

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 790 OF 2016

1. Sau. Sunita w/o. Gangadhar
Suryawanshi (Babhalikar),
Age 50 years, Occu. Social Work,
R/o. Deshmukh Galli, Bhokar,
Tal. Bhokar, District Nanded.

**....Petitioner.
(Ori. Complainant)**

Versus

1. The State of Maharashtra,
Through Police Station,
Bhokar, Tal. Bhokar,
District Nanded.
2. Girish s/o. Vinayakrao Joshi,
Age 42 years, Occu. Service i.e.
Executive Engineer, P.W.D.
Bhokar, Tal. Bhokar, Dist. Nanded,
R/o. Plot No. 40, Flat No. 1,
Siddhi Residency, Shrey Nagar,
Aurangabad, Dist. Aurangabad,
Serving Superintendent Engineer,
P.W.D., Circle - Akola, Tq. & Dist.
Akola.

....Respondents.

Mr. P.R. Katneshwarkar, Advocate for petitioner.

Mr. S.W. Munde, APP for respondent No.1/State.

Mr. N.B. Khandare, Advocate for respondent No. 2.

CORAM : T.V. NALAWADE, J.

DATED : April 10, 2017.

JUDGMENT :

- 1) Rule. Rule made returnable forthwith. By consent,
heard both the sides for final disposal.

2) The proceeding is filed under Articles 226 and 227 of the Constitution of India to challenge the decision of Criminal Revision No. 14/2015, which was pending in the Court of Additional Sessions Judge, Bhokar. The revision filed by the present respondent No. 2 - Shri. Joshi , who is presently serving as Superintending Engineer is allowed by the Sessions Court and the order of taking cognizance of one offence as against respondent No. 2 on police report is set aside by the Sessions Court. The report was filed by police under section 169 of Criminal Procedure Code (Cr.P.C.) along with the chargeheet. The learned Judicial Magistrate, First Class (J.M.F.C.), Bhokar did not accept the report filed under section 169 of Cr.P.C., 'C' Summary Report which is given as per the Maharashtra Police Manual, 1999 and on the basis of the material collected, took cognizance of the offence punishable under sections 420, 467, 468, 471, 409, 34 etc. of Indian Penal Code (I.P.C.).

3) Regular Criminal Case No. 76/2014 was filed as a private complaint by the present petitioner for aforesaid offences and in that matter, order under section 156 (3) of Cr.P.C. was made by the learned J.M.F.C., Bhokar. After completion of the investigation, police had filed aforesaid 'C' Summary Report under section 169 of Cr.P.C. along with the

chargeheet.

4) It is the case of original complainant that present respondent No. 2 - Shri. Joshi was working as Executive Engineer of Public Works Department (P.W.D.) of the State Government Department and one Shri. Dange was working as Junior Engineer for Bhokar. One Shri. Deshpande was working as Sub Divisional Engineer at the relevant time. The complainant is resident of Bhokar, District Jalna.

5) In the private complaint, allegations were made by the present petitioner that false record of execution of work was created in connection with Dhavari - Therban - Somthana - Kini - Palaj road and by creating false record of measurement and Government money was misappropriated by these Engineer staff of P.W.D. Department. It was the duty of Shjri. Dange and Shri. Deshpande to take measurement and prepare the bills and Executive Engineer, respondent No. 2 - Shri. Joshi was to sanction the bills and disburse the amount on the basis of bills. He was also responsible for allotment of work. There is allegation that amount of Rs.39,55,106/- of Government was misappropriated by these persons by creating false record. It is the case of complainant that she had made an attempt to collect the record of measurement, but the record was not supplied and

she had tried to collect the record of report of joint measurement made by other Executive Engineer, but the department has avoided to supply that record also. Ultimately, she got some information and on that basis, she filed the complaint. The complainant was sure that present respondent No. 2 and other two Engineers were responsible for the creation of false record and misappropriation and they were made accused in the private complaint. The concerned police station filed report that the complaint was made due to some misconception and such report was filed under 'C' Summary category created by Maharashtra Police Manual, 1999. The submissions made, the report of police and the argument advanced show that not a single person was arrested by police during investigation even when anticipatory bail was refused by this Court to accused Shri. Joshi.

