

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 2125 OF 2015

1. Dilip s/o Vishwanath Musale
age 53 years, Occ. Service,
as Executive Engineer, Minor
Irrigation Division-1, Sinchan
Bhavan, Jalna Road,
Aurangabad.
 2. Ajay s/o Prabhakar Kohirkar,
age 53 yrs, Occ. Service,
as Superintending Engineer,
G.M.I.D.C. Aurangabad.
 3. Prakash s/o Dagadu Vaze,
age 57 yrs, Occ. Service,
as Executive Engineer,
GMIDC, Aurangabad.
 4. Manohar s/o Gundappa Kapte,
age 55 yrs, Occ. Service
as Assistant Superintending Engineer,
Aurangabad Irrigation Circle,
Aurangabad.
 5. Ganesh s/o Vasantao Vyavhare,
Age 58 yrs, Occ. Service,
as Executive Engineer,
GMIDC., Aurangabad.
 6. Suresh s/o Trimbak Naik,
Age 65 yrs, Occ. Consultant
as Executive Engineer,
Godavari Khore, Aurangabad.
- ...Applicants

VERSUS

1. The State of Maharashtra
 2. Sharad s/o Sadashivrao Kulkarni,
age 53 yrs, Occ. Social Work and
Contractor, R/o R.H.6/8,
Ashtavinayak Nagar, Chikalthana,
Aurangabad.
- Respondents.

-2-

WITH

CRIMINAL APPLN NO. 2197 OF 2015

1. Gundappa s/o Shivlingappa Lokhande
Age 57 yrs, Occ. Service,
As Chief Engineer, North Maharashtra
Region Nashik (Water Resources).
 2. Arun s/o Ramchandra Kamble,
Age 52 yrs, Occ. Service,
As superintending Engineer,
Aurangabad Irrigation Circle,
Aurangabad.
 3. Dilip S/o Vishvanath Musale,
age 53 yrs, Occ. Service,
As Executive Engineer, Minor
Irrigation Division-1, Sinchan Bhavan,
Jalna Road, Aurangabad.
 4. Anil s/o Motilal Nimbhore,
age 47 yrs, Occ. Service,
As sub Divisional Engineer,
Minor Irrigation Sub Division,
(Local Sector), Aurangabad.
- ...Applicants

VERSUS

1. The State of Maharashtra.
 2. Sharad s/o Sadashivrao Kulkarni,
age 53 yrs, Occ. Social Work and
Contractor, R/o R.H.6/8,
Ashtavinayak Nagar, Chikalthana,
Aurangabad.
- ...Respondents.

WITH

CRIMINAL APPLICATION NO. 2289 OF 2015

1. Kiran s/o Ravindra Wadi,
Age. 45 years, Occ. Business,
R/o. Plot No. 242/243, N-1,
B-Sector, CIDCO, Aurangabad.
- ...Applicant

VERSUS

1. The State of Maharashtra.

2. Sharad s/o Sadashivrao Kulkarni,
age 53 yrs, Occ. Social Work and
Contractor, R/o R.H. 6/8,
Ashtavinayak Nagar, Chikalthana,
Aurangabad.

...Respondents

...
Advocates for Applicants : Mr. M.S. Deshmukh with Mr. U.L. Momale
APP for Respondent: Mr. A.R. Kale
Advocate for Respondents : Mr. S.S. Kulkarni, Party in Person Respondent
No. 2
...

CORAM : V. K. JADHAV, J.
DATED : 16th NOVEMBER, 2016

ORDER:-

1. By consent, heard finally at admission stage.
2. Being aggrieved by the order of issuance of process dated 19.9.2014 for the offences punishable under Sections 119, 120(B), 126, 217, 218, 417, 420, 465, 468 and 471 r.w. 34 of I.P.C. passed by the learned Chief Judicial Magistrate, Aurangabad in R.C.C. No. 517 of 2013, 1035 of 2013 and the judgment and order passed by the Additional Sessions Judge, Aurangabad dated 9.3.2015 in Criminal Revision application Nos. 258 of 2014, 256 of 2014 and 259 of 2014, confirming thereby the order passed by the Magistrate, original accused Nos. 8 to 13 in R.C.C. No. 517 of 2013, preferred criminal application No. 2125 of 2015, original accused Nos. 4 to 7 in R.C.C. No. 1035 of 2013 preferred criminal application No. 2197 of 2015 and original accused No. 9 in R.C.C. No. 1035 of 2013

preferred criminal application No. 2289 of 2015.

