

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

Criminal Application No.3325 of 2005

* Kishor s/o Kisandas Bora,
Age 50 years,
Occupation : Business,
R/o. Sanmitra Housing Colony,
Behind Zopadi Canteen,
Savedi, Ahmednagar. **.. Applicant.**

Versus

- 1) The State of Maharashtra,
Through the Secretary,
Home Department, Mantralaya,
Mumbai.
- 2) The Police Station Officer,
Topkhana Police Station,
Ahmednagar.
- 3) Sachin s/o Bhimrao Kale,
Age 26 years,
Occupation: Social Work,
R/o Behind Chhaya Talkies,
Topkhana, Ahmednagar.
- 4) Shir. R.P. Abhinkar,
Age 52 years,
Occupation: Service,
The then Police Inspector
Police Station Topkhana,
At present Posted with the
Railway Police at Pune
District Pune.
- 5) Shri. Nisar Shaikh,
Age 50 years,
Occupation: Service
The then police Inspector
Police Station Topkhana,

At present posted at
Police Training College Nashik.

- 6) Shri. Ramakant Jawale,
Age 58 years,
Occupation: Retired
The then Sub Divisional Police
Officer, Sub Division Police Office
Ahmednagar,
Now residing at Shahada,
District Nandurbar.

.. Respondents.

Shri. R.R. Mantri, Advocate, for applicant.

Shri. P.G. Borade, Additional Public Prosecutor, for
respondent Nos.1 and 2.

Shri. S.G. Chapalgaonkar, Advocate for respondent No.6.

**Coram: T.V. NALAWADE &
K.L. WADANE, JJ.**

Date: 8 JUNE 2018

JUDGMENT (Per T.V. Nalawade, J.):

1) The proceeding is filed under Articles 14, 21, 226 and 227 of the Constitution of India. Initially, the proceeding was registered as Criminal Writ Petition No.595/2005. Due to the order made by this Court, the proceeding was then made under the provision of section 482 of the Code of Criminal Procedure and it was given Criminal Application No.3325/2005.

2) The proceeding is filed for the main relief of quashing of F.I.R. No.I-231 of 2005 registered in Topkhana Police Station Ahmednagar. After filing of the proceeding, charge sheet came to be filed in this crime and to the said case number is given as R.T.C.No.169/2006 in the Court of the Chief Judicial Magistrate, Ahmednagar. Charge sheet is filed for offence punishable under section 420, Indian Penal Code and sections 3 & 7 of Essential Commodities Act.

3) The proceeding was filed on 30-11-2005 in this Court though initially it was filed for quashing of F.I.R.. The F.I.R. was registered on 2-10-2005. On 20-12-2005 notice was given to the learned A.P.P. for the State and the notice was waived by learned Additional Public Prosecutor. On the same day this Court made interim order for granting interim relief in terms of prayer clause (D) of the original proceeding. Interim relief in terms of prayer clause (D) was as follows :

"(D) Pending the admission, hearing and disposal of the present writ petition, stay further proceedings on the basis of the F.I.R. being Crime No.I-231/2005 registered at Topkhana police station, Ahmednagar."

4) Even when interim relief of aforesaid nature was granted by this Court on 20-12-2005 police filed charge sheet on 31-3-2006. After that application for amendment of the proceeding was filed and prayer was made for permission to add other police officers as party respondents. This application was allowed by this Court on 24-10-2007. Subsequent developments including the development of filing of charge-sheet came to be mentioned in paragraph 7 of the proceeding which is a prayer clause and in the prayer clause new prayers were made like relief of quashing of the charge sheet and also relief of compensation of Rs. fifty lakh from the respondents. The respondents are State Government, concerned police station, original informant, the police officer who filed charge sheet and respondent Nos.5 and 6 are the police officers who were involved in actual investigation.

5) On merits, on 30-9-2010 this Court granted the relief of quashing of the criminal case itself. In the same order this Court observed that the matter cannot end there and other things need to be inquired into due to the

subsequent developments and also the amendment made in the proceeding. This Court has mentioned three things which need to be decided, in the order made on 30-9-2010 and they are as under :-

"(I) Whether by filing the charge sheet against the applicant, the police had committed contempt of Court ?

(II) who is responsible for filing of the charge sheet ?

