

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

CRIMINAL WRIT PETITION NO. 269 OF 2017

Dr.Deepak S/o Vasantrao Kesari,
Age 59 years, Occ : Medical Practitioner,
R/o Ravi Nagar, Taroda Naka
Tq. & Dist.Nanded

.. PETITIONER

Versus

- 1] Dr.Shriram S/o Mukundrao Kalyankar
Age 47 years, Occ : Medical Practitioner
R/o Bhavsar Chowk, Malegaon Road,
Nanded, Dist.Nanded.
- 2] Dr.Mukund s/o Narayanrao Pande
Age 57 years, Occ : Medical Practitioner
R/o Behind Bank of Baroda,
Malegaon Road, Nanded, Dist.Nanded.
- 3] The State of Maharashtra
Through Police Inspector;
Bhagya Nagar Police Station
Nanded, Dist.Nanded.
- 4] The Investigation Officer,
Shivaji Nagar Police Station,
Nanded, Dist.Nanded.
- 5] The Police Inspector,
Police Station Vazirabad,
Nanded, Dist.Nanded.

[copies to Respondent Nos.3 to 5

be served on Public Prosecutor
High Court of Judicature at
Bombay Bench at Aurangabad] .. RESPONDENTS

Mr.S.S.Kazi, Advocate for petitioner.
Mr.J.M.Murkute,Adv. for Respondents no.1 and 2.
Mr.V.M.Kagne,APP for respondents no.3 to 5.

CORAM : MANGESH S. PATIL, J.

RESERVED ON : 17/07/2018.

PRONOUNCED ON :20/08/2018.

JUDGMENT :

Rule. The rule is made returnable forthwith.
Mr.J.M.Murkute, learned Advocate waives service for
respondents no.1 and 2 and the learned APP waives service for
the respondents no.3 to 5. With the consent of both the sides,
the matter is heard finally at the stage of admission.

2] The learned advocate for the petitioner vehemently
submits that the learned Magistrate had rightly directed
investigation under Sub Section 3 of Section 156 of the Code of
Criminal Procedure on an application filed by the petitioner
bearing No.OMCA No.522/2015 by order dated 8/6/2015 but
has committed a gross error which has resulted in miscarriage of
justice when the self same Magistrate without having any power
under the Code of Criminal Procedure recalled his earlier order
by the impugned order dated 15/10/2015. The Magistrate had

no such jurisdiction to recall his own order and has committed gross illegality. He referred to and relied upon the judgment of the Supreme Court in the case of **Subramaniam Sethuraman V/s State of Maharashtra and another; (2004) 13 SCC 324 and Iris Computers Limited V/s Askari Infotech Private Limited and others; (2015) 14 SCC 399.**

3] The learned advocate for the petitioner further pointed out that even the learned Additional Sessions Judge by the impugned order dismissed the revision without appreciating the law that the Magistrate had no jurisdiction and power to recall his own order. Therefore, even the impugned judgment passed by the learned Additional Sessions Judge dismissing the revision suffers from gross illegality.

4] As far as factual aspects are concerned, the learned Advocate for the petitioner submitted that the two Courts below had failed to appreciate the facts and circumstances and had mis directed themselves which has resulted in miscarriage of justice. They failed to consider the distinction between the facts in the two complaints filed by the petitioner. In the earlier complaint, he had alleged about the respondents no.1 and 2 having committed misappropriation of specific items which were not the part and parcel of the second complaint which was solely based upon a specific item of misappropriation of Rs.10,000/-. There was apparently no duplication. The two complaints were in respect of different items of misappropriation and still the two

Courts below failed to take into account such distinction and under the misconception that the misappropriation alleged in both the complaints was the same have passed the orders which has the consequence of dismissal of the complaint.

5] The learned advocate for the respondents no.1 and 2 submitted that there cannot be any dispute about the trite legal principle that the Criminal Courts do not have power to recall their own order since no such provision is available under the Code of Criminal Procedure. However, the learned Magistrate though has set aside his own order, he has clearly demonstrated that the order procured from him directing investigation under Sub Section 3 of Section 156 of the Code of Criminal Procedure was a fraud. Material facts and circumstances were suppressed and the order was obtained. Therefore, the two Courts below have concurrently held that it was a fraud on the Court and the order was *non est* and while directing that the order passed by him on 8/6/2015 was set aside, the Magistrate was merely declaring the consequence of the fraud and cannot be said to have exercised a jurisdiction which did not vest in him.

6] I have carefully gone through the papers with able assistance of the learned advocates of both the sides. Though it sounds pessimistic, in my considered view, there is no apparent illegality committed by the two Courts below. They have consistently demonstrated as to how the material facts were not disclosed by the petitioner while lodging the OMCA

No.522/2015 and as to how the order was procured from the Magistrate on 8/6/2015 directing an investigation under Sub Section 3 of Section 156 of the Code of Criminal Procedure. They have concurrently held that since it was a matter of fraud, the order was *non est* and the learned Magistrate has simply declared it and has quashed and set aside the order passed by him on 8/6/2015.