6) In 'C' Summary Report, it was informed by police to the learned J.M.F.C. that Report of the first Committee of expert was confronted to accused by the police and respondent Shri. Joshi had denied that Report by contending that he was not present at the time when joint measurement was taken by the Committee. Due to such defence taken by Shri. Joshi, police had written to the Chief Engineer of the Department that the Report cannot be accepted. It appears that in the Legislative Assembly

and Council of the State, this subject was raised and the State Government then gave directions to the Vigilance Committee created for Aurangabad division to make inquiry and submit report. Then other Executive Engineer made inquiry and submitted report dated 14.2.2014. The previous report was submitted on 13.7.2012. The subsequent Committee, Vigilance Committee reported that the report of the year 2012 was not correct and there was no substance in the allegations made against these Engineers. The Superintending Engineer Shri. Kulkarni considered the two reports and he gave his own report to the Chief Engineer that subsequent report needs to be accepted. He also reported that there was no necessity of joint measurement again in view of the report of Vigilance Committee. The papers of investigation and the police report show that police had recorded statements of the persons, who were involved in making the inquiry and police accepted the final report and informed to the Magistrate that as the subsequent report was of the Committee of higher grade, it was necessary to accept it and so, the investigating agency was filing 'C' Summary Report.

7) The aforesaid record and the report of investigating agency was considered by the learned J.M.F.C. Hearing was given to the counsel of complainant. The learned J.M.F.C. refused to

accept 'C' Summary Report and on the basis of aforesaid record which included the report of first joint measurement and the statements of the members of that Committee took cognizance of the offences.

8) The learned Additional Sessions Judge has set aside the aforesaid order of J.M.F.C. on following three grounds :-

"(A) There is no sanction under section 197 of Cr.P.c. to initiate prosecution against accused.

(B) The lower court totally ignored the subsequent report and there is no whisper of third and fourth report.

(C) The contractors who prepared forged bill are not implicated as an accused in absence of main accused who are the author and mastermind of the forged bill. There act can not fastened on the petitioner."

9) There are peculiar circumstances in the matter and such circumstances are also with regard to the record of two revisions and the matter which was filed in this Court. The record produced shows that initially all the three Engineers had filed Criminal Revision No. 8/2014 on 14.4.2014. This revision was not pressed by them and so, it was shown to be disposed of as not pressed on 25.7.2014. Prior to that, a proceeding was filed under

section 482 of Cr.P.C. by present respondent No. 2 - Joshi to challenge the order of investigation made by J.M.F.C. in this Court. Thus, the order of J.M.F.C. was challenged by filing two proceedings like revision and proceeding filed under section 482 of Cr.P.C. Joshi and other two accused also attempted to get anticipatory bail by filing applications in Sessions Court and in this Court. This Court had refused anticipatory bail to all these three accused by order dated 25.8.2014 made in Criminal Application No. 2664/2014. The record shows that the first Criminal Revision No. 8/2014 was pending on 25.7.2014, but the proceeding was filed under section 482 of Cr.P.C. The first revision which was not pressed was filed through one Advocate Shri. Sharma and the second revision was filed through another advocate Shri. P.H. Deshmukh. Though some reasons are given by the Sessions Court for deciding the second revision in favour of accused, the fact remains that the accused had failed to get order under section 482 of Cr.P.C. and also order of anticipatory bail from this Court.

10) The aforesaid circumstances and particularly, the creation of one more Committee for making inquiry and the circumstance of acceptance of the the said report by the Chief Engineer and the circumstance that police acted on the basis of second report are sufficient to show that somebody from

Government was helping these accused. While deciding the anticipatory bail application, this Court had considered those circumstances and it was observed that it was an attempt to cover up the things. When the Court is expected act independently and even police were expected to make investigation independently and fairly, the learned Judge of the Sessions Court ignored all these circumstances and presumed that the report of the subsequent Committee ought to have been accepted by the learned J.M.F.C. It cannot be said that the learned Judge of the Sessions Court was not aware of the aforesaid circumstances because the learned J.M.F.C. had considered those circumstances. As the report submitted by police under section 169 of Cr.P.C. and the papers collected by police were available before the J.M.F.C., the learned Judge of the Sessions Court ought to have presumed that the learned J.M.F.C. had considered all this material and after that had taken cognizance of the matter. The Sessions Court ought to have kept in mind the scope of revisional jurisdiction and also the powers of the learned J.M.F.C. The power exercised by the learned J.M.F.C. is well withing his jurisdiction and that was on the basis of some record, but the learned Sessions Judge did not consider that aspect of the matter. It can be safely said that the learned Sessions Court has exceeded the powers by accepting the other probability which was suggested to him by the side of accused.