(III) If the complaint against the applicant was malicious and he was wrongfully restrained due to his arrest, whether he is entitled to any compensation from the respondents ?"

The order dated 30-9-2010 made by this Court is not challenged by the respondents. Though respondent Nos.4 to 6 were added by making amendment in the proceeding in the year 2007, they did not file reply till the date of the order i.e. 30-9-2010. In this order dated 30-9-2010 this Court directed these respondents to file reply affidavit in view of aforesaid specific points raised for consideration by this Court. The respondents then filed reply affidavit. Though there are specific allegations of misuse of power by respondent No.5, Police Inspector, who effected arrest,

learned Additional Public Prosecutor represented this Police Inspector. Respondent No.6, who was Sub Divisional Police Officer ("SDPO") had retired prior to service of notice and so he appointed private counsel. When the present matter was heard, both the police officers had already retired.

6) For deciding the aforesaid three points some relevant facts which necessitated raising of the points need to be mentioned and they are as under :

(i) The applicant is a businessman and at the relevant time he was dealing in food items like milk powder, chemicals like caustic soda and other articles including appliances. He had obtained necessary licences and permission including the permission of Food Department.

(ii) At the relevant time milk powder was not controlled by any Order which can be issued under the Essential Commodities Act.

(iii) The incident in question took place on 2-10-2005. On that day, the applicant had loaded packets of milk powder

and caustic soda into a tempo as these items were to be sold and reached to a customer. The driver of the vehicle, Tempo-407, bearing No.MH-10-K-6001 was present in front of the shop of the applicant and the shop is situated in Ahmednagar. The driver of the tempo was also arrested and he is made accused in the aforesaid matter.

(iv) One Sachin Kale who had called himself as social worker gave report to police on 2-10-2005 that the aforesaid material was being taken to Baramati and he had information that the material was to be used for preparing milk.

(v) On the basis of the F.I.R. given by Sachin Kale, initially crime was registered for offences under sections 420, 328, 308, 120B of IPC and also under the aforesaid provisions of the Essential Commodities Act at 11.15 a.m. of 2-10-2005.

(vi) On 2-10-2005 police went to the shop of the applicant, started search of the tempo and some places belonging to the applicant and his relatives and started preparing panchanamas. The process as per the record

was started at 11.15 a.m. of 2-10-2005. The police seized the milk powder and the caustic soda which were already loaded in the tempo. From the tempo the packed milk powder and packed soda and these items found in the premises of the present applicant were taken over. The record like account books, vouchers, bills and invoices were taken over to trace the customers of the applicant. Samples of milk powder and caustic soda, found in the tempo, were collected under panchanama for sending them to laboratory for testing.

(vii) The aforesaid samples were sent to laboratory for testing during the course of investigation but no adulteration was found in the samples.

(viii) During the course of investigation statements of some purchasers who had purchased milk powder came to be recorded and even samples of the milk found in the dairy of the customer was taken over. It is not the case of the prosecution that said samples were found to be adulterated.

(ix) Present applicant was shown to be arrested at 4.00 a.m. of 3-10-2005 when the driver was shown to be arrested immediately after completion of the panchanamas prepared on 2-10-2005.

(x) SDPO - respondent No.6 remained present during the search of the tempo and also the premises of the applicant and of his relatives and his name is mentioned in the record of the search. The panchanamas were prepared in the presence of panch witnesses by respondent No.5, Police Inspector, who made investigation. On 3-10-2005 both the Police Inspector and the SDPO remained present before the Judicial Magistrate First Class and the SDPO made submissions before the Judicial Magistrate for obtaining police custody remand against the applicant. The learned Judicial Magistrate refused police custody remand. The Magistrate committed the applicant to magisterial custody and on 3-10-2005 the applicant came to be released on bail and it was probably in the evening of 3-10-2005.

7) This Court has quashed the criminal proceeding by holding that in the F.I.R. and in the charge sheet there is virtually no material to make out a *prima facie* case against the applicant. It is observed by this Court that there was virtually no reason for arrest of the applicant as no provision of the Indian Penal Code or of the Essential Commodities Act was attracted and police ought to have made necessary inquiry before taking drastic steps like arrest. It needs to be observed that even when the interim order was known to the respondents as learned Additional Public Prosecutor had represented the State and the concerned Police Station, the charge-sheet was filed and it was in breach of the interim order made by this Court.