3. Since the issue involved in all these applications is identical, they are being decided together and disposed of by this common order.

4. Brief facts giving rise to the present criminal applications are as follows:-

a) Respondent No.2 original complainant has filed criminal complaint bearing R.C.C. No. 517 of 2013, against in all 13 accused persons before the learned Chief Judicial Magistrate (hereinafter for short, referred to as "Magistrate"), Aurangabad alleging therein that, accused No. 7/ Chief Engineer Mr. G.S. Lokhande has ordered as to which officer is to be provided which vehicle. It is further alleged that, the officers have used the vehicles without authority and power. It is further alleged that, the accused, by committing breach of law, have used the vehicles and committed misappropriation of huge amount of the Government and the senior officers have also tried to conceal the misconduct of the accused. Whereas in R.C.C. No. 1035 of 2013, it is alleged that the contractors had carried out the work of the scheme of irrigation at Bramhagavan. The contractor was to construct the building as per condition No.69. However, the accused flouted the

conditions and by fabricating false documents and by conspiring with each others, committed the misappropriation of huge amounts of the Government.

b) After filing the compliant, The learned Magistrate directed investigation into the matter, as provided under Section 202 of Cr.P.C. to the concerned police. Accordingly, the concerned police have carried out investigation into the allegations made in the complaints and submitted report before the learned Magistrate Aurangabad. On perusal of report submitted by the police, the learned Magistrate has observed that the police has not made proper investigation and thus by order dated 11.2.2014, directed the complainant to examine himself and lead evidence of witnesses, if any, in support of his complaints under Section 202 (2) of Cr.P.C. In R.C.C. No. 517 of 2013, the complainant instead of examining himself, has examined two witnesses viz. Laxmikat Ramchandra Yermalkar, Sub Divisional Engineer, G.M.I.D.C. Aurangabad and Sham Laxman Kulkarni, Executive Engineer, Nandur Madhmeshwar Canal, Division No.2, Vaijapur. In R.C.C. No. 1035 of 2013, inspite of directions given by the court, the complainant neither examined himself nor examined any witness in support of the allegations made in the said complaint.

c) The complainant, accordingly, has led his evidence. Learned Magistrate heard the complainant, perused the complaints and documents submitted alongwith the complaints and by impugned order dated 19.9.2014 directed issuance of process for the offences punishable under Sections 119, 120(B), 126, 217, 218, 417, 420, 465, 468 and 471 r.w. 34 of I.P.C. against the present applicants original accused Nos. 8 to 13 in R.C.C. No. 517 of 2013 and original accused Nos. 4 to 7 and 9 in R.C.C. No. 1035 of 2013. The learned Magistrate has observed in the order that prima facie case is made out against the said accused persons for having committed the aforesaid offences.

d) Being aggrieved by the order of the Magistrate of issuing process, applicants in criminal application No. 2125 of 2015 preferred criminal revision No. 258 of 2014, the applicants in criminal application No. 2197 of 2015 preferred criminal Revision Application No. 256 of 2014 and applicant in criminal application No. 2289 of 2015 preferred criminal revision application No. 259 of 2014. The learned Additional Sessions Judge, Aurangabad, by its impugned judgment and order dated 9.3.2015, dismissed all aforesaid revisions. Hence, these criminal applications.

5. Learned counsel for the applicants submits that learned

Magistrate initially directed police investigation, as provided under Section 202 of Cr.P.C. and on perusal of the documents placed on record and the report of the police filed on record under Section 202 Cr.P.C., observed that the police has not made proper investigation and further directed the complainant to examine himself and lead evidence of the witnesses, if any, in support of his complaints, under Section 202 (2) of Cr.P.C. Even though learned Magistrate directed the complainant to examine himself, the complainant has not examined himself before the Magistrate.

