

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

Criminal Writ Petition No. 01299 of 2016

District : Aurangabad

1. Kalpana Dhanu Kachre,
Age : 34 years,
Occupation : Service,
R/o. Soyagaon Panchayat
Samiti,
Taluka Soyagaon,
Dist. Aurangabad.
2. Arvind Asaram Wagh,
Age : 35 years,
Occupation : Service,
R/o. Sarawati Colony,
Kannad,
District Aurangabad.
3. Ushabai Bhimrao Thorat,
Age : 54 years,
Occupation : Labour,
R/o. Garada,
Taluka Kannad,
District Aurangabad.
4. Gulabchand s/o. Balchand
Rathod,
Age : 50 years,
Occupation : Agriculture,
R/o. as above.
5. Ramesh Tukaram Rathod,
Age : 35 years,
Occupation : Agriculture,
R/o. as above.
6. Sahebrao s/o. Gaba Rathod,
Age : 50 years,
Occupation : Agriculture,
R/o. Garada,
Taluka Kannad,
District Aurangabad.

7. Premchand s/o. Bhika Chavan,
Age : 65 years,
Occupation : Agriculture,
R/o. Garada,
Taluka Kannad,
District Aurangabad.

.. Petitioners
(Original
accused)

versus

1. The State of Maharashtra,
Through Police Inspector,
Kannad Police Station,
Kannad, Taluka Kannad,
District Aurangabad.

2. Wahedkha s/o. Walmahamad
Kha Pathan,
Age : 56 years,
Occupation : Agriculture,
R/o. Garada,
Taluka Kannad,
District Aurangabad.

3. Block Development Officer,
Panchayat Samiti, Kannad,
District Aurangabad.

.. Respondents
(No.02 -
Original
complainant)

.....

*Mr. V.B. Jagtap, Advocate, holding for
Mr. V.D. Sapkal, Advocate, for the petitioners.*

*Mrs. P.V. Diggikar, Additional Public Prosecutor,
for respondent no.01.*

*Mr. Pratik Kothari, Advocate, holding for
Mr. S.S. Bora, Advocate, for respondent no.02.*

Mr. Suhas B. Ghute, Advocate, for respondent no.03.

.....

**CORAM : T.V. NALWADE &
SMT. VIBHA KANKANWADI, JJ.**

DATE : 05TH OCTOBER 2018

JUDGMENT *[Per Smt. Vibha Kankanwadi, J.] :*

01. Present petition has been filed by the original accused persons invoking the powers of this Court under Article 226 and 227 of the Constitution of India and the provisions under Section 482 of the Code of Criminal Procedure, 1973, to quash the Summary Criminal Case No. 602 of 2016, filed before learned Judicial Magistrate (First Class), Kannad, District Aurangabad, on the basis of first information report in Crime No. I-90/2016, dated 24.08.2016, registered with Kannad Police Station, District Aurangabad, for offences punishable under Section 420, 467, 468, read with Section 34 of the Indian Penal Code.

02. The facts leading to the petition are that a private complaint came to be filed on 12.08.2016 by present respondent no.02 before the learned Judicial Magistrate (F.C.), Kannad, District Aurangabad. In the said complaint, it was alleged that four nurseries were granted to village Garada, Taluka Kannad, District Aurangabad, for the year 2012-13. As per the revised budget, 60,000 plants were sanctioned in nursery no.01. However, without preparing such plants, only paper work was done. It was shown that those plants have been grown in Gut no.06 of village Garada, thereby misappropriation of Rs. 2,72,646/- has been committed. Further, for

preparation of plants to the extent of 20,000 for the year 2012-13, in nursery no.02 located at Gut no.08 of the village and as per revised budget for 2013-14, in all 14,000 plants were sanctioned. At that time also, actually those plants were not taken but paper work was done and misappropriation to the tune of Rs. 7,45,768 has been committed. Further, for the year 2012-13, nursery no.03 was located in land Gut no.47 and as per the revised budget, 1,00,000 plants were sanctioned. Again, by doing only paper work, misappropriation has been committed to the tune of Rs. 7,85,164/-. For the year 2011-12, for preparation of 90,000 plants in nursery no.04 situated in the village of accused no.07, sanction was obtained and by showing false record, misappropriation to the tune of Rs. 6,85,051/- has been committed. The complainant had made complaint regarding the said misappropriation with Block Development Officer, Deputy Chief Executive Officer and Chief Executive Officer, Zilla Parishad, Aurangabad, on 04.07.2013 and 05.09.2013. As per the directions given by the higher authorities, Extension Officer, Panchayat Samiti, Kannad, had conducted the enquiry by visiting spots and preparing panchanama, the report was submitted. Even in the said report, the Extension Officer has concluded that there are no such plants as have been shown on the papers. It is, therefore, stated by the complainant, that all the accused persons, in furtherance of their common

intention, without preparing such plants as per the scheme, misappropriated amount of Rs. 24,88,629/-. On the basis of the same, in S.C.C. No.602 of 2016, the learned Magistrate passed order on 20.08.2016, for investigating the matter under Section 156(3) of the Code of Criminal Procedure. On the basis of those directions, Crime No. I-90/2016 has been lodged with the police station.