11) On merits also, it can be said that the investigating agency did not act fairly and did not make investigation competently. When there were such serious allegations and when there was the report of first Committee constituted for joint measurement, investigation ought to have been made independently. The investigating agency did not take help of any independent agency to find out the truth in to the allegations. The investigating agency did not record the statements of persons living in the vicinity of the road. It did not record statements of persons who were regularly using the said road and the investigating agency did not approach some witnesses who could have been supplied information as to whether the material like Murum, metal etc. was supplied by them and it was taken to the site for repair and construction of the road. When such work is executed, some minor mineral like Murum, metal is required to be excavated and for that, there is always revenue record. The report of the Investigating Officer does not show that such an attempt was made. The report even does not show that the Investigating Officer went in to the details of the bills when the first Committee had given finding that most of the work was not actually executed and false measurements were recorded. Thus, the things were not verified independently by the investigating agency. There was atleast the material before the

investigating agency like the statements of members of the first Committee showing that they had visited the spot and they had noticed that most of the work was not executed and false record of measurement was prepared.

12) There is copy of Government Resolution (G.R.) dated 30.10.2003 of P.W.D. of Government in which guidelines are given for making inquiry when there are allegations of present nature. As per these guidelines, the first Committee for joint measurement was constituted and one Shri. Khaja Masioddin was presiding over this Committee and he was incharge Executive Engineer at the relevant time. This Court has no hesitation to observe that the first Committee was constituted as per the G.R. dated 30.10.2003. The G.R. does not show that the incharge Executive Engineer cannot do such inquiry. Clause No. 4 of the G.R. shows that such Committee consist of atleast five members as follows :-

- (i) Executive Engineer, Deputy Executive Engineer and atleast one officer of rank of Branch Engineer/Junior Engineer (Total number of members - three), and
- (ii) One Deputy Engineer and one Branch Engineer/Junior Engineer of the office against which there are allegations (Total number of members - two).

If felt necessary, the Executive Engineer/Superintending Engineer, Quality Control Committee, Vigilance Committee had also right to remain present during such inquiry. Thus, the main inquiry was to be conducted as per the aforesaid G.R. and that was through joint measurement.

13) Clauses Nos. 3 and 5 of the aforesaid G.R. show that in advance intimation of joint measurement needs to be given and 20 days notice needs to be given to the officer against whom there are allegations. However, it further shows that if the officer does not remain present, his absence is to be marked and the inquiry is to be completed. The G.R. also shows that if the officer against whom there are allegations remains present and he expresses some grievance with regard to any matter, the Committee is expected to see that his grievance is redressed by taking some steps. The procedure which is required to be followed for taking joint measurement is also given in clause No. 7 of the G.R. and that includes the taking of the holes.

14) Copy of the report submitted by the first Committee of joint measurement dated 13.3.2012 is on the record and it shows that it was done on the basis of directions given to make inquiry in respect of the allegations made against the Junior

Engineer Shri. M.N. Dange. It shows that people of that area had started agitation and they were asking for making inquiry.

15) The report of the first Committee shows that in all six officers mentioned in the aforesaid G.R., who are required to be included in the committed were present for joint measurement. Shri. M.N. Dange, against whom there were allegations, was also present. It appears that notice was given to one Shri. P.P. Deshpande also. But, he remained absent. Thus, notices were given against two officers. These two officers were working in the field and they were expected to prepare the bills etc. after taking the measurement and they were involved in day to day supervision. The main points of the report prepared by the first Committee after joint measurement are as follows :-

- (i) Inquiry was made between 22.5.2012 and 19.6.2012.
- (ii) The work in respect of the allegations was shown to be completed in financial year 2010-11.
- (iii) In all the items, the pieces of work, where irregularities were found and misappropriation was noticed, there is clear mention that the Committee had visited the concerned site for measurement.
- (iv) In respect of Dhavri - Therban - Somthana - Kini - Palaj road, for repairs k.m. 38/700 to 39/100, in

addition to other irregularities, it was noticed that no work was actually executed as per the work order of repairs and as per the measurements. The Committee noticed that for about 800 mtrs. from the two side road, some earth material was collected after digging and that earth material was shown to be spread on side patts. By using this modus operandi, the amount of Rs. 7.06 lakh was misappropriated.

