

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 3049 OF 2014

Mr. Jitendra S. Awhad ... Petitioner
V/s.
Mr. Pravin P. Wategaonkar & Anr. ... Respondents

Mr. S.M. Oak i/b. Mr. S.S. Bhise for the Petitioner.
Mr. Pravin P. Wategaonkar, Respondent present in person.
Mr. A.S. Shitole, A.P.P. for the State.

CORAM : A. V. NIRGUDE, J.
DATE : 11th DECEMBER, 2015.

P.C. :

1. This Petition, filed under Article 227 of the Constitution of India, challenges action initiated by the learned Magistrate directing the police to investigate into the complaint lodged by the respondent-complainant.

2. The respondent-complainant lodged this complaint before the learned Judicial Magistrate, First Class, Thane, which was registered as Private Complaint No.84 of 2012. The respondent-complainant alleged that the petitioner had committed offences punishable under Sections 177, 181, 199 and 200 of I.P.C. r/w. 125-A of the Representation of People Act, 1951.

3. The gist of the complaint is as under :

The petitioner is a politician. He agreed to acquire one flat in building known as 'Adarsh Co-Operative Housing Society' and became a member of the same way back in 2004. He even deposited certain sums periodically. The total amount deposited by him with the Society is more than Rs.20 lakhs. In 2009, the petitioner filed his nomination paper and an affidavit for the purpose of getting elected as a member of the Legislative Assembly in the general election of 2009.

4. Rather belatedly the respondent-complainant came to know that the petitioner did not mention about his transaction with the society in 2011 and on 09.02.2012 he lodged this complaint alleging that the petitioner stated falsehood on affidavit etc. At the time when the learned Magistrate was recording verification of the respondent-complainant, the petitioner intervened in the criminal case. On the other hand, the learned Magistrate after recording verification statement, ordered enquiry under Section 202 of Cr.P.C. on 10.12.2013. Thereafter, the police also sent a notice to the petitioner that enquiry was commenced.

5. Rather belatedly this Petition was filed on 13.08.2014. The question that arises in this petition is whether the complaint is maintainable? The answer appears to be in the negative.

6. On the face of it, it clearly appears to me that the petitioner avoided to mention his interest in the immovable property of Adarsh Cooperative Housing Society in the affidavit filed with the nomination papers.

7. He was declared elected. But no Election Petition was filed against him. Had such an Election Petition been filed alleging that false statement was made in the affidavit, probably the question as to whether the petitioner committed illegality in not disclosing the material particulars of his proprietary interest would have been gone into. The respondent-complainant is admittedly neither a voter nor opponent of the petitioner in the election. So he had no occasion to challenge the election of the petitioner. In such a Petition the only question is whether the disclosure so made in the affidavit would have been enquired into and the Court would have given a finding that the affidavit was incomplete or purposely kept incomplete. The Court would have even recorded finding that in view of incorrectness of information, there was non-disclosure of important information. Upon recording of such finding, the Court would have set aside the election of the petitioner. It is only then the petitioner could have faced Criminal proceeding under Seciton 125-A of the Act. Along with such proceeding he would have also been called upon to face charges of offences punishable under Sections 199 and 200 of I.P.C. In other words, I am of the view that

complaint of this nature is permissible only after a Court, where election petition is decided, records a finding that the candidate had provided incorrect information in his affidavit and thereby was guilty of non-disclosure of certain important information. No Court can take cognizance for the offence punishable under Section 125-A of the Act. I am told that there is no statutory provision apprehending taking of cognizance of offence punishable under Section 125-A of the Act.

8. I have formed my opinion mainly because of certain observations of the Supreme Court in the judgment of **Kisan Shankar Kathore vs. Arun Dattatray Sawant and others**, (2014) 14 SCC 162. For the purpose of clarifying further, I would rather quote paragraph 43 of the judgment –

“43. When the information is given by a candidate in the affidavit filed along with the nomination paper and objections are raised thereto questioning the correctness of the information or alleging that there is non-disclosure of certain important information, it may not be possible for the Returning Officer at that time to conduct a detailed examination. Summary enquiry may not suffice. The present case is itself an example which loudly demonstrates this. At the same time, it would not be possible for the Returning Officer to reject the nomination for want of verification about the allegations made by the objector. In such a case, when ultimately it is proved that it was a case of non-disclosure and either the

affidavit was false or it did not contain complete information leading to suppression, it can be held at that stage that the nomination was improperly accepted. Ms. Meenakshi Arora, learned Senior Counsel appearing for the Election Commission, rightly argued that such an enquiry can be only at a later stage and the appropriate stage would be in an election petition as in the instant case, when the election is challenged. The grounds stated in Section 36(2) are those which can be examined there and then and on that basis the Returning Officer would be in a position to reject the nomination. Likewise, where the blanks are left in an affidavit, nomination can be rejected there and then. In other cases where detailed enquiry is needed, it would depend upon the outcome thereof, in an election petition, as to whether the nomination was properly accepted or it was a case of improper acceptance. Once it is found that it was a case of improper acceptance, as there was misinformation or suppression of material information, one can state that question of rejection in such a case was only deferred to a later date. When the Court gives such a finding, which would have resulted in rejection, the effect would be same, namely, such a candidate was not entitled to contest and the election is void. Otherwise, it would be an anomalous situation that even when criminal proceedings under Section 125-A of the Act can be initiated and the selected candidate is criminally prosecuted and convicted, but the result of his election cannot be questioned. This cannot be countenanced. ”

9. From the observations quoted above, it is clear to me that a criminal proceeding under Section 125-A is not permissible unless an elected candidate's election is set aside on the ground of non-disclosure of important information in nomination paper and affidavit. The respondent-complainant also suggested that even though the offence punishable under Section 125-A of the Act is beyond his reach, he should be allowed to prosecute the petitioner under Sections 199 and 200 of I.P.C. These proceedings are cognate provisions to Section 125. The provisions under Sections 199 and 200 are part of chapter II of the I.P.C. which deals with giving of false evidence and offences against public justice. This chapter does not deal with election offences. The allegations against the petitioner is in respect of his nomination paper/affidavit which were submitted for the purpose of contesting election. So, as stated above, unless the Court deciding Election Petition did not record a finding that the petitioner was guilty of non-disclosure of important information, the provisions of Sections 199 and 200 of I.P.C. would not be attracted. Therefore, the complainant cannot continue with the prosecution for the offences punishable under Sections 199 and 200 of I.P.C. The respondent-complainant who argued the case himself quite ably placed reliance on the judgment of Supreme Court in the case of **Subramanian Swamy vs. Manmohan Singh and Another** (2012) 3 SCC 64, and more particulars on paragraphs 30 and 68. Having regard to the law laid down in these

paragraphs, I am still of the view that no Court can take cognizance of the complaint lodged by the respondent-complainant.

10. The Petition is allowed. The prosecution of the petitioner stands set aside.

(A.V. NIRGUDE, J.)

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