

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

Criminal Application No. 03155 of 2016

District : Nandurbar

Rajabhau s/o. Shankar Nagare,
Age : 56 years,
Occupation : Pensioner,
R/o. D-201, Janki Niwas,
Tapovan, Near Pathanwadi,
Malad (E), Mumbai 400 097.

.. Applicant

versus

1. The State of Maharashtra,
Through Police Inspector,
Police Station, Akkalkuwa,
Taluka Akkalkuwa,
District Nandurbar.

2. Amsha s/o. Fulji Padvi,
Age : 56 years,
Occupation : Agriculture,
R/o. Koylivihir,
Taluka Akkalkuwa,
District Nandurbar.

.. Respondents.

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Mr. S.S. Thombre, Advocate, for the applicant.

*Mr. A.A. Jagatkar, Addl. Public Prosecutor, for
respondent no.01.*

Respondent no.02 served (Absent).

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 01ST AUGUST 2018.

JUDGMENT :

01. Present application has been filed by original accused, challenging the order below Ex.50 in R. C. C. No. 117 of 2013 by learned Judicial Magistrate First Class, Akkalkuwa, Dist. Nandurbar; whereby the application filed by accused/ applicant for discharge came to be rejected.

02. In short the facts leading to this application under Sec. 482 of Code of Criminal Procedure are that, original complainant/ present respondent No. 2 has filed a private complaint stating that accused No. 1 is working as field officer with M/s. Avtar Enterprises, Mumbai. Accused No. 2 to 4 are government servants. Accused No. 2 (present applicant) had published government letter/ circular, by conspiring with accused No. 1 on 04-02-2010. The said letter was sent to Zilla Parishad, Nandurbar on 11-02-2010. On the basis of said letter, accused No. 3 and 4 prepared another letter on 11-03-2010 to all the Sarpanch within the jurisdiction. The said letter was in respect of entry of husband and wife to be taken on form No. 8 and the updated CD was to be prepared by the company. The Company was to get Rs.25/- per entry. It was alleged that without any verification, amount was collected to the extent of Rs.2 to 2.5 Crores from Akkalkuwa Taluka by giving fabricated receipts. There is conspiracy between accused No. 1 to 4. Complainant had made complaint with Collector, Nandurbar; however,

it was not taken seriously. General public is being defrauded by showing the letter issued by Government. Fabricated documents have been prepared. Therefore, complainant had prayed for sending matter for investigation under Sec. 156 (3) of Code of Criminal Procedure.

03. It appears from the record that after taking verification and perusing the documents, learned Magistrate has asked police to make inquiry under Sec. 202 of Code of Criminal Procedure. Police made inquiry and submitted report. It was positive i.e. In favour of complainant only in respect of accused No. 1 and 2. Complainant was called upon to submit his say on the said report. He has filed his say. After hearing complainant, learned Magistrate has dismissed the complaint under Sec. 203 of Code of Criminal Procedure against accused No. 3 to 5 and issued process for the offence punishable under Sec. 420, 409, 468, 471 r/w. 34 of Indian Penal Code against accused No. 1 and 2 vide his order dt. 10-06-2015.

04. Present applicant/ accused No. 2 appeared in the matter. Complainant has led evidence before charge. He has examined 7 witnesses. Accused No. 2 has reserved the cross. Learned Magistrate has passed order on 13-04-2016 that material on record is sufficient to frame charge.

05. Thereafter, accused No. 2 has filed an application at Ex.50 under Sec. 239, 245 of Code of Criminal Procedure for discharge. It was submitted that he was not called by the investigating officer to explain any circumstance. Process has been issued only on the basis of assumption and presumption that he had issued the letter. It was necessary to see whether he had really issued that letter or not. His signature was not obtained during the inquiry for comparing it with original. Original documents have not been seized. Zilla Parishad Dhule ought to have confirmed as to whether the said letter was issued by Mantralaya or not, before circulating the said letter. No evidence has been collected to show how had sent the said Fax message. Accused No. 2 is a Government Servant, therefore, prior sanction was necessary under Sec. 197 of Code of Criminal Procedure to prosecute him. Learned Magistrate has not considered it and therefore, no case was made for framing charge against him. He therefore, prayed for the discharge.

06. Complainant has filed his say stating that accused can not be discharged at that stage. Evidence has been led and material was brought on record to show the involvement of accused No. 2.

07. After hearing both sides, the learned Magistrate has rejected the said application. Hence, this application.

08. Heard learned Advocate Shri. S. S. Thombre for applicant and learned A. P. P. Shri. A. A. Jagatkar for respondent No. 1- State. Notice was issued to respondent No. 2/ complainant, but he refused to accept. It has been taken as proper service. In order to cut short, I would like to say that both the learned Counsels have argued in support of their respective contentions.

