

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

CRIMINAL WRIT PETITION NO.381 OF 2006

1. Shri Prashant Sureshrao Suryawanshi,
Age 33 years, Occu. Tahsildar,
Ambajogai, R/o Tahsil Office,
Ambajogai, District Beed.
2. Shri Sujit Angadrao Narhare,
Age 27 years, Occu. Naib Tahsildar,
R/o Tahsil Office,
Ambajogai, District Beed. ... PETITIONERS

VERSUS

1. The State of Maharashtra
(Copy to be served on Addl. P.P.,
High Court of Bombay,
Bench at Aurangabad)
2. Shyam Balkrushna Sailukar,
Age 57 years, Occu. Service & Agril.,
R/o Deshpande Galli,
Ambajogai, District Beed. ... RESPONDENTS

.....

Shri Mukul Kulkarni, Advocate for petitioners
Shri S.W. Munde, A.P.P. for respondent No.1./State
Shri S.S. Chapalgaonkar, Advocate for respondent No.2

.....

WITH

CRIMINAL WRIT PETITION NO.382 OF 2006

1. Shri Prashant Sureshrao Suryawanshi,
Age 33 years, Occu. Tahsildar,
Ambajogai, R/o Tahsil Office,
Ambajogai, District Beed.
2. Shri Sujit Angadrao Narhare,
Age 27 years, Occu. Naib Tahsildar,
R/o Tahsil Office,
Ambajogai, District Beed. ... PETITIONERS

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Ambajogai, District Beed. ... RESPONDENTS

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Shri Mukul Kulkarni, Advocate for petitioners
Shri S.W. Munde, A.P.P. for respondent No.1./State
Shri S.S. Chapalgaonkar, Advocate for respondent No.2
.....

WITH

CRIMINAL WRIT PETITION NO.383 OF 2006

1. Yogiraj s/o Dattatraya Deshpande
Age 53 years, Occu. Service.
 2. Digambar s/o Nagorao Deshpande,
Age 58 years, Occu. Pensioner
 3. Vimlakar s/o Nagorao Deshpande,
Age 49 years, Occu. Service.
- All R/o Kakajiwada, Deshpande Galli,
Tq. Ambajogai, District Beed. ... PETITIONERS

VERSUS

1. The State of Maharashtra
(Copy to be served on Addl. P.P.,
High Court of Bombay,
Bench at Aurangabad)
2. Shyam Balkrushna Sailukar,
Age 57 years, Occu. Service & Agril.,
R/o Deshpande Galli,
Ambajogai, District Beed. ... RESPONDENTS

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Shri A.M. Gaikwad, Advocate for petitioners
Shri P.G. Borade, A.P.P. for State
Shri S.S. Chapalgaonkar, Advocate for respondent No.2
.....

CORAM: T.V. NALAWADE AND
 SUNIL K. KOTWAL, JJ.

Date of reserving judgment : 24th July, 2017.

Date of pronouncing judgment : 3rd August, 2017

JUDGMENT (PER SUNIL K. KOTWAL, J.) :

1. These three petitions are filed for quashment of order passed by Judicial Magistrate, first Class, Ambajogai, dated 21/6/2006, in Criminal M.A. No.161/2006, under Section 156(3) of the Code of Criminal Procedure, directing P.I., Ambajogai Police Station to register crime and investigate the same and to file report as per Section 156(3) of the Code of Criminal Procedure. Petitioners No.1 and 2 in Criminal Writ Petition No.381/2006 and 382/2006 are non-applicants No.1 and 2 and petitioners No.1 to 3 in Criminal Writ Petition No.383/2006 are non-applicants No.3 to 5 in Criminal M.A. No.161/2006. Respondent No.2 in all the petitions is original complainant. Respondent No.1 is the State of Maharashtra.

2. Facts leading to institution of these petitions are that, respondent No.2 filed Criminal Complaint before the Judicial