03. The petitioners have contended that the learned Magistrate has not considered the ratio / guidelines laid down by the Hon'ble Apex Court in *Priyanka Srivastava & another Vs. State of U.P. and others* [AIR 2015 SC 1758]. Further, the learned Magistrate did not consider that no prior sanction under Section 197 of the Code of Criminal Procedure to prosecute public servants was obtained before filing the complaint. There was no *prima facie* case against the petitioners and, therefore, they prayed for quashing the FIR as well as proceedings in S.C.C. No. 602 of 2016.

04. Heard learned Advocate Mr. V.B. Jagtap holding for Mr. V.D. Sapkal, learned Advocate for the petitioners. Heard learned Additional Public Prosecutor Mrs. P.V. Diggikar for respondent no.01. Heard learned Advocate Mr. Pratik Kothari, holding for Mr. S.S.Bora, learned Advocate for respondent no.02. So also, heard learned Advocate Mr. S.B. Ghute for respondent no.03. Perused the documents on record filed by the petitioners as well as police

papers.

05. Learned Advocate appearing for the petitioners vehemently submitted that the learned Magistrate did not follow the guidelines issued in *Priyanka Srivastava's case (supra)*, so also, did not consider that prior sanction under Section 197 of the Cr.P.C. has not been obtained. The order passed by the learned Magistrate does not reflect his application of mind which is *sine qua non* for even sending matter for investigation under Section 156(3) of the Cr.P.C. He relied on the said decision in *Priyanka Srivastava's case*, wherein following observations are made :-

" In our considered opinion, a stage has come in this country where Section 156(3), Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under

Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that the application under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute / family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay / laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR. "

06. Learned Advocate for the petitioners further relied on the decision of the Hon'ble Apex Court in *Anil Kumar & others Vs. M.K. Aiyappa & another [2013 AIR SCW 5570]*, wherein it has been held thus :-

" The word "cognizance" in Section 197 of Code and Section 19 of Prevention of Corruption Act (P.C. Act) has a wider connotation and not merely confined to the stage of taking cognizance of the offence. When a Special Judge refers a complaint for investigation under Section 156(3), Cr.P.C., obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. When a Special Judge takes cognizance of the offence on a

complaint presented under Section 200, Cr.P.C. the next step to be taken is to follow up under Section 202, Cr.P.C. Consequently, a Special Judge under P.C. Act referring the case for investigation under Section 156(3) is at pre-cognizance stage. When a private complaint is filed before the Magistrate, he has two options. He may take cognizance of the offence under Section 190, Cr.P.C. or proceed further in enquiry or trial. A Magistrate, who is otherwise competent to take cognizance, without taking cognizance under Section 190, may direct an investigation under Section 156(3), Cr.P.C. The Magistrate, who is empowered under Section 190 to take cognizance, alone has the power to refer a private complaint for police investigation under Section 156(3), Cr.P.C. Once in a complaint of corruption it is noticed that there was no previous sanction, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3), Cr.P.C."

07. He also relied on the decision of this Court at principal seat in *Pandharinath Narayan Patil & others Vs. State of Maharashtra & another* [2016 Cri.L.J. 146], wherein it was observed that "the application under Section 156(3) of the Cr.P.C. should contain facts disclosing cognizable offence and further that the police has failed to exercise powers under Section 154 despite intimation. Thereafter, the Magistrate in the exercise of powers under Section 156(3) can order investigation of the crime. The powers under Section 156(3) cannot be exercised mechanically but are required to be exercised judiciously." Further, in the same case, it has been held that "when the alleged crime was against police officers did not

include section referred to in explanation to Section 197(1) of the Cr.P.C. The grievance against them was related to acts performed by them in discharge of their official duty. Therefore, power under Section 197 of the Cr.P.C. would be attracted." Similar view was also taken in *Alka Udhav Khaire & others Vs. State of Maharashtra & another*, in Criminal Application No. 4878 of 2016, decided on 17th April 2017, by this Court.

08. Per contra, it has been submitted on behalf of the respondents that, part of the investigation would show that the amount was granted by the State under the scheme wherein it was incumbent on the Gram Panchayat to prepare and distribute them. Budget was given. However, paper work was done and actual work to the extent of budget was not done. The plants in the nursery were tried to be shown. After the complaint was made by the respondent no.02 to the Chief Executive Officer, enquiry was conducted and it was found that no such plants have been grown. Therefore, it is a clear case of misappropriation of government funds.