(v) In respect of the aforesaid road for k.m.39/100 to 41/00 and k.m. 42/00 to 42/00 for repairs, additional work was executed like 20 mm premix carpet when there was no such tender and estimate. Similarly, like done in aforesaid matter, earth material from both the sides of the road was collected to prepare the side patts of the road and by using that modus operandi, the amount of Rs.82,690/- was misappropriated. There was one more irregularity in respect of this work like giving of technical sanction of Rs.7.95 lakh to the work when the administrative sanction was of Rs.5 lakh. This Court is not going into the details of that count and this Court is trying to deal with the particular allegations made in respect of false record and misappropriation.

(vi) For aforesaid road for the piece k.m. 41/200

to 41/600, false record of measurement was prepared and no work was actually executed on that place. Some ditches were filled, but when the contractor was expected to reconstruct the road of the width of 3.75 mtrs., such work was not executed and the amount of Rs. 9.87 lakh was misappropriated.

(vii) to (x) These items are in respect of the same road of k.m. 52/00 to 52/200, k.m. 54/400 to 54/600, k.m. 55/700 to 55/900 and k.m. 55/00 to 58/00. In respect of these items also, it was noticed that record of false measurement was created and loss was caused and thereby Government amount was misappropriated. Some other circumstances leading to suspicion like creation of entire record of measurement and bills on the same day are also noted. The notings made by the Committee in these items show that they had visited the spot and the material used for filling the ditches was also seen and it is noted.

16) The first Committee had given report that loss of Rs.39.55 lakh was caused and this amount was grabbed by preparing false record of measurement and false bills. The blame was put on divisional accountant also as the bills prepared were found to be highly suspicious in nature. It is already observed

that ultimately, the bills come to Executive Engineer for sanction and releasing the amount.

17) From the aforesaid report prepared by the first Committee and the procedure given in the G.R. already quoted, it could have been presumed by the Magistrate at the stage of cognizance that necessary procedure was followed by this Committee and even holes were taken at various places by this Committee for verification. As the measurement was taken by this Committee immediately after the work was shown to be completed, more importance could have been given by the Magistrate to this report and so, the Magistrate gave due importance to this report. There is one more circumstance that Shri. Dange who was present on the spot at the time of measurement taken by the first Committee, did not raise grievance and this circumstance is not considered by the learned Judge of the Sessions Court. Fortunately, police had recorded statements of all the members of this Committee and they are on record.

18) The second Committee is called as Vigilance Committee and the report is signed by only one officer whose designation is Executive Engineer. His report shows that he visited the spot between 3.12.2013 and 5.12.2013 and again

between 21.1.2014 and 23.1.2014. Here only it needs to be kept in mind that the work was completed in the financial year 2010-11. There is always wear and tear due to rain, wind, use etc. There is also other circumstance like every year or after some time repairs are again carried out of the same piece.

19) In the complaint itself, the complainant has contended that he was required to run from pillar to post to collect the information and every time, the officers of the department had avoided to supply information, much less the copies of report. In view of these circumstances, if there was the direction to the second Committee, the second Committee ought to have collected the record and ought to have done verification by visiting the spot, but that was not done and vague excuse is given by the Committee in respect of the most of the works by saying that allegations are vague. If one goes through the second report carefully, it is not difficult to form opinion that this report was given to cover up the things. many loop holes are kept in the second report by the Committee and it can be said that this is done to save it's own skin. On one hand, this Committee has observed for item No. (iv) that due to passing of period of three years since the execution of the work, it was not possible to give specific and clear report/opinion and on other hand, it is again mentioned that sample holes were taken for

verification and it was found that approximately work which was to be executed was executed. In first Committee, as many as six officers of the department were involved. In the second Committee, only one Officer has signed the report and the Superintending Engineer has given report that there is no need to go for second joint measurement. It can be said that second joint measurement could not have helped to find out the truth as much time had expired and the possibility of again executing the same work on same site was not at all considered in the second report.

20) The Superintending Engineer, who accepted the second report has given strange reason that post of Shri. Khaja was of Sub Divisional Engineer and he was only holding the charge of Executive Engineer and so, he was not competent to take the joint measurement. The relevant portion of G.R. is already quoted and it shows that to discard the report given by the first Committee which was constituted as per the G.R., this reasoning is not at all acceptable. Other reason is given that short notice of four days was given to the officers against whom there were allegations when 20 days notice is required and so, the report is not binding even on Shri. Dange. Considering the purpose behind the creation of Committee, this reason also could not have been accepted by anybody. Shri. Dange had

remained present when the first Committee took the joint measurement. The other circumstance that when there was the allegation of the complainant that at the same site, subsequently more work was executed, attempt was not made to ascertain on the basis of record as to whether such work was executed subsequently. These circumstances are sufficient to create probability that the second Committee tried to cover up the things.

