

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

CRIMINAL APPLICATION NO.246 OF 2017

Avinash Trimbakrao Dhondage,
Age : 42 years, Occu. Service as
Executive Engineer, PWD,
Presently at Pune.

... **Applicant**

Versus

1. The State of Maharashtra,
Through Police Station Officer,
Shivajinagar, Nanded
Maharashtra.

2. Datta S/o Tulshiram Shembale,
Age : 44 years, Occu. Agri and Business,
R/o 133-B, Shiv Kripa Niwas,
Shobha Nagar, Nanded.

... **Respondents**

...

Mr. N.B.Khandare, Advocate for Applicant
Mr. S.P.Deshmukh, APP for Respondent No.1 – State
Mr. S.S.Thombre, Advocate for Respondent No.2

...

WITH

CRIMINAL APPLICATION NO.1641 OF 2017

Shankar Vitthalrao Totawar,
Age : 52 years, Occu. Government
Service, at present Executive
Engineer, at Public Works Department,
(PWD) presently posted Bhokar
R/o Shashtri Nagar,
Tq. and District Nanded.

... **Applicant**

Versus

1. The State of Maharashtra,
Through Station Officer,
Shivaji Nagar Police Station,
Nanded Tq & District Nanded.
2. Datta S/o Tulshiram Shembale,
Age : 49 years, Occu. Agri and Business,
R/o 133-B, Shiv Krupa Nivas,
Shobha Nagar, Nanded. ... **Respondents**

...

Mr. P.G.Godhamgaonkar, Advocate for Applicant
Mr. S.P.Deshmukh, APP for Respondent No.1 – State
Mr. S.S.Thombre, Advocate for Respondent No.2

...

WITH

CRIMINAL APPLICATION NO.7063 OF 2016

Mohan Vasantrao Sangvikar,
Age : 50 years, Occu. Government Service,
As Sub Divisional Engineer at Public Works
Department, (PWD)
presently posted at Nanded,
R/o Vivek Nagar, Near Regional Work Shop,
Tq. and District Nanded. ... **Applicant**

Versus

1. The State of Maharashtra,
Through Station Officer,
Shivaji Nagar Police Station,
Nanded Tq & District Nanded.
2. Datta S/o Tulshiram Shembale,
Age : 49 years, Occu. Agri and Business,
R/o 133-B, Shivkrupa Nivas,
Shobha Nagar, Nanded. ... **Respondents**

...
Mr. P.G.Godhamgaonkar, Advocate for Applicant
Mr. S.P.Deshmukh, APP for Respondent No.1 – State
Mr. S.S.Thombre, Advocate for Respondent No.2
...

WITH

CRIMINAL APPLICATION NO.3928 OF 2017

Deepak Shankarrao Devatraj
Age : 58 years, Occu. Govt. service,
As Deputy Engineer PWD Department,
R/o Yeshwantnagar, Nanded,
Tq. and District Nanded. ... **Applicant**

Versus

1. The State of Maharashtra,
Through Police Station Officer,
Shivaji Nagar Police Station,
Nanded, Tq & District Nanded.
2. Datta S/o Tulshiram Shembale,
Age : 49 years, Occu. Agri and Business,
R/o 133-B, Shivkrupa Nivas,
Shobha Nagar, Nanded. ... **Respondents**

...
Mr. P.G.Godhamgaonkar, Advocate for Applicant
Mr. S.P.Deshmukh, APP for Respondent No.1 – State
Mr. S.S.Thombre, Advocate for Respondent No.2
...

**CORAM : S.S.SHINDE AND
MANGESH S. PATIL, JJ.**

**RESERVED ON : 01st November, 2017
PRONOUNCED ON : 17th November, 2017**

JUDGMENT : (Per Mangesh S. Patil, J.) :-

Rule. The Rule is made returnable forthwith. With the consent of both the sides the matter is heard finally.

2. In all these applications filed under Section 482 of the Criminal Procedure Code (hereinafter referred to as 'the Cr.P.C.') the respective applicants are praying for quashing the order passed by the learned 6th Judicial Magistrate First Class, Nanded in Miscellaneous Criminal Application No.367 of 2013 filed by the present Respondent No.2 directing an inquiry to be made in pursuance of the order passed under Section 156(3) of the Cr.P.C. They are also seeking to quash and set aside the FIR bearing Crime No.157 of 2013 for the offences punishable under Sections 409, 420, 467, 468, 471, 166 and 167 read with Section 34 of Indian Penal Code registered in pursuance of such order passed by the learned Magistrate. Since by virtue of the same complaint and the same order the impugned FIR has

been registered against each of these applicants, with a view to avoid repetition, as common questions of law and fact arise in all these applications we propose to decide them by this common judgment and order.

