

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.2140 OF 2015

1. Rajendra s/o Pandurangrao Kale
age 49 yrs, Occ. Service
As Executive Engineer, Jalna Minor
Irrigation Division, Jalna.
 2. Laxmikant s/o Govindrao Patil,
age 56 years, Occ. Service,
as Executive Engineer.
 3. Bastian Rodney Leonard,
age 57 years, Occ. Service,
Divisional Accountant, Upper
Vardha Canal Division-1,
Amrawati.
- ...Applicants

Versus

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

.....
Mr. V.D.Sapkal, advocate for the applicant Nos. 1 and 2.
Mr. V.M.Mane Advocate for applicant No.3.
Miss R P Gour A.P.P. for respondent-State
Mr. S.S.Kulkarni, respondent No.2 in-person.
.....

WITH
CRIMINAL APPLICATION NO.2126 OF 2015

Ruprao s/o Laxman Shahare,
age 62 years, Occ. Pensioner,
R/o N-3, Cidco, Aurangabad.

....Applicant

Versus

-2-

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

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Mr. U.L. Momale & M.S. Deshmukh, advocate for applicant.
Miss R P Gour A.P.P. for respondent-State
Mr. S.S.Kulkarni, respondent No.2 in-person.

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WITH
CRIMINAL APPLICATION NO.2313 OF 2015

M/s. S.S. Fabricators and Manufacturers,
M/s Manisha Infrastructures Private Limited,
Labh Chambers, Railway Station Road,
Aurangabad through its authorized signatory,
Diliprao s/o Bhanudasrao Chavan,
age 45 yrs, Occ. Business,
R/o Sahakar Nagar, Aurangabad.
District Aurangabad. ...Applicants

Versus

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

...
Mr N.B.Khandare Advocate for applicant.
Miss R P Gour APP for Respondent No.1 State
Mr. S.S.Kulkarni, respondent No.2 in-person.

...
WITH
CRIMINAL APPLICATION NO.6031 OF 2015

Sachin Madhukarrao Mulay,

age 49 yrs, Occ. Business,
R/o Sai Vrundavan Colony,
Plot No.1, Paithan Road,
Aurangabad.

...Applicant

Versus

1. The State of Maharashtra

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

...Respondents

...
Mr U.P.Giri h/f Mr R.M. Gaikwad Advocate for applicant.
Miss R P Gour APP for Respondent No.1 State
Mr. S.S.Kulkarni, respondent No.2 in-person.
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CORAM : V. K. JADHAV, J.

Date of Reserving

the Order : 29.08.2016

Date of pronouncing

the Order: 14.10.2016

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, 471 r.w. 34 of I.P.C. passed by the learned Chief Judicial Magistrate, Aurangabad in R.C.C. No. 589 of 2013 and the common judgment and order passed by the Additional Sessions Judge, Aurangabad dated 9.3.2015 in Criminal

Revision application Nos. 257 of 2014, 271 of 2014 and 288 of 2014, confirming thereby the order passed by the Magistrate, original accused Nos. 8, 9 and 11 preferred criminal application No. 2140 of 2015, original accused Nos. 10 preferred criminal application No. 2126 of 2015, original accused No.14 preferred criminal application No. 2313 of 2015 and original accused No.15 preferred criminal application No. 6031 of 2015.

3. Since all these criminal applications arise out of the order passed in criminal Case No. 589 of 2013, 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 case against in all 15 accused persons before the learned Chief Judicial Magistrate (hereinafter for short, referred to as "Magistrate"), Aurangabad alleging therein that all accused in collusion with each other and in furtherance of their common intention, without following terms and conditions of the tender notice, have committed misappropriation of the Government money by preparing false, bogus and forged bills. The learned Magistrate by order dated

5.8.2013 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 complaint and submitted report before the learned Magistrate Aurangabad. On perusal of the 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 complaint under Section 202 (2) of Cr.P.C.

b) The complainant, accordingly, has examined two witnesses. Learned Magistrate heard the complainant, perused the complaint and documents submitted alongwith the complaint and by impugned order dated 18.9.2014 directed issuance of process for the offences punishable under Sections 119, 120-B, 126, 217, 218, 417, 420, 465, 468, 471 r.w. 34 of I.P.C. against accused Nos. 8 to 15. The learned Magistrate has observed in the order that prima facie case is made out against accused Nos. 8 to 15 for having committed the aforesaid offences.