21) When there are aforesaid circumstances against the officers of P.W.D., atleast investigating agency ought to have acted fairly and ought to have made the investigation independently. It was not open to the investigating agency to give opinion only on the basis of rank or grade of the two Committees. The investigating agency was expected to find out the truth. The report of police does not show that police tried to find out the truth. In ordinary course, Investigating Officer ought to have recorded the statements of the persons of that locality, the persons who were regularly using that road and also the witnesses whose names were appearing in the record like bills of the work. That exercise was not done. The investigating agency could have appointed independent expert and the other expert could have also ascertained as to whether the work was really executed in the year 2010-11. But the investigating agency

wrote to department to obtain one more report and that was done only because respondent Shri. Joshi had objection to the report prepared by Shri. Khaja. Thus, the investigation was not made fairly, competently and independently.

22) The Sessions Court has committed serious error in holding that the learned J.M.F.C. did not consider the entire material. The Sessions Court ought to have presumed that the entire material was before the J.M.F.C. as the aforesaid things were mentioned by police in the report and the papers were collected by police during investigation. The learned Judge of the Sessions Court did not consider the circumstance that no investigation was made by police and only on the basis of report of the second Committee, which was accepted by Superintending Engineer and Chief Engineer, opinion was formed by Investigating Officer that it was a case in which 'C' Summary Report needs be to be filed.

23) The learned Judge of the Sessions Court has committed one more error in observing that the prosecution cannot be allowed against the officers as the contractor, who allegedly executed the work is not made accused. This proposition is not correct in law. The main allegations are against the officers and only due to these officers offence could have

been committed. It is always open to the Court trying the offence to include other persons who were also responsible for the offence as provided in section 319 of Cr.P.C.

24) The learned Judge of the Sessions Court has committed one more error in holding that there is necessity of sanction under section 197 of Cr.P.C. for taking cognizance of the matter as against the respondent and other Engineers. On this point, one case is referred by the learned Judge of the Sessions Court and reliance is placed on two cases reported as **(2013) 10 SCC 705 [Anilkumar and Ors. Vs. M.K. Aiyappa and Anr.]** and **(2016) 9 SCC 598 [L. Narayan Swamy Vs. State of Karnataka and Ors.]**. The facts of the first case show that it was a matter under Prevention of Corruption Act, 1988 and in view of section 19 (1) (3), the Apex Court had held that for ordering investigation against the public servant sanction needs to be obtained and if the matter is referred for investigation without sanction, reference is bad in law. In the second matter also, the provision of section 19 of the Prevention of Corruption Act, 1988 was considered and it was also involving directions given under section 156 (3) of Cr.P.C. Thus, the main offence involved was different and the Apex Court was considering the provision of section 19 of the Prevention of Corruption Act.

25) On the aforesaid point, the learned counsel for petitioner placed reliance on the observations made by the Apex Court in the case reported as **AIR 2015 SC 2403 [Inspector of Police and Ors. Vs. Battenapatla Venkata Ratnam and Ors.]**. In this case, the Apex Court has laid down that if the public servants get indulged in criminal conduct constituting the offences punishable under sections 420, 120-B, 468, 471 etc. of I.P.C., the protection of section 197 of Cr.P.C. cannot be given to them. This Court has no hesitation to observe that observations made in this case need to be used in the present matter. There was no necessity of sanction in the present matter in view of the nature of allegations made against the Executive Engineer and other Engineers.

26) The aforesaid discussion, the material and the law show that the Sessions Court has committed error in interfering in the order made by the learned J.M.F.C. Such decision cannot sustain in law.

27) In the result, the petition is allowed. The decision given by the learned Additional Sessions Judge, Bhokar in Criminal Revision No. 14/2015 is hereby set aside. The order made by the learned J.M.F.C., Bhokar in Final Report No. 1/2015

dated 25.5.2015 is hereby restored.

Rule is made absolute in aforesaid terms.

[T.V. NALAWADE, J.]

ssc/