8) The material collected as it is shows that the applicant is a vendor of milk powder, chemical substances including caustic soda and appliances. In the past, he was not found involved in any kind of adulteration much less adulteration of milk. There was no prohibition for possession and sale of both caustic soda and milk powder and he could have sold those items to any customer. In

view of these circumstances, it was not possible to draw inference that for preparing adulterated milk, the milk powder and caustic soda were being purchased by those persons and it was within the knowledge of the applicant that they intended to use these substances for adulteration of milk and he was helping them in that activity. Even on the date of the charge-sheet police could not trace any person who was vendee of the applicant and who was found involved in adulteration of milk.

9) In the background of aforesaid facts and circumstances the contentions of both sides need to be considered for deciding the aforesaid points raised by this Court.

10) It is the case of the applicant that on that date even when he had not committed any offence and the allegations did not constitute any offence, the police harassed him by taking search not only of the tempo, but the premises belonging to him and his relatives and police remained there from 11.45 a.m. of 2-10-2005 to 3-10-2005. It is his contention that his family members were

also harassed by police. It is his contention that police seized the milk powder worth Rs. three lakh and the caustic soda worth Rs.42,000/- and that way caused loss to his business. It is his contention that right from 11.45 a.m. of 2-10-2005 police restricted his movements and he was taken into custody by police though police showed that he was arrested at 4.00 a.m. on 3-10-2005. It is his contention that false record of arrest is prepared as he was actually taken in custody much prior to that and panchanamas were prepared prior to 8 p.m. of 2-10-2005. He has contended that even when provisions of sections 328, 308 of the Indian Penal Code were not applicable, those provisions were also used against him to get police custody. It is his contention that even no order was issued putting restriction on sale or possession of aforesaid items under the Essential Commodities Act, provisions of this special Act were used with mala fide intention and only to detain him illegally. It is his contention that the SDPO remained present during entire search and for getting police custody remand only to create seriousness in the matter and everything was done for extraneous consideration by respondent Nos.5 and 6. It is the

contention of the applicant that prior to the incident in question the annual turn over of his business was more than Rs. three crores and after that the turnover came down to Rs. one crore and he started sustaining loss of around Rs. 15 lakh per year. It is contended that only due to this action of police he sustained loss in business. It is his contention that he is required to spend on the case also. It is his contention that he then suffered heart problem due to this action of police. On all these grounds, he has claimed Rs.50 lakh as compensation from the respondents.

11) It is contended by respondent No.5, Police Inspector who effected arrest that in the FIR given by the first informant there was allegation that the applicant was selling milk powder and caustic soda for adulteration purpose and so action was taken. He has contended that on that date the applicant could not show any material or document for possession of such huge quantity and he did not inform that he was possessing necessary licences. He has contended that there was reasonable information and so provision of section 328 IPC was used against the

applicant. He has denied that action was taken for extraneous consideration or the action was illegal. Respondent No.6 has contended that respondent No.5 was the investigating officer and as this police station was under control of respondent No.6, he remained present during action and only due the request made by respondent No.5 he remained present before the Judicial Magistrate for obtaining police custody remand. These contentions of respondent Nos.5 and 6 themselves show that they are hollow contentions, there is no force in these contentions. The reasons for the same are already given.

12) Respondent No.4 has filed reply and has contended that he was not informed by respondent No.5 that there was interim order of the Court. It is his contention that investigation was already over and he only filed charge-sheet. This contention is also not acceptable as before filing charge sheet it was necessary for him to consider the material and to get satisfied that there was *prima facie* case for the offences mentioned in the charge sheet. It is already observed that the allegations even if they are considered as they are, and the material was not

sufficient to make out *prima facie* case. The applicant was simply a vendor of milk powder and caustic soda and he was selling these articles to the customers.