c) Being aggrieved by the order of the Magistrate of issuing process, applicants in criminal application No. 2140 of 2015 and

applicant in criminal application No. 2126 of 2015 preferred criminal revision No. 257 of 2014, the applicant in criminal application No. 6031 of 2015 preferred criminal revision No. 271 of 2014 and applicant in criminal application No. 2313 of 2015 preferred criminal revision No. 288 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 in criminal application No. 2140 of 2015 and 2126 of 2015 submits that learned Magistrate initially by order dated 5.8.2013 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., recorded observation in the order dated 11.2.2014 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 complaint, under Section 202 (2) of Cr.P.C. Even though the learned Magistrate directed the complainant to examine himself, the complainant has not examined himself before the Magistrate. As directed by the Magistrate the P.S.I., Jawahar Nagar Police Station, Aurangabad has carried out investigation into the allegations made in the complaint and submitted various documents alongwith the statements of

witnesses recorded during the course of said investigation. Even certain papers in respect of enquiry also submitted before the Magistrate by the P.S.I. alongwith his report. On perusal of said report and the documents submitted alongwith the report, learned Magistrate has directed the complainant to examine himself and examine the witnesses, if any, in support of his complaint. However, the complainant instead of examining himself, has examined witness No.2 Trimbak Ramkrishna Bodre, Deputy Executive Engineer, Minor Irrigation and witness No.3 Ravindra Radhakrishna Kakade, Deputy Executive Engineer, Water Science Project Division, Aurangabad. Both the witnesses besides their designations were also assigned with work of Public Information Officer in their respective departments and they have merely deposed about the application submitted by the complainant seeking certain information from the department and accordingly the information in writing was supplied to the complainant. Witness No.3 Ravindra Kakde, when confronted with certain bills, deposed that those are supplied to the complainant in response to his application submitted under the provisions of Right to Information Act 2005.

Learned counsel submits that learned Magistrate on perusal of police report and documents submitted therewith was expecting from the complainant to examine himself before the court and

examine the witnesses, if any, in support of his complaint. By way of initial order dated 5.8.2013 the learned Magistrate has observed that after reading complaint, verification of the documents annexed with the complaint, allegations made in the complaint needs enquiry and further in the order dated 11.2.2014 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 complaint and also alongwith the police report and to further support the allegations made by him in the complaint.

Learned counsel submits that as per the contract for carrying out the work of the department, by way of special conditions, as mentioned in clause 69, for Apegaon high level Barrage and Hiradpuri high level barrage, clause 70 for Jogladevi and Mangrul high level barrage and clause 59 for Loni Savangi high level barrage the contractor was to supply certain articles and after supply of those articles, the same will become the property of the Corporation after completion of the work. As per those terms and conditions, some articles were supplied by the contractor, and articles which were not supplied by the contractor or procured by the applicants by following prescribed Rules and Regulations of the Government even costs of the said articles came to be recovered from running bills with penalty.

It has submitted that the penalty is also recovered in case the delay is occurred in providing the articles. There are no pecuniary benefits earned by any of the applicants or even anybody concerned with the contract. The same is also evident from the documents collected during the course of investigation by the police.

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.

Learned counsel for the applicants submits that even accepting the allegations made in the complaint 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 fabrication or forgery of documents and using the same as genuine one.

Learned counsel for the applicants submits that the order of issuance of process is mechanical and is without application of mind. Even the learned Additional Sessions Judge has not appreciated that

even though allegations made in the complaint 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.

Learned counsel for the applicants submits that the applicant No.3 in criminal application No. 2140 of 2015, came to be transferred from Chandrapur to Aurangabad in the month of August, 2012 and joined as Divisional Accountant on 13.8.2012 and he served at Aurangabad till 7.8.2013 and thereafter he came to be transferred to Amravati. Thus, applicant No.3 was working in Aurangabad Division only for the period mentioned above. Learned counsel submits that during the tenure of applicant No.3 i.e. 13.8.2012 to 7.8.2013, no single tender was called, passed or even issued. Even no any purchase was done during that period. He has not made any payment. There is no single document on record to indicate that any transaction at his hands during the said period is taken place. As per the allegations made in the complaint the duration of the alleged transaction was between 2005-2007.