09. The first and the foremost fact required to be taken note of is that though detailed grounds were raised by accused No. 2 for discharge, the learned Magistrate has passed a very cryptic order, without dealing with the points raised in the application. Such a cryptic order can not be allowed to sustain. Though a formal order of proceeding with the matter to frame charge was passed on 13-04-2016, actual charge was not framed on the day when the application Ex. 50 was given. Therefore, there was no hurdle for learned Magistrate to consider the application Ex.50 on merits. That application has been rejected only on the ground that though opportunity was given to accused No. 2 to cross examine, he has not cross-examined witnesses examined by complainant, especially Ex.37 letter. It appears that learned Magistrate lost sight of the basic principle that complainant/ prosecution has to prove the guilt of the accused beyond reasonable doubt. Though the stage of the case was

prima facie, even at that stage certain evidence was required to show that matter can proceed against accused No. 2. Learned Magistrate has also sight of the basic ingredients of the offences with which accused No. 2 was charged or was required to face the trial. In order to prove offence under Sec. 465, 468 and 471 of Indian Penal Code, there should have been evidence, even prima facie that, the said disputed letter was issued by accused No. 2. The letter Ex.37 bears the signature of sender. The report submitted by police under Sec. 202 of Code of Criminal Procedure does not show that specimen signatures of the accused No. 2 was taken and then after seizure of original, it was sent for the opinion of the handwriting expert with specimen signatures. It appears that police as well as learned Magistrate proceeded on the presumption that the said letter was issued by accused No. 2. It appears from the report that no inquiry was made with the accused No. 2, though inquiry was made with accused No. 3. There was no effort to seize the original letter. When the allegation is in respect of preparation of a false document, then the document which is said to be false, should have been seized. What was received by Zilla Parishad was the Fax. There is no inquiry about the fax number, whether it is from Mantralaya, Mumbai or from some other place. When the inquiry was based on presumption, then learned Magistrate ought to have been very careful, even at the time of issuance of process. Guilt of the accused

can not be established on the basis of such presumption, when the law requires that it should be proved beyond reasonable doubt. Only exception would be given in law itself.

10. Merely because the accused No. 2 had not asked any question in cross, to the witnesses examined by complainant, it can not be concluded that there is prima facie case against him. Learned Magistrate should independently assess the material on record from all angles and then come to the conclusion as to whether case is made out for framing charge. He was not supposed to consider whether accused can be convicted or not, but at the same time it should be seen as to whether all the basic requirements have been adhered to or not. Accused has right to even keep mum, but then it for the prosecution to prove the guilt of the accused beyond reasonable doubt.

11. Another important fact, which has been missed by the learned Magistrate at the time of issuance of process as well as passing order on 13-04-2016 and 18-05-2016 that accused No. 2 is admittedly government servant. It is alleged that letter Ex.37 was issued by him in the said capacity as government servant. Therefore, it was necessary for the learned Magistrate to consider whether sanction to prosecute was required or not. The point in respect of bar for taking cognizance under Sec. 197 of Code of Criminal

Procedure was not at all dealt with. The facts of the case clearly showed that such sanction was required. The said letter was stated to be issued in the capacity or purporting to be in the said capacity as government servant. No efforts were made by police to obtain the sanction, nor complainant has complied with it. When such sanction was mandatory and it was not obtained, the cognizance of the offence itself was illegally taken. There was no point in proceeding with the trial, with such defect in the trial. Therefore, learned Magistrate ought to have discharged the accused No. 2.

12. Learned Magistrate did not consider the ingredients of offence under Sec. 420 of Indian Penal Code. He failed to consider that there was no direct contact between those persons from whom amount of Rs.25/- was collected and accused No. 2. There was no evidence on record to show common intention. Report of the police was silent on the point how much amount was actually collected, by whom, where it has been kept or who has received the said amount. With out going into all these details, the Police Officer had filed report. It was sheer abuse of process of law. When the matter was sent for inquiry to him, he ought to have conducted a detailed inquiry, involving all the points. When it was alleged that large number of persons were affected by the said act, then the police officer ought to have been sensitive enough. It

appears that taking into consideration the seriousness of the case, investigation papers were called and affidavit in reply by Superintendent of Police was also called by this Court. Affidavit in reply filed by Superintendent of Police, Nandurbar filed before this Court, would show that he has made inquiry in respect of fax number. He states that inquiry with BSNL as well as with one Choudhari Sanjay from Mulund East, Mumbai. He has stated that he was having that number earlier, but he has never used the Fax facility. At the end he has stated that "after considering material available, it can be gathered that Avtar Enterprises is not yet traced. Neither the persons those who have collected Rs.25/- are also not traced out as their whereabouts are not known". Thus, it can be seen that even till today the investigating machinery is not certain as to who are the real culprits. No doubt, the report of Superintendent of Police was not before Magistrate, but whatever evidence was adduced by complainant, was certainly not sufficient to frame charge. Therefore, the order passed by learned Magistrate to that effect deserves to be set aside. Hence, following order:

ORDER

1. Application is hereby allowed.
2. Order of framing charge against present applicant/ original accused No. 2 in R. C. C.

No. 117 of 2013 (Old No. 128 of 2010) passed by Judicial Magistrate First Class, Akkalkuwa, Dist. Nandurbar on 13-04-2016 and order of rejection of application Ex.50 filed therein by accused No. 2, passed on 18-05-2015 is hereby quashed and set aside.

3. Accused No. 2 in the said case stands discharged from the offence punishable under Sec. 420, 465, 468 and 471 of Indian Penal Code.

4. His bail bonds stand cancelled.

(Smt. Vibha Kankanwadi)
JUDGE

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