

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

CRIMINAL APPLICATION NO. 5752 OF 2016

Padmakar Gajananrao Pande,
Age 58 years, Occupation Service,
working as a Sub-Divisional Engineer,
(Marketing), Office of the Telecom,
District Manager, Bharat Sanchar
Nigam Limited, B.S.N.L. Jalna,
Ner Shivaji Statue, Jalna.

...Applicant

Versus

- 1) Ramesh Tukaram Diwate,
Age 63 years, Occupation Nil,
R/o Flat No. C-7, CTS Building,
Bahadurpura, Opposite Abhinay
Theatre, Aurangabad.

- 2) The State of Maharashtra.

...Respondents

Mr. S. C. Arora, Advocate for the applicant.
Mr. A. R. Kale, Additional Public Prosecutor for respondent
No.2

**CORAM : SMT. VIBHA KANKANWADI, J.
DATE : 23-11-2017**

ORAL JUDGMENT :

1. Heard learned counsel appearing for the applicant and
learned Additional Public Prosecutor for respondent No.2. The

learned counsel for respondent No.1 is absent. He was absent yesterday also. The notice issued to respondent No.1 by order dated 18-10-2016 clearly indicated that it is for final disposal at the admission stage, hence the matter is taken up for final hearing.

2. The present applicant is the original accused. The original complainant i.e. respondent No.1 filed private complaint Summary Criminal Case No.39 of 2014 against the present applicant contending that, the applicant/ accused has committed offence punishable under Section 500 of the Indian Penal Code. I would like to address parties hereinafter by their nomenclature in the original complaint.

3. The complainant was working as Sub-Divisional Officer with Bharat Sanchar Nigam Limited (B.S.N.L.) Office at Aurangabad. The accused is also serving with the same institution and he was the Divisional Engineer (Vigilance). It is the contention of the complainant that he has gained reputation because of his work. His family members have also earned reputation in the society. Accused started harassing him on trifle grounds since 2012. He used to defame him by leveling false allegations. He had given threat to suspend the complainant on the allegation

that, he has demanded amount of Rs.2,00,000/-. The accused had conspired with the union leader and secretary in order to defame the complainant. In fact a notice defaming the complainant was displayed by the accused on 07-12-2012 on the notice board of the office, and thereby it is the contention of the complainant that he has committed offence punishable under Section 500 of Indian Penal Code.

4. After the presentation of the complaint, the verification was recorded. After perusing the complaint, verification and perusal of the documents, the learned J.M.F.C., Aurangabad issued process against the accused for the offence punishable under Section 500 of Indian Penal Code. After the accused appeared in the matter, he had filed a complaint for discharge at exh.19. The said application came to be rejected on 1st January, 2015. The accused carried the matter forward and challenged the order below exh.19 before learned Additional Sessions Judge, Aurangabad in Criminal Revision No. 57 of 2015. The said revision came to be dismissed on 30-07-2016.

5. The accused by invoking the inherent powers of this Court under Section 482 of the Criminal Procedure Code has filed

present application, for quashing the complaint.

6. It has been submitted on behalf of the applicant that, the prima facie perusal of the complaint would show that the ingredients of the offence have not been made out and the learned Magistrate had failed to consider this important aspect. The learned Magistrate as well as learned Additional Sessions Judge failed to consider that the accused being a Government servant and had done the act in discharge of his official duty was protected by virtue of provisions of Section 197 of Code of Criminal Procedure, and therefore, without the sanction been obtained, the process ought not to have been issued. He also submitted that, though the accused had earlier invoked his remedy under Section 397 of Code of Criminal procedure, yet his remedy before this Court under Section 482 of Cr.P.C. has not been taken away, and therefore the petition is maintainable.

7. Per contra, it has been submitted by the learned Additional Public Prosecutor that, since the applicant had already invoked his remedy under Section 397 of Cr.P.C., he ought to have filed writ petition, he cannot now invoke the inherent powers of this Court.