3. Shorn of unnecessary details the facts leading to the filing of these applications may be summarized as under :

The applicant Shri. Avinash Trimbakrao Dhondage in Criminal Application No.246 of 2017 was the Executive Engineer of the Public Works Department at Nanded at the material time. Shri. Chandrashekhar Vasantryao Tunge was the Superintendent Engineer also posted in the Public Works Department at Nanded. The other applicants and few other employees of the Public Works Department were posted in the same office at Nanded on various posts. One Narayan Vitthalrao Aghav was the Deputy Registrar of Co-operative Societies posted at Nanded at the relevant time. Respondent No.2 herein filed a complaint with the learned Judicial Magistrate First Class by alleging that

according to the Government norms and rules for allotment of contracts to Labour Co-operative Societies the Public Works Department has to forward the proposal to the Deputy Registrar of the Co-operative Societies. There are specific guidelines laid down by the State Government for allocation of such work. After following such procedure the Deputy Registrar of the Co-operative Societies recommends to the Executive Engineer and accordingly the Public Works Department enters into a work contract with such societies whose names are recommended. He further alleged that in utter disregard to such Government guidelines and norms the applicant Avinash Dhondage and all other applicants prepared a bogus recommendation letter dated 27.01.2010 and allocated work by executing agreement. Without their being any reference to such recommendation in the meeting of the concerned committee dated 27.01.2010 the work was allocated by fabricating the recommendation letter. Similarly, by indulging in forgery several other contracts were also allocated to few Co-operative Societies by resorting to

under hand dealings. The works which were actually got done could not have been got done from such Labour Co-operative Societies and thus, he alleged that all these applicants and the proposed accused in furtherance of their common intention committed forgeries, used the forged documents and have committed criminal breach of trust.

4. The learned Magistrate apparently found substance in the allegations and by the impugned order directed an investigation into the complaint. The order reads as under :

*Order below Exh.1 in Oth.Misc.Cri.Appln. No.367/2013
Date : 23.09.2013*

01 - Perused the petition and documents annexed herewith. Heard the ld. advocate for the petitioner. After having perusal of the petition it appears that the petitioner has made allegation of cognizable offence against the accused. Compliance of Sec.154 is seen. The ld. Advocate for petitioner has submitted that mere application of Sec.156(3) of Cr.P.C. Is maintainable.

02- The ld. Advocate for petitioner is relied upon Panchabhai Butani & others vs State of Maharashtra, 2010 ALL MR (Cri) 244. In this case Hon'ble Bombay High Court discuss the law relating to sec.156(3) of Cr.P.C. The ld. Advocate for petitioner submitted that the accused No.1 to 14 in their common intention committed misappropriation of the Government funds therefore investigation is necessary.

03- After considering the allegation of the application, application prima facie disclose the cognizable offences,

therefore detail investigation through police agency is required. Hence, report u/sec.156(3) of Cr.P.C. will have to be called. Hence, the order.

ORDER

- 1) *Application is allowed.*
- 2) *The Police Station Shivajinagar, Nanded is hereby directed to investigate the matter and submit the report U/sec.156(3) of Cr.P.C.*
- 3) *The copy of complaint and writ of this order be sent to concerned police station by maintaining the original for Court records.*
- 4) *Pronounced in the open court.*

Dated:23-09-2013.

*Sd/-
(K.S.Suryawanshi)
6th Judicial Magistrate, F.C.,
Nanded.*

In accordance with such order, the police have registered the impugned FIR and the investigation is in progress.

5. It is necessary to note, at this juncture that there is a chequered history to this litigation. We are only reproducing the facts which are relevant to resolve the present controversy. Earlier, all these applicants had preferred Writ Petitions invoking inherent powers in this Court under Section 482 of the Cr.P.C. for quashing the very same order and the FIR registered on that basis.