Magistrate, First Class, Ambajogai, which was registered as Criminal M.A. No.161/2006 against the petitioners for the offences punishable under Sections 166, 167, 177, 182, 193 and 218 read with Section 34 of the Indian Penal Code. Petitioners No.1 and 2 in Criminal Writ Petition No.381/2006 and 382/2006 were the Tahsildar and Naib Tahsildar respectively, working at Tahsil Office, Ambajogai at the relevant period. Contention of complaint is that, late Radhabai Govindrao Deshpande was owner of agricultural land bearing Survey No.70, situated at Mouze Kodri, and after her death, under her registered last Will dated 29/12/1989, the complainant and his brother became the exclusive owners of that land. Father of non-applicant No.3 namely Dattatraya Manohar Deshpande filed Regular Civil Suit No.283/1990 against Radhabai and the complainant, challenging the validity of the Will Deed executed by Radhabai. Their suit was dismissed and even the Civil Appeal No.136/1998 preferred against that decree was dismissed by Additional District Court, Ambajogai on 27/1/2006. After the death of Radhabai, name of the complainant was recorded in the record of rights of the above said lands on the basis of her Will. However, as that mutation was objected by Dattatraya Deshpande, the said matter was challenged up to Additional Divisional Commissioner, Aurangabad. On 31/5/2002, the Additional Divisional Commissioner directed the litigating parties to get decided their

rights from the Civil Court, and till final decision of Civil Court, the disputed mutation was kept in abeyance. Learned Additional Divisional Commissioner directed that, after decision of Civil Court, mutation be recorded as per the directions of Civil Court. However, after decision of Civil Appeal No.136/1998, when complainant submitted fresh application to Talathi, Kodri for recording his name in record of right of the disputed land, in accordance with decree passed in his favour, said proposal for mutation was forwarded to Tahsildar, Ambajogai. However, on the basis of representation of non-applicants No.3 to 5 (petitioners in Criminal Writ Petition No.383/2007, the Tahsildar and Naib Tahsildar avoided to record mutation entry in favour of the complainant. Therefore, complainant submitted application to higher revenue authorities, and on 2/5/2006 Collector, Beed directed the Sub-divisional Officer, Ambajogai to record the mutation entry on the basis of decision of the Civil Court. However, even thereafter, non-applicants No.1 and 2 (petitioners in Criminal Writ Petition No.380/2006 and 381/2006) with malafide intention, refused to record the mutation entry in favour of the complainant. Therefore, the complainant was constrained to file the criminal complaint. According to complainant, he has already filed application before competent revenue officer for sanction of prosecution of non-applicants No.1 and 2 Tahsildar and Naib Tahsildar.

3. After filing of this complaint, learned trial Court, on 21/6/2006, passed one line order :

“P.I. Ambajogai to register crime, investigate the same and file report as per Section 156(3) of the Code of Criminal Procedure.”

4. On the basis of this order, crime is registered against the petitioners, therefore, this order of registration of the crime is challenged by petitioners on the ground of lack of sanction for prosecution of petitioners No.1 and 2 in Criminal Writ Petition No.381/2006 and 382/2006, who are public servants, as well as on the ground that, no criminal offence is made out against any petitioner who acted in bonafide manner as Second Appeal is preferred by petitioners before the High Court against the decree passed by Additional District Judge, Ambajogai. Learned Additional Divisional Commissioner had directed the petitioners to keep the mutation entries in abeyance till final decision of the Civil Court. Therefore, as the matter is pending before High Court, the petitioners kept the mutation entry pending in compliance with the directions of Additional Divisional Commissioner, Aurangabad.

5. Learned Advocate for the petitioners raised objection that, petitioners being public servants, for their prosecution

previous sanction under Section 197 of the Code of Criminal Procedure is necessary. The second objection raised by learned Advocate for the petitioners is that, the learned Magistrate passed order under Section 156(3) of the Code of Criminal Procedure mechanically and without application of mind. Such order is illegal in the eye of law.

6. In reply, learned Advocate for respondent No.2 submitted that, at the pre-cognizance stage i.e. while passing order under Section 156(3) of the Code of Criminal Procedure, sanction under Section 197 of the Code of Criminal Procedure is not necessary. He placed reliance on **K. Kalimuthu Vs. State** reported in **2005 CRI.L.J. 2190 (SC)**, wherein Apex Court observed in paras 15 and 16 as under :

"15. The question relating to the need of sanction under Section 197 of the Code is not necessarily be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage. Further, in cases where offences under the Act are concerned the effect of Section 19, dealing with question of prejudice has also to be noted.

16. Therefore, we do not find any infirmity in the judgment of the High Court declining to consider the applicability of Section 197 of the Code at the present juncture. It is open to the appellant to raise that question if occasion so arises at an appropriate stage during trial."

7. Regarding non-application of mind, while passing order under Section 156(3) of the Code of Criminal Procedure, the learned counsel for respondent No.2 submitted that, there was no need to apply mind to the facts of the case while passing order under Section 156(3) of the Code of Criminal Procedure, i.e. directions to the police to conduct the investigation and submit report.

