

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 1117 OF 2007

1. Rajesh S/o Rangnathrao Joshi,
Age. 39 years, Occ. Service,
Presently working as Tahasildar (Revenue),
Divisional Commissioner Office, Aurangabad.
2. Vishnu Gajba Patil,
Age. 60 years, Occ. Retired as Circle Officer,
R/o. Bhagyanagar, Old Jalna,
Tq. & Dist. Jalna.
3. Rajendra Piraji Bagde,
Age. 41 years, Occ. Service,
Presently working as Talathi,
R/o. Priyadarshini Colony,
Jalna. ...PETITIONERS.

Versus

Majharkhan Jafarkhan Pathan,
Age. 45 years, Occ. Business,
R/o. Afgan Mohalla, Old Jalna. ...RESPONDENT.

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Advocate for Applicants : Mr S V Kurundkar
Advocate for Respondent : Mr Joydeep Chatterjee

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CORAM : V.K. JADHAV, J.
Dated: November 30, 2016

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ORAL JUDGMENT :-

1. Being aggrieved by the order of issuance of process passed by the Judicial Magistrate First Class, Jalna dated 28.06.2005 for the offence punishable under sections 466, 474, 420, 506 (II) of Indian Penal Code and

the order dated 2.9.2006 rejecting thereby the application for discharge filed by applicant/orig applicant no.1, the applicants/original accused preferred this criminal application.

2. Brief facts, giving rise to the present criminal application are as follows :-

Respondent-original complainant has filed a private complaint bearing RCC No.97/2005 before the Judicial magistrate First Class, Jalna against the present applicants and his own brother accused no.4, who is presently no more for having committed an offence punishable under section 466, 472, 474, 420, 425, 504, 506 of Indian Penal Code. It has alleged in the complaint that, respondent-complainant and his relatives purchased the land survey no.529 to the extent of 81R and survey no.532 to the extent of 16.80R jointly on 15.12.2000 and accordingly, Mutation No.3019 was sanctioned. Further, the complainant had purchased the land survey no.532 to the extent of 19R independently and separate mutation entry no.3796 was sanctioned. Thus, the respondent-complainant is

owner jointly and independently of land survey no.532 and 529 as aforesaid. It has further alleged in the complaint that, after purchasing the land, the complainant kept aforesaid land without cultivation. Said land is surrounded by the residential houses and plots and thus it was not possible for the respondent-complainant to cultivate the said lands. It has further alleged in the complaint that, on certain dates the spot inspection was done at the instance of original accused no.4, who is brother of respondent-complainant. Even though, said lands were kept without cultivation, on the basis of certain false documents, present applicants-accused in collusion with the original accused no.4 showed him in possession of said land and accordingly committed the offence as alleged in the complaint. On the basis of these allegations, learned Magistrate has directed the police report as provided under section 202 of Cr.P.C. On perusal of the verification statement and report of the police station, the learned Magistrate by impugned order dated 16.03.2005 issued process against the applicants-accused for the offence punishable under section 466, 474, 420, 506 (II) of

Indian Penal Code. Furthermore, in response, to the said process, the petitioner-original accused no.1 appeared and filed his application for discharge. Learned Magistrate by impugned order dated 2.9.2006 rejected the said application. Hence, this criminal application.

3. The learned counsel for the applicants/original accused submits that, the applicant-accused no.1 is working as Tahsildar and applicant no.2 is working as circle officer and applicant no.3 was working as Talathi at the relevant time. On the basis of the application submitted by the original accused no.4, who happened to be a real brother of the respondent-complainant, the applicant-original accused no.1 being Tahsildar has directed the inquiry into the matter and accordingly applicants-accused nos.2 and 3 visited the disputed land, and after conducting the panchnama submitted report to applicant no.1-Tahsildar to the effect that aforesaid lands are under cultivation and original accused no.4 had cultivated the said land in the year 2003-2004. Learned counsel submits that, being

aggrieved by the same, respondent-complainant has preferred appeal before Sub-Divisional Officer (Revenue), Jalna, who by judgment and order dated 21.4.2006 dismissed the said appeal by confirming the order passed by the present applicant no.1. Being aggrieved by the same, respondent-complainant has preferred an appeal before the Additional Collector, Jalna, who has partly allowed the appeal and further remanded the matter to the applicant no.1-Tahsildar by setting aside the order dated 7.9.2004 passed by applicant no.1 Tahsildar. Learned counsel submits that, thus respondent-complainant had instituted a R.C.S. No.552/2004 in respect of the said lands for the decree of perpetual injunction, however, said suit also came to be dismissed by the Civil Court.

4. Learned counsel submits that, there is a reasonable nexus between the act complained off and official duties performed by the applicants. Learned counsel submits that, in absence of any sanction as contemplated under section 197 of the Cr.P.C., cognizance taken by the Magistrate is liable to be

quashed and set aside, so also the order of issuance of process passed against the applicants-accused.