Learned counsel for the applicants in criminal application Nos. 2140 of 2015 and 2126 of 2015 in order to substantiate his submissions, places reliance on the following cases:

- i) Anil Kumar and Ors. vs. M.K. Aiyappa and Anr, reported in 2013 AIR SCW 5570,
- ii) State of Uttar Pradesh vs. Paras Nath Singh, reported in 2009 CJ (SC) 1659,
- iii) Judgment of the Supreme court of India in the case of D.T. Virupakshappa vs. C. Subash, dated 27.4.2015 in criminal appeal No. 722 of 2015. (arising out of S.L.P. (Criminal) No. 6684 of 2013),
- iv) Priyanka Srivastava and Anr. vs. State of Uttar Pradesh and others, reported in (2015) 6 SCC 287,
- v) Judgment and order passed by Division Bench of this Court in criminal writ petition No. 4765 of 2014 and other connected writ petitions.

6. Learned counsel for the applicants in criminal application No. 2313 of 2015 and criminal application No. 6031 of 2015 submits that as per the allegations made in the complaint, the contract for construction of Mangrul low level barrage across Godavari river, Tq. Ghansavadi, District Jalna was awarded and the work order came to be issued in favour of the applicants. It has further alleged in the complaint that under special conditions of the contract, the applicant is obliged to provide instruments viz. one Precise Pentax level, one Lap Top of IBM or HP make, one Xerox machine, one Digital Camera (Nikon), one Handi Cam (Sony) and one Total Station Pentax and

also has to supply one Ambassador car. It has alleged in the complaint that said instruments and the vehicle were not provided and the amount quoted was also not deducted from the bills by the officers. It has also mentioned that the applicants have not provided above mentioned articles and vehicle, which amounts to fraud and accordingly in collusion with each other, the applicants have committed misappropriation of government money. Learned counsel submits that supply of instruments and the vehicle is a privity of contract between the parties to the contract i.e. the G.M.I.D.C. and the applicant being the contractor. The parties to the contract agreed with the terms and conditions and further also agreed that any breach of terms and conditions would be dealt with in accordance with law applicable for the same. Learned counsel submits that non providing of such articles in no way would amount to criminal offence. The ingredients of offence alleged are not at all satisfied. There is no fabrication or forgery of documents and using the same as genuine one. Learned counsel submits that the parties to the contract and the authority concerned are having right to change the conditions so far as the instrument/articles mentioned in the relevant clause is concerned and the same could have been done in accordance with the need of the work. There are documents on record indicating that the goods are supplied by the applicants and penalty is also recovered in case of delay occurred in providing the said articles.

Learned counsel submits that the complaint is sheer abuse of court process. There is no fraudulent and dishonest intention on the part of the applicants from very beginning of the transaction. Mere use of the expression "cheating" in the complaint would not be sufficient. Learned counsel submits that the Magistrate would not have issued process and the learned Additional Sessions Judge has erroneously confirmed the said order in the revisions.

The learned counsel in order to substantiate his contentions, places reliance on the judgment of Supreme Court in the case of ***Anil Mahajan vs. Bhor Industries Ltd. and Anr, reported in (2005) 10 SCC 228.***

7. Respondent No.2, appearing in person, submits that the learned Magistrate, on perusal of complaint, 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.

Respondent No.2 submits that learned Additional Sessions Judge has also dismissed the revision after thoroughly examined the

allegations made in the complaint and the documents submitted alongwith the compliant in support thereof. The applicants in furtherance of their common intention prepared false and forged documents and thus committed offences as alleged in the complaint. There is prima facie evidence to show that the contractors have not supplied required articles as per the terms and conditions of the contract and even then the cost of said articles was not recovered from them, though specifically stated in the terms and conditions of the contract. Even said amount is not recovered by making deduction in the payments made to the said contractors. The same is evident from the documents submitted alongwith the complaint. Respondent No.2 submits that he has collected information by taking recourse to the provisions of Right to Information Act from the department and it appears from the said collected information that the applicants have committed offences as alleged in the complaint.

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. Thus the party in person-original complainant has examined two witnesses and pointed out to the learned Magistrate that the documents submitted alongwith the complaint are collected

from the department and those were supplied to him on his application submitted to the authorities under the provisions of Right to Information Act. 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 complaint. The offence relating to misappropriation, cheating, forgery etc. as alleged against the applicants in first two criminal applications i.e. (1) Criminal application No. 2140 of 2015 and 2126 of 2015 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. The party in person during the course of the arguments also submitted that there are irregularities in not following the terms and conditions of the contract by the applicants.