The preliminary objection was raised on the ground that the inherent powers vested in this Court under Section 482 of the Cr.P.C. cannot be invoked when a specific remedy is available under Section 397 of the Cr.P.C. to challenge the impugned order and the FIR. By the judgment and order dated 21.10.2015 a Division Bench of this Court concluded that the inherent powers of this Court under Section 482 of the Cr.P.C. could not have been invoked in view of the remedy of revision available under Section 397 of the Cr.P.C. Against such order the applicants approached the Supreme Court. However, the Special Leave Petitions were dismissed and ultimately the applicants were granted liberty to approach the High Court in view of the principle of law rendered by the Supreme Court in the case of ***Prabhu Chawla Vs. State of Rajasthan [(2016) 16 SCC 30]*** holding that the inherent powers of the High Court under Section 482 of the Cr.P.C. are plenary in nature and are not restricted by availability of remedy under Section 397 of the Cr.P.C. It is in pursuance of such development that the present applications have been

filed. Obviously, we need not delve any more as regards the issue regarding maintainability of these applications on this count. We, therefore, are proceeding to decide these applications on merits.

6. We have heard the learned Advocates for the applicants. According to them, the impugned order suffers from the vice of non-application of mind. The learned Magistrate has not assigned any reason for passing the impugned order and has straight way directed an investigation by invoking the power under Section 156(3) of the Cr.P.C. For this sole reason, the impugned order is liable to be quashed and set aside. The learned Advocates also submitted that the department has already conducted a detailed administrative inquiry when a complaint was lodged with the Chief Engineer, Aurangabad. The Superintending Engineer has after a detailed inquiry found that there were no irregularities in allocation of the contracts. The conclusion was duly approved by the Chief Engineer as well as the State Government.

However, Respondent No.2 is bent upon to harass all the public servants. The PIL filed by him was rejected on merits. He has mala fide filed an application with the police and on the preliminary inquiry the police did not find any substance and refused to register the offence. Soon thereafter, with a view to harass the applicants, he has filed the complaint without disclosing all these facts and has procured the impugned order. Thus, according to the learned advocates, the complaint filed by Respondent No.2 is prompted by mala fides and deserves to be quashed by invoking the guidelines laid down by the Supreme Court in the case of ***State of Haryana Vs. Bhajan Lal [AIR 1992 (S.C.) 604]***. The learned advocates also raised a legal issue by submitting that since all the applicants are public servants, no prosecution could be launched against them for any acts done in discharge of their official duty, in view of Section 197 of the Cr.P.C. without previous sanction of the State as contemplated therein. The learned Advocates also referred to the decision in the case of ***Anil Kumar and others Vs. M.K. Aiyappa and***

another [(2013) 10 SCC 705] in support of their such arguments.

7. The learned advocates further submitted that as laid down in the case of **Priyanka Srivastava and others Vs State of U.P. and others [AIR (2015) Supreme Court 1758]**, the complaint filed before the learned Judicial Magistrate seeking investigation under Section 156(3) of the Cr.P.C. was also not supported by any affidavit of Respondent No.2 and therefore, even this lapse vitiates the order.

8. The learned APP supported the impugned orders.

9. The learned advocate for Respondent No.2 submitted that the learned Magistrate has passed the impugned order only after going through the complaint and the papers annexed thereto and must have applied his mind, as he was indeed obliged to do, while passing the order even if the impugned order does not state so in so many words. The learned advocate also submitted

that the question whether conduct of Respondent No.2 is bona fide or otherwise would only be a peripheral issue. When in pursuance of the investigation carried out in accordance with the directions in the impugned order the Investigating Officer has found some substance, that should be the end of the matter and the intention of Respondent No.2 in filing the complaint alone cannot change the course. The learned advocate for Respondent No.2 also submitted that the acts and omissions which are alleged to have constituted the offences are clearly criminal in nature and make out necessary ingredients for constituting the offences registered by the impugned FIR. According to the learned advocate forgery and criminal breach of trust by the applicants cannot be said to have been done by them in discharge of their official duties, for it cannot be said that committing forgery and breach of trust is part and parcel of their duty. Lastly, the learned advocate for Respondent No.2 vehemently submitted that since the investigation has already proceeded further substantially, no purpose would be served now by

directing the learned Magistrate to once again to go through the papers and the complaint and to make him pass a reasoned order after lapse of so many years.