8. Learned Advocate for the petitioners has drawn our attention to the case of **Maksud Saiyed Vs. State of Gujarat & ors.** reported in **(2008) 5 SCC 668**, wherein Apex Court examined the requirement of the application of mind by Magistrate before exercising jurisdiction under Section 156(3) and held that, where a jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 Cr.P.C., the Magistrate is required to apply his mind in such a case. The application of mind by Magistrate should be reflected in order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) of the Code of Criminal Procedure should be reflected in the order, though a detailed

expression of his views is neither required nor warranted. This law is also followed by Apex Court in **Anil Kumar & ors. Vs. M.K. Aiyappa & anr.** reported in **AIR 2014 SC (Supp) 1801.**

9. After going through the above cited two authorities by the petitioner, the legal position has become absolutely clear that, before passing order under Section 156(3) of the Code of Criminal Procedure, the Magistrate should apply his mind to the facts of the case and such application of mind should be reflected in his order. However, in the present matter, the order passed by learned Magistrate is one line order, which is reproduced as under :

“P.I. Ambajogai to register crime, investigate the same and file report as per Section 156(3) of the Code of Criminal Procedure.”

10. A bare glance at impugned order passed by learned Judicial Magistrate, First Class, Ambajogai in Criminal M.A. No.161/2006, makes it clear that, while passing order under Section 156(3) of the Code of Criminal Procedure, the learned Magistrate has not at all applied his mind to ascertain whether cognizable offence is made out against the opponent Nos.1 to 5 or not. The order is absolutely not speaking and is an unreasoned order. On this count alone, the impugned order passed by learned Judicial Magistrate, First Class, Ambajogai in Criminal M.A. No.161/2006 deserves to be set aside.

11. Another important aspect is that, petitioner Nos.1 and 2 in Criminal Writ Petitions No.381/2006 and 382/2006, who are opponent Nos.1 and 2 in Criminal M.A. No.161/2006, are Tahsildar and Naib Tahsildar, Ambajogai respectively. Therefore, under Section 21 12th (a) of the Indian Penal Code, these petitioners are public servants. Being Tahsildar and Naib Tahsildar, it was their official duty to approve or disapprove the disputed mutation entry referred by Talathi. It is the allegation of respondent No.2 that, these both revenue officers neglected to approve the disputed mutation entry. Thus, obviously, both these petitioners were acting in discharge of their official duty, as such public servant. In the circumstances, we have to examine whether at the time of taking cognizance under Section 156(3) of the Code of Criminal Procedure, previous sanction of the Government under Section 197 of the Code of Criminal Procedure is mandatory or not.

12. Learned Advocate for the petitioners has rightly placed reliance on "Anil Kumar Vs. M.K. Aiyappa & anr. reported in AIR 2014 SC (Supp) 1801 (supra), wherein the Apex Court ruled that :

"The word 'cognizance' in S.197 of Code and S.19 of Prevention of Corruption Act (P.C. Act)

has a wider connotation and not merely confined to the stage of taking cognizance of the offence. When a Special Judge refers a complaint for investigation under S. 156(3), Cr.P.C., obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. When a Special Judge takes cognizance of the offence on a complaint presented under S.200, Cr.P.C. The next step to be taken is to follow up under S. 202, Cr.P.C. Consequently, a Special Judge under P.C. Act referring the case for investigation under S.156(3) is at pre-cognizance stage. When a private complaint is filed before the Magistrate, he has two options. He may take cognizance of the offence under S.190, Cr.P.C. Or proceed further in enquiry or trial. A Magistrate, who is otherwise competent to take cognizance, without taking cognizance under S.190, may direct an investigation under S.156(3), Cr.P.C. The Magistrate who is empowered under S.190 to take cognizance, alone has the power to refer a private complaint for police investigation under S.156(3), Cr.P.C. Once in a complaint of corruption it is noticed that there was no previous sanction the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3), Cr.P.C."

Thus, the contention of learned Advocate for respondent No.2 is not correct that at the stage of passing order under Section 156(3) of the Code of Criminal Procedure previous sanction under Section 197 of the Code of Criminal Procedure is not necessary. In view of this legal position, otherwise also the order passed by learned trial Court under Section 156(3) of the Code of Criminal Procedure is bad in law for lack of sanction under Section 197 of the Code of Criminal Procedure.

13. Learned Advocate for the petitioners tried to convince this Court that, the petitioners No.1 and 2 are also protected under the provisions of Judges (Protection) Act, 1995. He has drawn our attention towards Section 2 of the Judges (Protection) Act, which reads as under :

“2. In this Act, “Judge” means not only every person who is officially designated as a Judge, but also every person -

(a) Who is empowered by law to give in any legal proceeding a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive; or

(b) who is one of a body of persons which body of persons is empowered by law to give such a judgment as is referred to in Cl. (a).”