8. In order to appreciate the controversy posed in this matter, it is necessary to see as to whether the complaint discloses the ingredients of the offence and whether the points raised by the applicant can be upheld. It is not in dispute that, the original complainant was serving in BSNL. It is also not in dispute that, the accused is serving in the Government service and was holding post of Additional Engineer (Vigilance) in the office of BSNL at Aurangabad. Exhibit "C" in this petition is the impugned notice that was displayed on the notice board on 07-12-2012. Accused is not disputing that, he had displayed the said notice. The accused contends that, there were complaints against the complainant which were taken up to the higher authorities of B.S.N.L., and therefore he had received a confidential letter from higher authorities directing him to hold an enquiry in the matter. He has placed on record the said confidential letter dated 23-07-2012. In fact it is a reminder and original letter appears to be dated 29-03-2012. Prior to that, on 7th May, 2012 C.V.O., B.S.N.L., New Delhi was given some documents by under secretary which was containing the complaints. Complaint against the complainant was, by this letter, forwarded to C.V.O., B.S.N.L. It appears that, the allegations against the complainant were that while in service

he was doing work for a financial institution. He had collected huge amount from members, he had returned only a part of the said amount and the major portion of the said collected amount has been appropriated by him. The accused was directed to hold enquiry. The present applicant has filed on record the notice in the form of directions given to him by the higher authorities. It is on page No.23. It had given direction to the accused that, "Important notice to be displayed on notice board and all exchange buildings and office in Aurangabad SSA".

9. In pursuance to the said directions the impugned notice came to be displayed on the notice board of the B.S.N.L. office at Aurangabad. It can be considered from the contents of the impugned notice that, it conveyed what are the allegations against the complainant and then he invited that if at all anybody is honestly desires to take action against the complainant, then he may give evidence in the nature of receipt and complaint addressed at his official designation. The contents of the said notice does not even prima facie reveal that, accused had any kind of intention to defame the complainant. The most important ingredient of Section 499 of Indian Penal Code is that, the person i.e. accused should have intention to harm or knowing or having

reason to belief that such imputation will harm the reputation of such person. Basically when the complainant was under directions from his superior authorities, he cannot be said to be independently having any intention to defame/ harm the reputation of the complainant.

10. Another fact to be noted from the contents of the complaint are that, complainant alleges that since 2012 the accused was harassing him on trifle grounds. Those allegations are vague as possible. He also says that, he was given threat to suspend when allegation was levelled that he had demanded amount of Rs.2,00,000/- from the Union President and Secretary in conspiracy with the accused, but then he says that, he had not paid attention to the same. That means, he had not taken the said threat seriously. When there were no previous instances between complainant and accused showing any kind of rift between them, then the question is why all of a sudden on 07-12-2012 the accused will develop intention to defame the complainant. No doubt a Judicial Magistrate F.C. is required to consider only the prima facie allegations while considering whether to take cognizance of the offence or not. The Magistrate is not required to consider the pros and cons of the complaint and is not required to

deal with the point whether those allegations will be proved or not and will culminate in the punishment/ conviction of the accused. However, definitely the Magistrate is required to consider whether on the basis of the contents of the complaint, the ingredients of the offence have been made out or not. Prima facie in order to take cognizance of the offence, certainly in this case, those contents were absent.

11. Taking cognizance of an offence is, in fact, a serious business. For that purpose, judicial application of mind is required. If the facts are not clear then the option is available to the Magistrate to postpone the issuance of process and hold an enquiry under Section 202 of Code of Criminal Procedure. No doubt an accused is not expected to take part in the process till he is called upon by virtue of the summons issued to him, and therefore, many documents or facts may not be revealed before the Magistrate at the stage of taking cognizance. However, those facts can be revealed by resorting to the powers under Section 202 of Cr.P.C.