13) The record and the panchanama show that the search was started at 11.45 a.m. of 2-10-2005 and it was continued up to 3-10-2005. It is not disputed that not only the shop premises of the applicant but also the premises of his relatives were searched and the articles like milk powder and caustic soda were taken over from those places. However, no incriminating articles were found in those places. Though, police showed that the applicant was arrested at 4.00 a.m. of 3-10-2005 and if that contention is accepted it can be said that right from 11.45 a.m. of 2-10-2005 to 4.00 am. of 3-10-2005 the applicant was kept in the company of police by restricting his movements and he was illegally detained. It is not the case of the respondents that the applicant was not cooperating or he ran away. Thus, in ordinary course it was possible for police to show that the applicant was arrested after preparation of panchanama on 2-10-2005 but the arrest was shown to be made at 4.00 a.m. on 3-

10-2005. These circumstances show that police intended to create false record. There is no reason to disbelieve the applicant on his contention that he was virtually detained right from 11.45 a.m. of 2-10-2005 and he was released only due to the order made by learned Judicial Magistrate on 3-10-2005. In ordinary course he must have been released from custody in the evening of 3-10-2005. Police custody remand was demanded from the Judicial Magistrate by police even when there was no material. The Judicial Magistrate has considered all the aforesaid material and has observed that no prima facie case was made out and there was no reason to grant police custody remand. Thus, it can be said that in the chain of events there was at least one wise and fair man and due to him the further illegal detention was prevented.

14) From the aforesaid material and circumstances inference is easy that the action like arrest, the search and filing of charge-sheet by police in the present matter was mala fide and it was done with ulterior motive. Inference is easy that it was done for extraneous consideration. The SDPO remained present only to show

that the matter was serious and these circumstances support and strengthen the contentions of the applicant.

15) The contention of the respondents that crime was registered and so the search and the arrest cannot be called as illegal and mala fide is not acceptable. Superior police officer, of the rank of SDPO was involved in the matter and it cannot be accepted that he did not know that no offence could have been made out due to aforesaid allegations made against present applicant. The applicant was only a vendor and there was no allegation that he was in fact involved in adulteration of milk. Even if the police could have traced the customer using this material for adulteration, at the most, the present applicant could have been used as witness against that person to show that this material was sold by him to the said customer. Thus, everything was done arbitrarily by showing high handedness. In such circumstances State is also vicariously liable as the powers given to the public servants were misused and the aforesaid things were done by posing that they were discharging the duties. Though the State can be held liable directly in such case, it is the

duty of the Court to see that such officers suffer first. By using such *modus operandi* some public servants are virtually committing offence of extortion and they are harassing even honest businessmen and such incidents are increasing day by day.

16) It is true that when there is allegation of infringement of rights given by Article 19 or 21 of the Constitution of India, the burden of initial proof is on the applicant. It is also true that in such cases, the Courts need to proceed with the presumption that public servants were acting in due discharge of duty. In such cases as soon as *prima facie* case is made out of violation of fundamental right, the onus shifts on the respondents and it becomes necessary for them to show that there was material to make out *prima facie* case for such action. If the respondents fail to show such material, the Court can accept safely the contention of the applicant that there was infringement of his fundamental rights and for that provision of section 106 of the Evidence Act can be used in favour of the applicant and the respondents may not be in a position to take support of provision of section 114(e)

of the Evidence Act.

17) In the present matter, the first informant had no material at all to substantiate the allegation and the F.I.R. was not making out any *prima facie* case. It is already observed that even after search, no incriminating material was recovered. The provision of Article 21 has wide scope and it says that the accused has a right of fair investigation. The State has a duty to enforce human rights of fair and impartial investigation. Roping of person in criminal prosecution and unnecessary arrest of such person definitely violates the fundamental right of personal liberty as enshrined in Article 21 of the Constitution India. Though presumption of innocence is a part of human right and it is not fundamental right under Article 21 of Constitution of India, the fairness needs to be shown by the public servant during investigation. If the fairness is not shown and material as above is there, the Court is expected to step in under Article 21 of the Constitution of India. On this point, learned counsel for the applicant has placed reliance on a case reported as **(2001) 2 SCC 700 [J.K. (Bombay) Ltd. v. Bharti**

Mishra]. The Apex Court has laid down that the State must be held responsible for the unlawful acts of its officers and it must repair the damage done to the citizen by its officers by violating of the inalienable fundamental rights of personal liberty and when they show highhandedness and when they act without authority in law. In the case reported as **(1998) 5 SCC 419 (Mohd. Zahid v. Govt. of NCT of Delhi)** when there was illegal arrest, prosecution and sentence, the Apex Court set aside the sentence and ordered to pay Rs.50,000 as compensation to the victim which was to be recovered from the erring police officers. Thus, it is settled that once violation of fundamental right guaranteed under Article 21 of the Constitution of India is established Court may award compensation.