09. Learned Advocate appearing for respondent no.02 relied on the decision of the Hon'ble Apex Court in *Chandan Kumar Basu Vs. State of Bihar* [MANU/SC/0575/2014 = (2014) 13 SCC 70], wherein proceedings under Section 120B, 406, 409, 420, 467, 468 and 471 of IPC was initiated against the accused,

who was public servant and no sanction for prosecution was obtained, it was held that "it could be no part of duty of public servant or acting in discharge of his official duties to commit any of the offences covered by Section 406, 409 and 420 of the IPC. Official status of public servant could only provide opportunity for commission of offences. Therefore, no sanction for prosecution of public servant for such offences would be required under Section 197 of the Code. Further, the question of sanction could be raised at any time after cognizance had been taken and might be determined at different stages of the proceedings / trial." Similar view was taken by the Hon'ble Apex Court in *Punjab State Warehousing Corporation Vs. Bhushan Chander & others* [AIR 2016 SC 3014]. In *Alka Khaire's case* (supra), wherein it was held that prior sanction in terms of Section 197 of the Cr.P.C. is not required to initiate criminal case against the applicants / public servants.

10. Along with his affidavit in reply objecting the petition, respondent no.02 has filed on record, a written complaint lodged by him with Police Inspector, Kannad Police Station, dated 02.08.2016. Though it has not been stated in specific words in the private complaint, it can be seen that all the documents were perused by the learned Judicial Magistrate and thereafter after confirming the fact that all the parameters / guidelines in *Priyanka*

Srivastava's case (supra) have been fulfilled, the order for investigation under Section 156 of the Cr.P.C. has been passed. Therefore, the respondents have prayed that the petition should be dismissed.

11. The first and the foremost point that is required to be dealt with is that whether the order of sending the complaint for investigation under Section 156 of the Cr.P.C. by the learned Magistrate was legally sound. The contents of the complaint showed that under a government scheme, amount was given for a particular project to achieve a particular target. For each year, amount was given for plantation of trees and for that purpose, it is stated that four nurseries were identified. It is specific contention that only amount was withdrawn and distributed but, in fact, the work was never done, thereby, the amount has been misappropriated. Definitely, it was a government money and, therefore, the contents of the complaint showed cognizable offence. Record has been produced along with the affidavit in reply by the respondent no.02, stating that he had lodged a written complaint with Police Inspector, Kannad Police Station, on 02.08.2016 itself. However, cognizance was not taken. Non-mentioning of the said fact in the complaint cannot be said to be fatal because the learned Magistrate in his order has stated that he has perused all the necessary documents. If the complaint would have

been not filed as per the guidelines issued in *Priyanka Srivastava's case (supra)*, the learned Magistrate would not have taken any further step. Therefore, we cannot infer in the way the petitioner intends. When the complaint was maintainable, the learned Magistrate had every right to exercise his power to send the said complaint for investigation under Section 156(3) of the Cr.P.C.

12. Now, the point of sanction has been raised and for that purpose, reliance has been placed on the judgment in *Anil Kumar's case (supra)*. The ratio cannot be disputed. However, learned Advocate for respondent no.02 has also relied on the decision of the Hon'ble Apex Court in *Chandan Kumar's case (supra)*. In *Chandan Kumar's case*, various earlier pronouncements have been considered. It is to be noted that *Anil Kumar's case (supra)* was dealing with offence under the Prevention of Corruption Act, wherein the Special Judge is treated as Magistrate. Sanction is integral part in respect of offences under the Prevention of Corruption Act, whereas in *Chandan Kumar's case (supra)*, the offences were under Section 120B, 406, 409, 420, 467, 468 and 471 of the Indian Penal Code. Reliance has been placed on the observations in *Satwant Singh Vs. State of Punjab [AIR 1960 SC 266]*, *Harihar Prasad Vs. State of Bihar [(1972) 3 SCC 89]* and *Prakash Singh Badal & another Vs. State of Punjab & others [(2007) 1 SCC 1]*, wherein it was consistently held that, "It can be no part of the duty of a public

servant or acting in the discharge of his official duties to commit any of the offences covered by Section 406, 409, 420, etc and the official status of the public servant can, at best, only provide an opportunity for commission of the offences. Therefore, no sanction for prosecution of the public servant for such offences would be required under Section 197 of the Code." Therefore, we cannot quash and set aside the FIR in this case, on that ground.

13. It has been alleged that the misappropriation in this case is to the tune of Rs. 24,88,629/-, which is definitely stated to be the government money. The statements of witnesses recorded uptill now show that many persons were not even knowing where the nurseries were situated. Documents have been collected to the extent that the amount was sanctioned under the scheme and it has been withdrawn. It appears that, time and again, public officers in-charge of implementation of the scheme visited the sites and they have noted down the discrepancies. Therefore, it appears from the police record i.e. the investigation carried out uptill now, that there is prima facie evidence against the petitioners and, therefore, the inherent powers of this Court under Section 482 of the Cr.P.C. cannot be invoked to quash and set aside the FIR.

14. In the result, the criminal writ petition fails and the same is hereby dismissed.

(Smt. Vibha Kankanwadi)
JUDGE

(T.V. Nalawade)
JUDGE

.....