Respondent No.2 in order to substantiate his contentions places reliance on the judgments in the following cases:-

- i) Ravindra Kumar Madhanlal Goenka and Anr vs. M/s. Ragmini Ram Raghav Spinners P. Ltd, reported in 2009 Cri.L.J. 2852 (1),
- ii) Bindyachal Choubey vs. State of Jharkhand and others, reported in 2010 Cri.L.J. 1531
- iii) N.K. Sharma vs. Abhimanyu, reported in AIR 2005 SC 4303

- iv) Judgment of the Supreme court in Criminal appeal No. 129 of 2013 and other connected appeals decided on 13.4.2015.

8 Upon receiving the complaint, the learned Magistrate by order dated 5.8.2013 observed that, the allegations made in the complaint needs 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.

9. 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."

10. 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 complaint 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 stating therein that the tender conditions have been followed and the concerned officers have deducted certain amounts from the bill of the contractor towards the articles/equipments and, as such, no misappropriation as alleged in the complaint appears to have been committed. On perusal of the said report, learned Magistrate has come to the conclusion that, the police has not made proper investigation. Thus, the complaint has reached to the stage as on 5.8.2013 when the Magistrate has observed that the allegations made in the complaint 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 complaint 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 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.

11. It is well settled that the scope of inquiry under section 202 of the Code of Criminal Procedure is extremely limited and the scope of inquiry is limited to the extent of ascertainment of truth or falsehood of the allegations made in the complaint. The learned Magistrate, upon receiving the complaint 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 18.9.2014 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.

12. Party-in-person/original complainant submits that, upon receiving the complaint, his verification statement came to be recorded by the Magistrate, Aurangabad and thus, there was no

need to examine himself again before the Magistrate. On perusal of verification statement, it appears that the complainant has stated that the contents of complaint in paragraph Nos. 1 to 15 are true and correct. No other verification statement is produced before this Court. The applicants in Criminal Application No.2140 of 2015 and Criminal Application No.2126 of 2015 have raised the point of sanction as provided under section 197 of the Code of Criminal Procedure. Furthermore, the applicants in Criminal Application No.2313 of 2015 and Criminal Application No.6031 of 2015 have submitted that no case is made out against them and so far as obligation to supply instruments and vehicle as per the tender conditions are concerned, the same is privity of contract between the parties to the Contract. It is not reflected from the impugned order passed by the Magistrate, that he has considered the same and even, it further appears from the common Judgment and Order passed by the Additional Sessions Judge, Aurangabad in Criminal Revision Applications that the learned Additional Sessions Judge has also considered the same.

13. The Party-in-person/original complainant during the course of the arguments admitted that, there are irregularities in not following the terms and conditions of the alleged tenders. He has also alleged that subsequent to filing of his complaint before the Court, the said irregularities came to be regularized. The Party-in-person/original

complainant further 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 complaint.

14. 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 complaint 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 complaint only. Thus, without going into the merits of the case, I proceed to pass the following order:-

ORDER

- I. Criminal Application No.2140 of 2015 (Rajendra s/o Pandurangrao Kale and others Vs. The State of Maharashtra and another), Criminal Application No.2126 of 2015 (Ruprao s/o Laxman Shahare Vs. The State of Maharashtra and another), Criminal Application No.2313 of 2015 (M/s S.S. Fabricators and Manufactures Vs. The State of Maharashtra and another) and Criminal Application No.6031 of 2015 (Sachin Madhukarrao Mulay Vs. The State of Maharashtra and another) are hereby partly allowed.

- II. The impugned order passed by the Chief Judicial Magistrate, Aurangabad dated 18.9.2014 in RCC No.589 of 2013 and the common Judgment and Order passed by the Additional Sessions Judge, Aurangabad dated 9.3.2015 in Criminal Revision Petition Nos.257/2014 and 271/2014 and 288/2014 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 complaint, pass an appropriate order in accordance with law in the complaint against the present applicants only, after giving an opportunity of being heard, afresh to the original complainant.
- IV. After receipt of writ of this order, the learned Magistrate shall issue notice to the respondent-complainant for his examination before the Court.
- V. All Criminal Applications are accordingly disposed of.

(V. K. JADHAV, J.)

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