12. Another important point that has been raised on behalf of the applicant is that, the learned Magistrate failed to consider that sanction has not been obtained in pursuance to the provisions

of Section 197 of Cr.P.C., before the cognizance of the offence was taken. It is not in dispute that, the accused is a public servant, and therefore, the learned Magistrate ought to have given a thought before taking cognizance of the matter as to whether the question of sanction is involved in this case or not. The impugned notice would clearly show that, it has been issued in the official capacity by the accused. The further question that will be raised is whether he was discharging his official duty at the relevant time. On the basis of the directions given by the higher authorities which have been produced on record at page No.23, it can be definitely concluded that the accused was discharging his official duty at the relevant time and the act has been done on the basis of those directions. No doubt the directions on page No.23 were not before the learned Magistrate, but the learned Magistrate ought to have called upon the complainant to make submissions on the said point. Without considering the said element, the process has been issued, which shows non-application of mind by the learned Magistrate.

13. The learned counsel appearing for the applicant has relied on *Ramnath Goenka Vs. A. R. Raji*, 1982 Cri.L.J. 1153 (Madras High Court). In this case it has been held that,

"Where a complaint against Principal Information Officer, Government of India for an offence under Section 500 I.P.C. Alleging that the "hand outs" issued by him to the complainant, a newspaper magnate are only defamatory statements with intent to lower his estimation in the eye of general public and with malice aforethought. In such case previous sanction of Central Government under Section 197 of Cr.P.C. is necessary for prosecution."

14. He also relied on the decision in *Satya Narayan Omar Vs. N. K. Pillai Jabalpur, 1982 Cri.L.J. 478*, (Madhya Pradesh High Court, Gwalior Bench). In this case it has been held that,

"Where a Government employee was a local highest authority of a Department of State Government and his official duty was to see that proper discipline including punctual attendance by the staff was maintained but he was alleged to have fabricated a false report which contained a false statement that the complainant i.e. an employee of the staff had left his headquarters without his permission, the acts so complained of could be said to have been committed by the said Government employee while discharging his official duty. Therefore, the sanction under Section 197 would be necessary for filing the complaint before a Criminal;

Court against the Government employee."

15. Here in the present case also when the accused is a Government employee and the impugned notice has been published as per the directions given to him by the higher authorities, then it was necessary for the complainant to obtain sanction as contemplated under Section 197 of Cr.P.C. Since the said sanction has not been obtained, cognizance of the offence cannot be taken. This point was in fact raised before the Additional Sessions Judge in criminal revision by the present applicant, however the said point has been brushed aside by saying that issuance of notice on a notice board cannot be considered as an act by the accused while discharging his official duty. In fact when specific directions in respect of displaying the said notice on the board were issued to the accused by his higher authorities, then it becomes integral part of his official duty.

16. A point has been raised that the present application is not maintainable under Section 482 of Cr.P.C. since the accused has already exhausted his remedy under Section 397 of Cr.P.C. Reliance can be placed on the three Judges Bench decision of the Apex Court in *Girish Kumar Suneja Vs. C.B.I.*, reported in *A.I.R.*

2017 Supreme Court 3620, wherein after relying on the decision in *Madhu Limaye Vs. State of Maharashtra, A.I.R. 1978 Supreme Court 47*, and *State of Harayana and others Vs. Ch. Bhajan Lal and others, A.I.R. 1992 Supreme Court 604*, it has been held that the powers under Section 482 of Cr.P.C. should be exercised in the 'rarest of rare cases'. Definitely this is the rarest of the rare case in a way that, though the things were pointed out to the learned Additional Sessions Judge, he failed to exercise powers under Section 397 of Cr.P.C. This accused cannot be asked to undergo the ordeal of facing trial when he was following the directions of the superiors. Further the applicant has demonstrated that, the order of issuance of process passed by the learned Magistrate was without application of mind, and therefore, the application is maintainable and deserves to be allowed for the aforesaid reasons. Hence following order.

ORDER

- 1) The application is hereby allowed.
- 2) Complaint i.e. Summary Criminal Case No.39 of 2014 pending before Judicial Magistrate, First Class, Aurangabad, is hereby quashed.

3) The order passed by Additional Sessions Judge, Aurangabad in Criminal Revision No.57 of 2015 dated 30-07-2016 is also hereby set aside.

4) Writ petition accordingly disposed of.

[SMT. VIBHA KANKANWADI]
JUDGE

gawade/-.