10. Let us now consider the submissions of the learned advocates for the respective parties in seriatim.

So far as the powers of Magistrate to direct investigation under Section 156(3) of the Cr.P.C. are concerned, indeed it is trite that the powers can only be exercised after due application of mind and one can only refer to the decisions in the case of ***Lalitha Kumari Vs Government of U.P. and others [AIR (2014) SC 187]***, Anil Kumar (supra) and ***Maksud Saiyed Vs. State of Gujarat and others [(2008) 5 SCC 668]*** and the recent judgment in the case of Priyanka Srivastava (supra). Without deliberating much we can straight way proceed to examine the impugned order to ascertain if the learned Magistrate can be said to have applied his mind while passing the order.

11. Ex facie the order is cryptic. However, it mentions that the learned Magistrate had considered allegations in the complaint which prima facie disclosed commission of cognizable offence and that the Magistrate had perused the petition and the documents annexed with it. Not only this, but even the learned Magistrate has considered the legal aspect as to whether an application simpliciter seeking direction under Section 156(3) of the Cr.P.C. would be maintainable. He has also cursorily observed that the allegations are to the effect that the accused Nos.1 to 14, in furtherance of their common intention, have committed misappropriation of Government funds which requires investigation. Going by the law laid down by the various decisions of the Supreme Court referred to herein above it was expected of the learned Magistrate to have passed a detailed and elaborate order specifically pointing out as to how the allegations in the complaint prima facie would constitute / disclose commission of a cognizable offence. We are of the view that a careful reading of the impugned order though cryptic would demonstrate for

the reasons mentioned above that the learned Magistrate had indeed applied his mind before issuing direction under Section 156(3) of the Cr.P.C. albeit he could have been well advised to pass the order disclosing application of mind. However, it can none the less be said that we are satisfied that the impugned order has been passed by the Magistrate only after application of mind.

12. In this respect, it is also necessary to note that as has been laid down in the case of Priyanka Srivastava (supra) it is expected that before invoking the powers of a Magistrate under Section 156(3) there has to be prior compliance of Section 154 of the Cr.P.C. As is observed in the beginning, it is a common ground that Respondent No.2 had indeed approached the police seeking their intervention by reporting the complaint. The learned Magistrate in the impugned order has also observed that he has verified that there was a compliance with Section 154 of the Cr.P.C. Therefore, even this circumstance would clearly indicate that the

learned Magistrate had in fact applied mind while passing the impugned order and therefore, the submission of the learned advocates for the applicants in this regard does not hold water.

13. As regards the law laid down in the case of Anil Kumar (supra) that in view of Section 197 of the Cr.P.C., when a complaint is filed and a direction is sought under Section 156(3) of the Cr.P.C. implicating a public servant no order can be passed unless such a request is preceded by suitable sanction by the competent authority. However, it is equally trite, that the wording of Section 197 of the Cr.P.C. abundantly makes it clear that the offence alleged to have been committed by the public servant must have been done by him while acting or purporting to act in discharge of his official duty, as a condition precedent for taking cognizance of the offence. Admittedly, no such previous sanction has been obtained by Respondent No.2. However, as has been rightly submitted by his learned advocate, going by the nature of the allegations wherein the respondents have

forged the authority letters even when there were no such decisions taken by the concerned committee for allocation of work and the work contracts have been issued, it cannot be said that such forgery and criminal breach of trust were part and parcel of their official duty or were done in the purported discharge of their official duty. It is to be remembered that not in every case such a previous sanction to prosecute a public servant is necessary. It is only when the action complained of is done while acting or purporting to act in discharge of their official duty that a protection is sought to be extended to them by Section 197 of the Cr.P.C. Therefore, we are also satisfied that even in the absence of such sanction the applicants could have been legally proceeded against by filing the complaint.

14. So far as the submission of the learned advocate for the applicants that the complaint filed by Respondent No.2 was not supported by the affidavit as is laid down in the case of Priyanka Srivastava (supra) is concerned, suffice for the purpose to observe with

respect that there is no specific provision contained anywhere in the Cr.P.C. requiring such affidavit to be filed. However, it is only in view of the decision in the form of direction in the case of Priyanka Srivastava that the Magistrates would now be obliged to examine if the complaint / applications invoking their power under Section 156(3) of the Cr.P.C. are supported by an affidavit of the person making the application. Since the directions in the case of Priyanka Srivastava have been issued by the judgment dated 19.03.2015, such procedure can be expected to be followed only after that date. Since, in the matter in hand the impugned order was passed on 23.09.2013, it cannot be said that Respondent No.2 was under any legal obligation to follow such a procedure or for that matter the learned Magistrate should have ensured that such a procedure was followed. Therefore, even this limb of argument of the learned advocate for the applicants is not sustainable.