6. Learned counsel for the applicants submits that learned Magistrate, on perusal of police report and documents submitted therewith, was expecting from the complainant to examine himself before the court in support of his complaints. By way of initial order, the learned Magistrate has observed that after reading complaints, verification of the documents, annexed with the complaints, allegations made in the complaints need enquiry and further in the subsequent order has observed that the police have not made proper investigation. Under these circumstances, it was incumbent upon the complainant to examine himself and to explain about the documents submitted before the court alongwith the complaints and also alongwith the police report and to further support the allegations made by him in the complaints.

7. Learned counsel for the applicants submits in R.C.C. No. 517 of 2013, the complainant instead of examining himself, has examined witness No.2 Laxmikant Ramchandra Yermalkar, Sub Divisional Engineer, G.M.I.D.C. Aurangabad and one more witness viz. Sham Laxman Kulkarni, Executive Engineer, Nandur Madhmeshwar Canal, Division No.2, Vaijapur. The complainant sought certain information from witness Laxmikant Yermalkar by invoking the provisions of Right to Information Act, 2005 and accordingly witness Laxmikant has deposed that he provided the said information in the form of documents to the complainant. Further, witness Sham Laxman Kulkarni, has not stated anything and his examination-in-chief is in one sentence to the effect that he is not able to tell anything. In R.C.C. No. 1035 of 2013, inspite of directions given by the court, the complainant neither examined himself nor examined any witness in support of the allegations made in the said complaints.

8. Learned counsel for the applicants submits that the applicants are Government servants and there is reasonable nexus in the act complained and discharge of their official duties. The applicants are therefore, protected and as such sanction under Section 197 of Cr.P.C. is required. The court is not empowered to take cognizance of such offence except with the previous sanction of the Government.

Even accepting the allegations made in the complaints, as it is, the ingredients of offence punishable under Sections 119, 120-B, 126, 217, 218, 417, 420, 465, 468, 471 r.w. 34 of I.P.C. are not attracted. There are no allegations of committing breach of trust, misappropriation of huge amount and misconduct on the part of the applicants-accused. The order of issuance of process is mechanical and is without application of mind. Even the learned Additional Sessions Judge has not appreciated that the allegations made in the complaints are taken as it is, it does not constitute any offence. Learned counsel for the applicants submits that the impugned orders are thus liable to be quashed and set aside.

9. Respondent No.2, appearing in person, submits that the learned Magistrate, on perusal of complaints, documents submitted alongwith the complainant and on perusal of verification statement of complainant and the evidence of witnesses, has rightly issued process against the applicants for having committed offences punishable under Sections 119, 120-B, 126, 217, 218, 417, 420, 465, 468, 471 r.w. 34 of I.P.C. Learned Additional Sessions Judge has also dismissed the revisions after thoroughly examining the allegations made in the complaints and the documents submitted alongwith the complaints in support thereof. The applicants in furtherance of their common intention have committed the

offences as alleged in the complaints.

10 Respondent No.2, in person, further submits that the learned Magistrate has already recorded verification statement of the complainant before passing order dated 11.2.2014. Thus, there was no need to examine the party in person, original complainant before the court again. The party in person in the alternate submits that the matter may be remanded to the trial court for his examination in support of contents in the complaints. The offence relating to misappropriation, cheating, misconduct etc. as alleged against the applicants in the complaints can never be considered to be an act done in discharge of public duty and therefore, no sanction in terms of Section 197 is required for launching the prosecution.

11. I have also heard learned A.P.P. for respondent No.1-State.

12. Upon receiving the complaints, the learned Magistrate by initial order observed that, the allegations made in the complaints need inquiry. The learned Magistrate has further observed that considering the nature of the offence, matter be sent under section 202 of the Code of Criminal Procedure for inquiry and Police Inspector is directed to submit the report within a month.

13. On 11.2.2014, the learned Magistrate has heard the complainant in person and also perused the documents on record and the report of the police filed under section 202 of the Code of Criminal Procedure. It has observed in the order dated 11.2.2014 as follows :-

"1. Heard the complainant in person. Perused the documents on record and report of police filed under section 202 of the Code of Criminal Procedure code.

2. On perusal of the report filed by police, it reveals that the police has not made proper investigation, therefore, the complainant is directed to examine himself and lead the evidence of witnesses, if any, in support of his complaint under section 202 (2) of the Code of Criminal Procedure."