5. Learned counsel in order to substantiate his contentions places his reliance on the following judgments :-

1. Union of India Vs. Prafulla Kumar Samal reported in 1978 DGLS (SC) 318 : 1979 AIR (SC) 366.
2. State of Orissa Through Kumar Raghvendra Singh Vs. Ganesh Chandra Jew reported in 2004 DGLS (SC) 314.
3. D.T. Virupakshappa Vs. C. Subash reported in 2015 DGLS (SC) 532 : 2015 AIR (SC) 2022.
4. Om Prakash and Others Vs. State of Jharkhand Through the Secretary, Department of Home, Ranchi 1 and Another reported in (2012) 12 SCC 72.

6. The learned counsel for respondent-original complainant submits that the learned Magistrate while rejecting the application for discharge has observed that whether act complained off is done in official capacity or not is a mixed question of fact and law and it can be decided only after adducing evidence by the parties and thus sanction under section 197 of Cr.P.C. is required to

be taken or not also can be decided during the course of the trial of the case. The learned counsel submits that, in a case instituted otherwise than a police report, the Magistrate if find that no case has been made out which, if unrebutted, would warrant his conviction, then the Magistrate can discharge the accused. In the instant case, the allegations made in the complaint if unrebutted, would certainly warrant conviction of the applicants-accused. Learned Magistrate has, therefore, rightly rejected the application for discharge.

7. Learned counsel submits that, the applicants-accused have prepared false record in collusion with the original accused no.4 and therefore sanction as required 197 of the Cr.P.C. is not required.

8. On careful perusal of the contents of the complaint, it appears that, the applicant-original accused no.1, who is Tahsildar, had initiated proceeding on the basis of the application submitted by the original accused no.4, who happened to be real brother of respondent-complainant. It further appears from the

contents of the complaint that, the applicant-original accused nos. 2 and 3 visited the disputed lands and drawn Panchnama in presence of the Panchas about cultivation of the said land in the year 2003-2004. On the basis of the report and the Panchnama as aforesaid, the applicant-original accused no.1, who is Tahsildar has passed the order in accordance with law. It is thus clear that there is reasonable nexus between the act complained off and the official duties performed by the applicants.

9. In a case of Om Prakash and Others Vs. State of Jharkhand Through the Secretary, Department of Home, Ranchi 1 and Another (supra) relied upon by the learned counsel for the applicants, in paragraph no.32 of the judgment the Supreme Court has made following observations :-

“32. The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it (K. Satwant Singh). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his.

official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection (Ganesh Chandra Jew). If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood. (Emphasis supplied)

If the test as laid down are applied to the facts of the instant case, it is clear that the act complained off was integrally connected with or attached to office of the applicants as to be inseparable from it.

10. In a case of State of Orissa Through Kumar Raghvendra Singh Vs. Ganesh Chandra Jew (supra) relied upon by the learned counsel for the applicants, the Supreme Court held that, *there cannot be any universal rule to determine whether there is reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to*

commit the act complained of could have made him answerable for a charge of dereliction of his official duty, if the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant.

11. In the instant case, the original accused has submitted an application before the applicants-original accused and accordingly, the applicant-accused no.1 in the capacity of Tahsildar directed an inquiry into the contents of the application. Applicants-original accused nos. 2 and 3 accordingly visited the lands which was subject matter of the said application and, when found that land is under cultivation, original accused no.4 had cultivated the said land in the year 2003-2004, submitted report accordingly before the applicant-accused no.1. If the applicant-accused no.2 has failed to carry out any inquiry into the contents of the application submitted by the original accused no.4, then he would have been answerable to the charge of

dereliction of his official duty. Furthermore, the first appellate Court has also confirmed the order passed by the applicant-accused no.1 though matter subsequently remanded by the second appellate court on some technical aspects.

12. The applicants have submitted certain documents alongwith this application before this Court, however, in view of the observations made by the Supreme Court in a case of Om Prakash and Others Vs. State of Jharkhand Through the Secretary, Department of Home, Ranchi 1 and Another (supra) and also reiterated in a case of D.T. Virupakshappa Vs. C. Subash (supra), the court can look into any documents submitted at the time of inception of the case raising point of sanction.

The Supreme Court has made following observations:-

41. The upshot of this discussion is that whether sanction is necessary or not has to be decided from stage to stage. This question may arise at any stage of the proceeding. In a given case, it may arise at the inception. There may be unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection given under Section 197 of the Code. It is not possible for us to hold that in such a case, the court cannot look into any documents produced by the accused or the public servant concerned at the inception. The nature of the complaint may have to be kept in mind.

It must be remembered that previous sanction is a precondition for taking cognizance of the offence and therefore, there is no requirement that the accused must wait till the charges are framed to raise this plea. ...”.

13. Further, the respondents/original complainant has contended in the complaint itself that he has already filed application before the authority seeking sanction to prosecute the applicants but no sanction is accorded.

14. In view of the above, and the ratio laid down by the Supreme Court and having regard to the facts and circumstances of the case, the applicants-accused need to be protected by invoking the provisions of Section 197 of Cr.P.C. In absence of any sanction as contemplated under section 197 of Cr.P.C., issuance of process by the Magistrate is liable to be quashed and set aside. Hence, following order.

O R D E R

- I. Criminal Application is hereby allowed in terms of prayer Clause “**B**”.
- II. Rule is made absolute in above terms.

III. Criminal Application accordingly disposed
off.

sd/-
(**V.K. JADHAV, J.**)

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aaa/-