7] There cannot be dispute about the trite principle as laid down in the case of Subramaniam and Iris Computers (supra) that a Magistrate does not have any power under the Code of Criminal Procedure to recall, review or reconsider his own order howsoever illegal it might be. However, these principles do not cover the case of the present nature where it is not a matter of legality or otherwise of the order passed by the Magistrate but the manner in which the order was procured by misleading the Court by suppressing material facts and circumstances. Therefore, here is not a case where a jurisdiction not vested in the Magistrate was invoked by him. It is a case of bare and simple fraud practised upon the Court and it is trite that fraud vitiates everything. The two Courts below have rightly referred to and relied upon the decisions of the Supreme Court including the one in A.V.Papayya Sastry and others V/s Government of A.P. and others; AIR 2007 S.C. 1546 and K.D.Sharma V/s Steel Authority of India and others; (2008) 12 SCC 481. It is not a matter that the Magistrate having exercised a jurisdiction which is not vested in him but has exercised the powers which

inherits in him in cancelling/recalling his order which according to him was procured by practising fraud.

8] Now the facts which according to the two Courts below constituted misrepresentation or fraud need to be discerned. Admittedly, the petitioner had initially filed OMCA No.604/2014 alleging *inter alia* that the respondent No. 2 had indulged in misappropriation of the funds of NIMA Nanded to the tune of Rs.2,96,209/-. The learned Magistrate had directed Police Station, Shivajinagar, Nanded to investigate it under Sub Section 3 of Section 156 of the Code of Criminal Procedure and accordingly Crime No.133/2014 was registered. As a result of the inquiry, he submitted report under Section 173 of the Code of Criminal Procedure to the effect that it was a false complaint and no offence was committed. It is to be noted that the complaint was filed only against the respondent no.2 herein. It was filed on 11/8/2014 and the period of alleged fraud was mentioned as from 1/10/2012 to 8/3/2013.

9] It is also admitted that the petitioner thereafter, filed the present complaint OMCA No.522/2015 wherein the respondents no.1 and 2 both were shown as proposed accused. It was filed on 2/5/2015 with the allegation that the respondent no.1 had misappropriated an amount of Rs.10,000/- on 9/10/2012. The learned Magistrate by order dated 8/6/2015 directed Police Station Bhagya Nagar to carry out investigation under Sub Section 3 of 156 of the Code of Criminal Procedure.

10] *Ex facie* it is apparent that the items of misappropriation in respect of which the first complaint was filed did not include the item of Rs.10,000/- which was alleged in the second complaint. Based on this distinction the learned advocate for the petitioner strenuously submitted that there was no duplication. The items of misappropriation were distinct and there was no misrepresentation or suppression of material facts.

11] It is also pertinent to note that several other facts are relevant and one cannot simply go by the distinction in the items of misappropriation in the two complaints. The two Courts below have clearly and rightly demonstrated as to how the petitioner ingenuously made an attempt to misuse process of law by suppressing material facts. They have pointed out that the petitioner all the while knew that his first complaint was transmitted to Shivaji Nagar Police Station for investigation under Sub Section 3 of 156 of the Code of Criminal Procedure. He was also aware that he was unable to procure any charge sheet to be filed since the Investigating Officer had confirmed that there was no substance in the complaint and no offence was committed. Not only this but even the petitioner had lodged a separate complaint with Police Station Shivaji Nagar in respect of allegation regarding misappropriation of Rs.10,000/- committed by the respondent no.1 which formed part of his second complaint. The matter was apparently investigated and it was also found that there was no substance in the allegation.

A report to that effect was submitted by the concerned Police Sub Inspector to the Police Inspector of the Police Station dated 7/6/2015. It had actually sealed the fate of that part of allegation. Faced with the situation, the petitioner filed the second complaint for the self same item of Rs.10,000/-.

12] A careful reading of the O.M.C.A. No.522/2015 shows that in addition the petitioner had conveniently omitted to disclose he having already filed the complaint about that item of misappropriation with the concerned Police Station but no substance was found in it. It is also important to note that perhaps in order to come out of such situation, the petitioner made further allegations regarding misappropriation of few more items.

13] However, it is important to note that the two Courts below have clearly demonstrated that it was not merely a matter of non-disclosure of the fact of petitioner having filed a complaint with Shivaji Nagar Police Station in respect of the item of misappropriation of Rs.10,000/-. The petitioner also indulged in misuse of process by approaching a different Magistrate and had solicited the order which was subsequently set aside by the impugned order. They have pointed out that the jurisdiction of the Magistrate at Nanded at the relevant time was earmarked for specific Police Station. The cases pertaining to the jurisdiction of Police Station Shivaji Nagar were assigned to Third Judicial Magistrate, First Class, however, apparently with a view to avoid

the second complaint from being placed before the same Magistrate, the petitioner ingenuously while filing the second complaint invoked the jurisdiction of Judicial Magistrate, First Class Court No.1 by showing that the offence was committed within the jurisdiction of Police Station Bhagya Nagar. If the parties were same, if the misappropriation was in respect of the funds of the same institution and when the first complaint was filed by pointing out that the offence was committed within the jurisdiction of Police Station Shivaji Nagar, the petitioner while filing the second complaint made it look as if the offence was committed in the jurisdiction of Police Station Bhagya Nagar, apparently to enable him to go before another Magistrate. This is precisely a serious matter, noted by the learned Magistrate and the Revisional Court, which constituted fraud on the Court.

14] In my considered view, there is no illegality committed by the learned Magistrate in recalling his own order and even no illegality has been committed by the learned Additional Sessions Judge in dismissing the revision.

15] The Writ Petition is dismissed. The rule is discharged.

(MANGESH S. PATIL,J.)

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