14. By order dated 5.8.2013 considering the nature of the offence, the learned Magistrate has directed the police investigation as provided under section 202 of the Code of Criminal Procedure. Thereafter, the learned Magistrate on perusal of the police report observed that the police has not made proper investigation and accordingly directed the complainant to examine himself and lead evidence of witnesses, if any, in support of his complaints under section 202 (2) of the Code of Criminal Procedure. The Police Inspector, Jawahar Nagar Police Station, Aurangabad has submitted a report before learned Magistrate. On perusal of the said report, learned Magistrate has come to the conclusion that, the police has

not made proper investigation. Thus, the complaints has reached to the stage as on 5.8.2013 when the Magistrate has observed that the allegations made in the complaints needs inquiry. The learned Magistrate, therefore, decided to conduct inquiry himself as provided under section 202 of the Criminal Procedure Code and, the same also reflects from the order dated 11.2.2014 when the Magistrate has directed the complainant to examine himself and lead evidence of witnesses, if any, in support of his complaints under section 202 (2) of the Code of Criminal Procedure. It is a matter of record that the complainant has not examined himself. He has examined two witnesses in R.C.C. No. 517 of 2013 only on the point that the complainant has obtained certain documents from the department by taking recourse to the provisions of Right to Information Act, 2005 and not examined any witness in R.C.C. No. 1035 of 2013.

15. It is well settled that the scope of inquiry under section 202 of the Code of Criminal Procedure is extremely limited to the extent of ascertainment of truth or falsehood of the allegations made in the complaints. The learned Magistrate, upon receiving the complaints and on perusal of record, hearing of the complainant, felt a need of an inquiry through the police. The learned Magistrate when not satisfied with the report submitted by the police, directed the complainant to examine himself. If the complainant has not

examined himself before the Court, then it is not clear from the impugned order dated 19.9.2014 as to on what basis the learned Magistrate, issued process against the present applicants. It thus, appears that on the same material, learned Magistrate has directed police investigation and ignoring the negative report submitted by the police on the basis of same material, issued process.

16. Party-in-person/original complainant submits that, upon receiving the complaints, his verification statement came to be recorded by the Magistrate and thus, there was no need to examine himself again before the Magistrate. The Party-in-person/original complainant during the course of the arguments submits that he is ready to examine himself before the Court to point out various documents collected by him from the Department under the provisions of Right to Information Act in order to substantiate his allegations made in the complaints.

17. In my considered opinion, it would be just and proper to extend an opportunity to the party-in-person/complainant to examine himself before the learned Magistrate, Aurangabad to substantiate his allegations made in the complaints against the present applicants only. The party-in-person/original complainant may make out a case against the applicants before the Magistrate by examining himself

and by relying on the documents annexed with the complaints only. Thus, without going into the merits of the case, I proceed to pass the following order:-

ORDER

- I. Criminal Application No.2125 of 2015 (Dilip Vishwanath Musale and others Vs. The State of Maharashtra and another), Criminal Application No.2197 of 2015 (Gundappa Shivlingappa Lokhande and others Vs. The State of Maharashtra and another) and Criminal Application No.2289 of 2015 (Kiran Ravindra Wadi Vs. The State of Maharashtra and another) are hereby partly allowed.
- II. The impugned orders passed by the Chief Judicial Magistrate, Aurangabad, dated 19.9.2014 in RCC Nos.517 of 2013 and 1035 of 2013 and the Judgment and Order passed by the Additional Sessions Judge, Aurangabad, dated 9.3.2015 in Criminal Revision Petition Nos.258 of 2014, 256 of 2014 and 259 of 2014 are hereby quashed and set aside to the extent of the order of issuance of process passed against the present applicants and confirmed by the learned Additional Sessions Judge, Aurangabad, in the aforesaid criminal Revision applications.
- III. The learned Chief Judicial Magistrate, Aurangabad shall allow the complainant to examine himself before the Court and, after considering the evidence of the complainant and on perusal of the documents already annexed with the complaints, pass an appropriate order in accordance with law in the complaints against the present applicants only, after giving an opportunity of being heard, afresh to the original complainant.

- IV. The respondent No.2-original complainant, shall appear before learned Magistrate on 7.12.2016, for his examination before the Court.
- V. All Criminal Applications are accordingly disposed of.

(V. K. JADHAV, J.)

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