15. This takes us to the submission of the learned

advocates for the applicants touching the merits of the case on facts. However, suffice for the purpose to note that since the applicants are seeking quashment of the impugned order and the FIR, the scope of the present inquiry is very limited and disputed facts which require a minute scrutiny cannot be gone into. Simply because the Chief Engineer has directed the Superintending Engineer to inquire into the allegations levelled by Respondent No.2, it cannot be said that such inquiry having been undertaken on the administrative side should be sufficient to address the grievance of Respondent No.2. Therefore, merely because the department has taken some steps on the administrative side that would not per se absolve the persons if the acts would constitute the offences punishable under law. On the contrary, it must be noted that even on the applicants own showing, it is not that they have been honourably absolved during that inquiry. In fact the Superintending Engineer did find substance and has concluded that there were some irregularities in allocation of the work and that is why he had proposed

that the officers / persons should be warned to be careful in future and to avoid such irregularities. This circumstance, in our opinion is quite clinching and even on facts it can certainly be said that there does appear prima facie substance in the allegations levelled by Respondent No.2 against the applicants. Whether at the hearing such irregularities would turn out to be offences and would make out all the necessary ingredients is a matter for the Trial Court to ascertain. We are only referring to this circumstance to the limited purpose of ascertaining that this circumstance does demonstrate that prima facie there have irregularities in allocation of work and which in all probabilities could not have happened sans active involvement of various persons in the public office of the applicants.

16. As a corollary to this circumstance, we also think it proper to observe that the report of the Investigating Officer also corroborates the allegations levelled against the applicants and he has clearly given instances as to how the applicants are involved in preparation of false

documents and have used them for allocating work contracts. In our view, all these circumstances clearly justify the allegations which Respondent No.2 is making against all the applicants. Consequently, simply because Respondent No.2 has some oblique motive that would not ipso facto be sufficient to quash the impugned order and the FIR when we have found that there is indeed some substance. The case of the applicants does not fall in to any of the seven categories laid down in Bhajanlal's case (supra).

17. In this respect, we can fruitfully refer to the recent Judgment of the Supreme Court in case of **HDFC Securities Limited and others Vs. State of Maharashtra and another [9 (2017) 1 SCC 640]** held thus :-

“27. It appears to us that the appellants approached the High Court even before the stage of issuance of process. In particular, the appellants challenged the order dated 04.01.2011 passed by the learned Magistrate under Section 156(3) of Cr.P.C. The learned counsel appearing on behalf of the appellants after summarising their arguments in the matter have emphasised also in the context of the fundamental rights of the appellants under the Constitution, that the order impugned has caused grave inequities to the appellants. In the circumstances, it was submitted

that the order is illegal and is an abuse of the process of law. However, it appears to us that this order under Section 156(3) Cr.P.C. requiring investigation by the police, cannot be said to have caused an injury of irreparable nature which, at this stage, requires quashing of the investigation. We must keep in our mind that the stage of cognizance would arise only after the investigation report is filed before the Magistrate. Therefore, in our opinion, at this stage, the High Court has correctly assessed the facts and the law in this situation and held that filing of the petitioners under Article 227 of the Constitution of India or under Section 482 Cr.P.C., at this stage are nothing but premature. Further, in our opinion, the High Court correctly came to the conclusion that the inherent powers of the Court under Section 482 Cr.P.C. should be sparingly used."

18. In the result, we conclude that there is no merit in the applications and those are liable to be rejected. The applications are rejected. The rule is discharged. It is made clear that the observations herein are confined to the decision of these applications and shall not affect either the investigation or the trial.

(MANGESH S. PATIL, J.)

(S.S.SHINDE, J.)

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vmk/-

. After pronouncement of the Judgment, learned counsel appearing for the Applicants prays for continuation of the ad-interim relief which was in force during the pendency of the Applications.

. The said prayer is vehemently opposed by the learned counsel appearing for the respective Respondents.

. We have rejected the Applications and therefore any further continuation of ad-interim relief may amount interference in the investigation which is exclusive domain of the Investigating Officer. In that view of the matter, we are not inclined to entertain the prayer for continuation of ad-interim relief. Hence the said prayer stands rejected.

(MANGESH S. PATIL, J.)

(S.S.SHINDE, J.)

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