-cognizance stage the Magistrate is only required to arrive at a conclusion that the application discloses cognizable offence in respect of which investigation is intended to be ordered. The Magistrate is certainly not required to embark upon an indepth roving enquiry as to the reliability and genuineness of the allegations. Thus, the discretion and power of the Magistrate under Section 156(3) of Cr.P.C. is very limited. In exercise of such powers the Magistrate cannot travel into the arena of merit of the case. Considering the scope of Section 156 (3) of Cr.P.C. and in the absence of any statutory provision, the Respondents could not have been conferred with any right of hearing at pre-cognizance stage.

7. In this regard it would be advantageous to refer to the

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decision in ***Anju Choudhari Vs. State of Uttar Pradesh, 2013 Cr.L.J. 776,*** wherein whilst considering the question whether the accused is entitled for hearing prior to registration of the FIR the Apex Court has held thus:

> *30. The rule of audi alteram partem is subject to exceptions. Such exceptions may be provided by law or by such necessary implications where no other interpretation is possible. Thus rule of natural justice has an application, both under the civil and criminal jurisprudence. The laws like detention and others, specifically provide for post-detention hearing and it is a settled principle of law that application of this doctrine can be excluded by exercise of legislative powers which shall withstand judicial scrutiny. The purpose of the Criminal Procedure Code and the Indian Penal Code is to effectively execute administration of the criminal justice system and protect society from perpetrators of crime. It has a twin purpose; firstly to adequately punish the offender in accordance with law and secondly to ensure prevention of crime. On examination, the scheme of the Criminal Procedure Code does not provide for any right of hearing at the time of registration of the First Information Report. As already noticed, the registration forthwith of a cognizable offence is the statutory duty of a police officer in charge of the police station. The very purpose of fair and just investigation shall stand frustrated if pre- registration hearing is required to be granted to a suspect. It is not that the liberty of an individual is being taken away or is being adversely affected, except by the due process of law. Where the Officer In-charge of a police station is informed of a heinous or cognizable offence, it will completely destroy the purpose of proper and fair investigation if the suspect is required to be granted a hearing at that stage and is not subjected to custody in accordance with law. There would be the pre- dominant possibility of a suspect escaping the process of law. The entire scheme of the Code unambiguously supports the theory of exclusion of audi alteram partem pre-registration of an FIR. Upon registration of an FIR, a person is entitled to take recourse to the various*

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provisions of bail and anticipatory bail to claim his liberty in accordance with law. It cannot be said to be a violation of the principles of natural justice for two different reasons. Firstly, the Code does not provide for any such right at that stage. Secondly, the absence of such a provision clearly demonstrates the legislative intent to the contrary and thus necessarily implies exclusion of hearing at that stage. This Court in the case of Union of India v W.N. Chadha (1993) Suppl. (4) SCC 260 clearly spelled out this principle in paragraph 98 of the judgment that reads as under:

> *"98. If prior notice and an opportunity of hearing are to be given to an accused in every criminal case before taking any action against him, such a procedure would frustrate the proceedings, obstruct the taking of prompt action as law demands, defeat the ends of justice and make the provisions of law relating to the investigation lifeless, absurd and self- defeating. Further, the scheme of the relevant statutory provisions relating to the procedure of investigation does not attract such a course in the absence of any statutory obligation to the contrary."*

31. In the case of Samaj Parivartan Samuday v. State of Karnataka (2012) 7 SCC 407, a three-Judge Bench of this Court while dealing with the right of hearing to a person termed as 'suspect' or 'likely offender' in the report of the CEC observed that there was no right of hearing. Though the suspects were already interveners in the writ petition, they were heard. Stating the law in regard to the right of hearing, the Court held as under :

> *"50. There is no provision in CrPC where an investigating agency must provide a hearing to the affected party before registering an FIR or even before carrying on investigation prior to registration of case against the suspect. CBI, as already noticed, may even conduct pre-registration inquiry for which notice is not contemplated under the provisions of the Code, the Police Manual or even as per the precedents laid down by this Court. It is only in those cases where the Court directs initiation of investigation by a specialised agency or transfer investigation to such agency from another agency that the Court may, in its discretion,*

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> *grant hearing to the suspect or affected parties. However, that also is not an absolute rule of law and is primarily a matter in the judicial discretion of the Court. This question is of no relevance to the present case as we have already heard the interveners."*

32. While examining the above-stated principles in conjunction with the scheme of the Code, particularly Section 154 and 156 (3) of the Code, it is clear that the law does not contemplate grant of any personal hearing to a suspect who attains the status of an accused only when a case is registered for committing a particular offence or the report under Section 173 of the Code is filed terming the suspect an accused that his rights are affected in terms of the Code. Absence of specific provision requiring grant of hearing to a suspect and the fact that the very purpose and object of fair investigation is bound to be adversely affected if hearing is insisted upon at that stage, clearly supports the view that hearing is not any right of any suspect at that stage.