18) The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India can take cognizance of the entire facts and circumstances of the case and can pass appropriate orders to give complete and substantial justice. Once the Court is satisfied about arbitrariness or injustice, there is no restriction or rule

which can stand in the way of rendering justice. Further, there is inherent power to High Court under section 482 of the Code of Criminal Procedure which can be used with Articles 226, 227 of the Constitution of India. The present proceeding is filed under Articles 226, 227 read with Articles 14 and 21 of the Constitution of India. Only due to the order made by this Court the proceeding was treated as application under section 482 of the Cr.P.C. However, subsequently this Court realized that there was something more in the present proceeding and that is why the aforesaid three points were raised by this Court. This Court holds that while raising the points this Court had made it clear that this Court was to use jurisdiction under Article 226 of the Constitution of India. It cannot be disputed that monetary compensation relief can be granted by way of consequential relief also. In public law, claim for compensation is remedy available under Article 226 of the Constitution of India for protection and infringement of fundamental rights. On this point, cases reported as **AIR 1990 SC 513 (SAHELI a Women's Resources Centre v. Commissioner of Police, Delhi)** and **(2002) 7 SCC 478 (Rabindra Nath Ghosal v. University**

of Calcutta) can be referred. The case reported as **AIR 1994 SC 1349 (Joginder Kumar v. State of Uttar Pradesh)** was cited. This case was used by this Court in **Criminal Writ Petition No.162/1998 at this Bench (Ramrao and Others v. State of Maharashtra & Others)**. In Joginder Kumar's case (cited supra) the Apex Court has made some observations which are relevant and they are as under.

"No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for exercise of it is quite another. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter."

19) In view of the facts and circumstances of the present case and also the position of law, this Court holds that entire action of police was mala fide and it was not

permissible in law. There was infringement of fundamental rights. The arrest was not at all necessary and the detention in police custody was also not authorized. This action of police caused harassment not only to the applicant but to his family members. Due to this harassment the applicant must have suffered in business also. There is no reason to disbelieve the contention of the applicant that he suffered physically also and he developed heart ailment. He must have spent money for getting out of the custody and he must have spent on the present proceeding also. The action has definitely harmed the reputation of the applicant. For all these reasons and for keeping a lesson to like-minded public servants this Court holds that respondents need to be directed to pay compensation which needs to be substantial.

20) Respondent No.4 filed charge sheet even when there was interim relief but he was not involved in the search, seizure and arrest. This Court holds that giving him warning will be just and sufficient in the present matter.

21) Hearing was given on the point of quantum of compensation to both the sides. Considering the status of the parties and the aforesaid circumstances this Court holds that giving direction to both respondent Nos.5 and 6 to pay Rs.5 lakh (Rupees Five Lakh Only) by each of them will be just and sufficient. This amount is awarded as compensation. Due to their conduct the amount needs to be first recovered from them and only if Court finds it impossible to recover from respondent Nos.5 and 6 the Court will give direction to the State to deposit the said amount. As the matter is restricted by this Court to the aforesaid extent, the other points need not be dealt with in detail. Thus the relief of compensation needs to be given in favour of the applicant. In the result, following order.

22) Criminal Application No.3325/2005 is allowed as follows :

(i) Warning is given to respondent No.4 Shri. R.P. Abhinkar who filed charge sheet.

(ii) Respondent Nos.5 and 6 - Shri. Nisar Shaikh and Shri. Ramakant Jawale are hereby directed to pay Rs. Five Lakh each to the applicant by way of compensation. The amount is to be deposited by them within 45 days from today. Every attempt is to be made to recover this amount from respondent Nos.5 and 6. The amount is to be recovered by attaching first their movable property and then their immovable property. If the Court comes to the conclusion that the amount cannot be recovered from their property, further steps are to be initially taken like keeping them behind bars in civil prison and then asking the Government to deposit the amount. The applicant would be entitled to recover interest at the rate of 8% per annum if the amount is not deposited within 45 days from today. Rule is made absolute in those terms.

Sd/-
(K.L. WADANE, J.)

Sd/-
(T.V. NALAWADE, J.)

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