

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

CRIMINAL WRIT PETITION NO. 596 OF 2015

Amrutrao S/o Wamanrao Deshpande,
Age: 72 years, Occ: Medical Practitioner,
R/o. Keshav Nagar, Ambajogai,
Tq. Ambajogai, Dist. Beed. ...Petitioner

versus

1. The State of Maharashtra
2. Bhagwan s/o Sopanrao Lomte,
Age: 68 years, Occ: Agri.,
R/o. Khadakpura, Ambajogai,
Tq. Ambajogai, Dist. Beed. ...Respondents

.....
Mrs. A. S. Rasal, Advocate for petitioner
Mr. R. V. Dasalkar, A.P.P. for respondent No.1
Mr. A. P. Munde, Advocate for respondent No. 2
.....

CORAM : N.W. SAMBRE, J.

DATE : 4th APRIL, 2016

ORAL ORDER :

Learned Magistrate, at the behest of respondent No. 3, has ordered issuance of process by an order dated 01/11/2007 for the offence punishable under Sections 420, 467, 468, 465, 471, 472 read with Section 34 of the Indian Penal Code.

2. The allegations against the present petitioner is, the petitioner being an office bearer of Housing Society, has purchased property bearing Block No. 86-B by virtue of sale deed dated

31/07/1980, however, he has encroached upon the other land of respondent No. 2 thereby plotting the same and sold the said plots to other accused persons though he has no title to the said property.

3. The said order came to be questioned in Revision Application Nos. 06 of 2008 and 72 of 2008 before learned Additional Sessions Judge (Court No.3), Ambajogai, who has dismissed the same, by the judgment dated 16/03/2015. As such, present writ petition.

4. At the outset, while inviting attention of this Court to the order of issuance of process, which is passed by learned Magistrate on 01/11/2007, Mrs. Rasal, learned Counsel would urge that the order suffers from non application of mind. According to her, the order of issuance of process does not speak or reflect application of mind, as there are no reasons whatsoever recorded while issuing process. She would then submit that the revisional Court has also lost sight of the said aspect of the matter and as such, according to her, the order passed by learned Sessions Judge in the revision is not sustainable.

5. Learned Counsel for the respondent-complainant would urge that the order passed by learned Magistrate speaks of any proof

of the contents of the complaint and upon satisfaction thereof has ordered issuance of process against the accused persons. He would then submit that the petitioner would get appropriate opportunity at the time of trial and as such, present petition, which is devoid of merit, be rejected, as there are concurrent findings recorded by both the Courts below against the accused-persons.

6. Having bestowed my thoughts to the submissions made, it is required to be noted that the respondent-complainant filed Criminal Case No. 73 of 2004 claiming to be owner of Block No. 86-B and other block namely Block No. 86-C at Ambejogai. He has transferred the property Block No. 86-B by virtue of sale deed dated 31/07/1980. In the complaint, he has claimed that apart from Block No. 86-B, the petitioner has encroached and sold plots carved out from other block, which is not owned by him and as such, alleged offence.

7. Learned Magistrate, after considering the documents and contents of the complaint and verification, has proceeded to pass an order of issuance of process.

8. It is required to be noted that as accused persons are not resident of, within the jurisdiction of learned Magistrate, pursuant

to the order under Section 202 of Code of Criminal Procedure, inquiry report was called from the Police Officer and based on the same, learned Magistrate recorded satisfaction for passing the order of issuance of process. While doing so, the Magistrate has not recorded any reasons, so also not recorded any satisfaction of ingredients qua offence alleged, particularly section under which offence is triable. The said aspect is also lost sight of by the revisional Court. Least that was expected of the learned Magistrate is to consider the contents of the complaint and upon satisfaction of ingredients of sections under which offence is alleged, by application of mind and by reasoned order, proceed ahead with the aspect of issuance of process. I am fortified in my view, in view of law laid down by the Division Bench of this Court in the matter of ***State of Maharashtra vs. Shashikant s/o Eknath Shinde***, reported in ***2013 ALL MR (Cri) 3060***. The attention of this Court is invited to paragraphs-29 and 30 of the said judgment, which reads thus :

"29. The Apex Court in the said case has referred to its earlier observations made in the case of Pepsi Foods Ltd. and another vs. Special Judicial Magistrate and others, reported in (1998) 5 SCC 749), Criminal Application No.258.13 (APL) which reads thus:

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion

as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

36 Criminal Application No.258.13 (APL)

30. In view of the aforesaid Judgments of the Apex Court, it can, thus, clearly be seen that when the Magistrate passes order directing investigation under Section 156 (3) of Cr.P.C., it is necessary that, prior to doing so, he should apply his mind to the case before him. Least that is expected of the Magistrate, is to verify from the averments of the complaint as to whether the ingredients to constitute the offence/s complained of have been made out or not. As such the order under Section 156(3) of Cr.P.C., should depict the application

of mind. No doubt the Magistrate is not expected to give elaborate Judgment at that stage. However, the least expected is that the order should depict application of mind and as to how the complaint discloses the ingredients to constitute the offence complained of.”

9. In the background of above observations, if the order passed by the learned Magistrate is analyzed, *prima facie* it could be inferred that same is not sustainable. As such, present writ petition stands allowed.

10. The complaint stood restored to the file of learned Magistrate, after quashing the orders passed by learned Magistrate and Additional Sessions Judge referred supra, dated 04/11/2007 and 16/03/2015 respectively. The respondent-complainant to appear before the learned Magistrate on 18/04/2016 and keeping in mind the observations made herein above, the Magistrate will be at liberty to pass appropriate order in accordance with law, afresh.

[N.W. SAMBRE, J.]