33. Even in the cases where report under Section 173(2) of the Code is filed in the Court and investigation records the name of a person in column (2), or even does not name the person as an accused at all, the Court in exercise of its powers vested under Section 319 can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law.

34. Of course, situation will be different where the complaint or an application is directed against a particular person for specific offence and the Court under Section 156 dismisses such an application. In that case, the higher court may have to grant hearing to the suspect before it directs registration of a case against the suspect for a specific offence. We must hasten to clarify that there is no absolute indefeasible right vested in a suspect and this would have to be examined in the facts and circumstances of a given case. But one aspect is clear that at the stage of registration of a FIR or passing a direction under Section 156(3), the law does not contemplate grant of any hearing to a suspect. ..xxx

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8. In ***Manharibhai Muljibhai Kakadia and Anr. Vs. Shaileshbhai Mohanbhai Patel and Ors (2012) 10 SCC 517*** the question before three Judge Bench of the Apex Court was whether a suspect is entitled for hearing by the revisional court in a revision preferred by the complainant challenging the order of the Magistrate dismissing the complaint under Section 203 of the Cr.P.C. Whilst considering the said question the Apex Court has observed that :-.

> *"The Code does not permit an accused person to intervene in the course of inquiry by the Magistrate under Section 202. The legal position is no more res integra in this regard. More than five decades back, this Court in Vadilal Panchal vs. Dattatraya Dulaji Ghadigaonker and Anr. with reference to Section 202 of the Criminal Procedure Code, 1898 (corresponding to Section 202 of the present Code) held that the inquiry under Section 202 was for the purpose of ascertaining the truth or falsehood of the complaint, i.e., for ascertaining whether there was evidence in support of the complaint so as to justify the issuance of process and commencement of proceedings against the person concerned."*

9. It is thus well settled that till the process is issued, a person against whom a FIR is sought to be registered or a complaint is filed, has no right to intervene in an application under Section 156(3) of Cr.P.C. or an enquiry under Section 202 of Cr.P.C. The learned Magistrate has disregarded these settled principles of law and has exceeded the jurisdiction in allowing intervention.

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10. Mr. Ponda, the learned counsel for the Respondent No.4 has submitted that a mere formal or technical error in the order would not warrant exercise of writ jurisdiction. He has relied upon the decision of the Apex court in ***Nagendra Nath Bora & Anr. Vs. Commissioner of Hills Division and Appeals, Assam & Ors., (1958) SCR 1240*** wherein the Apex Court has held thus:-

> *24. It is clear from an examination of the authorities of this Court as also of the courts in England, that one of the grounds on which the jurisdiction of the High Court on certiorari may be invoked, is an error of law apparent on the face of the record and not every error either of law or fact, which can be corrected by a superior court, in exercise of its statutory powers as a court of appeal or revision.*
>
> *25. xxx*
>
> *26. But the question still remains as to what is the legal import of the expression 'error of law apparent on the face of the record.' Is it every error of law that can attract the supervisory jurisdiction of the High Court, to quash the order impugned ? This court, as observed above, has settled the law in this respect by laying down that in order to attract such jurisdiction, it is essential that the error should be something more than a mere error of law; that it must be one which is manifest on the face of the record. In this respect, the law in India and the law in England, are, therefore, the same. It is also clear, on an examination of all 1270 the authorities of this Court and of those in England, referred to above, as also those considered in the several judgments of this Court, that the Common Law writ, now called order of certiorari, which was also adopted by our Constitution, is not meant to take the place of an appeal*

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> *where the statute does not confer a right of appeal. Its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. ,Mere formal or technical errors, even though of law, will not be sufficient to attract this extraordinary jurisdiction."*

11. The principle on which writ of certiorari is issued are well settled. The four propositions laid down by the seven Judges Bench of the Apex Court in ***Hari Vishnu Kamath Vs. Ahmad Ishaque and Ors. – (1955) 1 SCR 1104*** have been summarised by the Constitution Bench in ***the Custodian of Evacuee Property Bangalore Vs. Khan Saheb Abdul Shukoor etc. – (1961) 3 SCR 855*** are as under :-

> *The limit of the jurisdiction of the High Court in issuing writs of certiorari was considered by this Court in Hari Vishnu Kamath Vs. Ahmad Ishaque 1955-I S 1104 : ((s) AIR 1955 SC 233) and the following four propositions were laid down :-*
>
> *"(1) Certiorari will be issued for correcting errors of jurisdiction;*
>
> *(2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice;*
>
> *(3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous.*
>
> *(4) An error in the decision or determination itself may also be amenable to a writ of certiorari if it is a manifest*

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> *error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision.*"

12. In the instant case, the error cannot be termed as a mere formal or technical error. The learned Judge has exceeded his jurisdiction in allowing the application for intervention in total disregard to the settled principles of law. The error is patently apparent on the face of the record and hence can be corrected by a writ of certiorari.

13. Under the circumstances, and in view of discussion supra, the Petition is allowed. The impugned order dated 4th August, 2017 is quashed and set aside.

(ANUJA PRABHUDESSAI, J.)

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