14. However, a bare glance to Section 2(a) of the Judges (Protection) Act makes it clear that, the Tahsildar or Naib Tahsildar are not empowered by law to give any definitive judgment in any legal proceeding. Therefore, they cannot become Judge within meaning of Section 2 of the Judges (Protection) Act, 1985. Learned Advocate for the petitioners also submitted that, the petitioners No.1 and 2 being Judges, under Section 77 of the Indian Penal Code, the act done by the Judge while acting judicially in exercise of their powers is protected. However, under Section 19 of the IPC, Judge is defined as “Who is empowered by law to give, in any legal proceedings, civil or

criminal, a definitive judgment". However, Tahsildar or Naib Tahsildar are not empowered by law to give in any civil or criminal legal proceedings definitive judgment. Therefore, they cannot be "Judge" within meaning of Section 19 of the IPC. It follows that, protection awarded under Section 77 of the IPC will not be available to the petitioners. In Criminal Application No.4924/2010, decided by learned Single Judge of this Court, the attention of the learned Single Judge was not drawn towards the definition of "Judge" under Section 19 of the IPC. Therefore, with great respect, we do not agree with proposition laid down by learned Single Judge.

15. However, as observed above, as the impugned order passed by Judicial Magistrate, First Class, Ambajogai is bad on account of non-application of mind as well as lack of previous sanction under Section 197 of the Criminal Procedure Code, these all petitions deserve to be allowed.

16. Before parting with the judgment, we must point out that, the respondent No.2 filed criminal complaint which was referred by investigation to the police under Section 156(3) of the Code of Criminal Procedure, for commission of the offence punishable under Sections 166, 167, 177, 182, 193, 218 read with Section 34 of the Indian Penal Code. Learned trial Court

failed to consider that the petitioners in Criminal Writ Petition No.383/2006 are private persons and Sections 166 and 167 of the IPC are applicable only in respect of public servant disobeying law or framing an incorrect document with intent to cause injury to any person. Thus, obviously, the petitioners in Criminal Writ Petition No.383/2006 (original opponents No.3 to 5) are not within the sweep of Sections 167 and 167 of the IPC.

17. The remaining Sections 177, 182 and 193 of the IPC are regarding contempts of lawful authority of public servant. Section 195(1) of Criminal Procedure Code has provided bar for taking cognizance of the offences punishable under Sections 172 to 188 and 193 to 196 of the IPC unless the complaint in writing is filed by the concerned public servant or authorised officer of the Court. Obviously, complainant is not public servant or authorised officer of the Court. Therefore, in view of Section 195(1)(a) and (b) of the Code of Criminal Procedure, Court cannot take cognizance of such offences on complaint filed by private person. Section 218 of the IPC is altogether different Section, which reads as under :

“218. Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture:- Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be

incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Classification of offence :- The offence under this section is cognizable, bailable, non-compoundable and triable by Magistrate of the first class."

18. It is not the case of complainant that petitioners being public servant, prepared incorrect record with intent to save person from punishment. Therefore, otherwise also, Section 218 of the IPC will not be at all applicable in the present matter. Otherwise also, no offence is made out against the original opponents No.3 to 5 who are petitioners in Criminal Writ Petition No.383/2006. On that count also, Criminal Writ Petition No.383/2006 deserves to be allowed.

19. Accordingly, we have come to the conclusion that, the impugned order passed by learned Judicial Magistrate, First Class, Ambajogai in Criminal M.A. No.161/2006 under Section 156(3) of the Code of Criminal Procedure is bad in law and consequently, offence registered against the petitioners at Police Station, Ambajogai is illegal and deserves to be quashed and set aside. We hold that, all these Criminal Writ Petitions deserve to be allowed. Hence the following order :

ORDER

- (i) Criminal Writ Petitions No.381/2006, 382/2006 and 383/2006 are allowed.
- (ii) The impugned order passed by Judicial Magistrate, First Class, Ambajogai in Criminal M.A. No.161/2006, dated 21/6/2006 and order passed by Additional Sessions Judge, Ambajogai below Exh.1 in Misc. Cri. Rev. No.55/2006, dated 23/6/2006 are quashed and set aside.
- (iii) F.I.R. in Crime No.3/2006, registered at Police Station, Ambajogai is quashed.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE

fmp/