

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1672 JOF 2017

Kabirroddin S/o Nasiroddin Inamdar, **PETITIONERS**
Age 32 Yrs, Occ. Social Work,
R/o. Phule Nagar, Kaij, Tq. Kaij,
District Beed

V E R S U S

- [1] The State of Maharashtra, Through **RESPONDENTS**
The Superintendent of Police,
Beed, District Beed
- [2] The Deputy Superintendent of Police
[ACB] Beed, District Beed
- [3] The Police Inspector, Police Station
Kaij, Tq. Kaij, Dist. Beed
- [4] Malti Ramchandra Gunde, Age 27 Yrs,
Occ. Household, R/o Near Samarth
Math, Kaij, Tq. Kaij, Dist. Beed

Mr. N.L. Jadhav, Advocate for the petitioners
Mr. R.V. Dasalkar, APP for respondents-State
Mr. S.J. Salunke, Advocate for respondent No.4

W I T H

CRIMINAL WRIT PETITION NO. 1678 JOF 2017

Pashupati S/o Ganpatrao Dangat,
Age 38 Yrs, Occ. Agriculture,
R/o. Awantika Niwas, Dharur Road,
Tq. Kaij, District Beed

PETITIONERS**V E R S U S**

[1] The State of Maharashtra, Through
Secretary, Home Department,
Mantralaya, Mumbai

RESPONDENTS

[2] The Superintendent of Police,
Beed, Taluka & District Beed

[3] The Deputy Superintendent of
Police [ACB], Beed, Taluka and
District Beed

[4] The Police Inspector, Police Station
Kaij, Tq. Kaij, Dist. Beed

[4] Malti Ramchandra Gunde, Age 27 Yrs,
Occ. Household, R/o Near Samarth
Math, Kaij, Tq. Kaij, Dist. Beed

Mr. D.J. Choudhary, Advocate for the petitioners
Mr. R.V. Dasalkar, APP for respondents-State
Mr. S.J. Salunke, Advocate for respondent No.4

W I T H

CRIMINAL APPLICATION NO. 6739 OF 2017

Aditya S/o Ashokrao Patil, Age
30 Years, Occupation Agriculture,
R/o. Kaij, Tq. Kaij, Dist. Beed

APPLICANT**V E R S U S**

[1] The State of Maharashtra, Through
Police Station, Kaij, Tq. Kaij,
District Beed

RESPONDENTS

[2] Malati W/o Ramchandra Gund, Age
37 Years, Occupation Household,
R/o Near Samarth Math, Taluka
Kaij, District Beed

Mr. N.B. Khandare, Advocate for the applicant
Mr. R.V. Dasalkar, APP for respondent-State
Mr. S.J. Salunke, Advocate for respondent No.2

...

**CORAM : T.V. NALAWADE AND
SMT.VIBHA KANKANWADI,JJ.**

DATE : 6th SEPTEMBER, 2018

ORAL JUDGMENT [PER : T.V. NALAWADE, J.] :

All the three proceedings are filed to challenge the order dated 25.09.2017 made in Criminal Regular Application No. 38/2017 by learned Additional Sessions Judge, Ambajogai, District Beed, who is

appointed under the Prevention of Corruption Act, 1988 as a Special Judge for the Act. By this order, the learned Special Judge has directed Anti Corruption Bureau to make investigation under Section 156 [3] of Criminal Procedure Code. The investigation will be for the offences punishable under Sections 420, 465, 466, 467, 468, 471, 406, 409, 120-B read with Section 34 of the Indian Penal Code and Section 13 [1] and 13 [2] of the Prevention of Corruption Act, 1988. Both the sides are heard. Learned A.P.P. supported the order made by learned Special Judge.

2. The proceeding before learned Special Judge was filed by respondent No.2-Smt.Malati, a Councilor of Nagar Palika, Kaij, District Beed. On the date of the proceeding, accused No.1 was the Chief Officer of this local body, accused No.2 was a Contractor to whom the work was allotted by the local body, accused No.3 was the President of this local body, accused No.4 was the Vice-President of local body, accused No.5 was Councilor of local body and accused No.6 was appointed by the local body as Engineer to supervise the work. It is the contention of complainant that accused No.2 is a close relative of accused No.4, and due to the relationship of this accused with the then Divisional Revenue Commissioner, the work was given to accused No.2. The complainant was elected as Councilor from

Ward No.9 [old], and on the date of the proceeding this Ward was given a new Ward No.12. The work was to be executed for this Ward.

3. The work was of construction of cement road and drainage line by the side of the road and the construction was to be made between the house property of one Nakhate and house property of one Bhagwat Gund. The necessary procedure for execution of this work was followed, and for this work, the amount of Rs.7.8 Lac was sanctioned.

4. The case of the complainant is that after few months of allotment of the work, when she made inquiry with the local body, it was informed to her that the work was already completed. As the work was not actually done, she collected information from the local body and then she realized that false record of execution of work was created and an amount of Rs.7.36 Lac was paid to the Contractor, accused No.2. It is her case that accused Nos.3 to 5 had approved the proposal for making payment and then accused No.1 had made the payment for execution of the work order. It is her case that she had given report to Police, but the Police did not act on the said report, and so, she was required to approach learned Special Judge. The order made by the learned Special Judge is challenged

by the then President [accused No.3], the Councilor [accused No.5] and the past president of the local body. The main contentions of the accused, who have approached this Court, can be summed up as follows:-

That the procedure for allotment of the work was followed, and as per the record, the work was shown to be completed in the first week of December, 2015. One Asad, employee of local body, after spot inspection, had given report about completion of work and on that basis, the account section of local body had processed the bills and had prepared proposal for making the payment. That on the basis of such recommendation, order was made by the Chief Officer of the Local Body on 11.12.2015. The report was submitted by Asad Khatil on 11.12.2015 itself. That when present complainant gave report to police, the office was again asked by the applicants to verify the things. That other officer of the office informed that the work was not executed at the site mentioned in the work order. That action was taken by this accused like, asking the Contractor to deposit the amount which he had collected and removal of Engineer from his work. That the work of similar value was executed at other place, but from the same Ward, and so, there was no misappropriation of public money.

5. In all the three proceedings, the impugned order is challenged on grounds like; absence of sanction under Section 197 of Cr.P.C. and Section 19 of A.C. Act. One more point was tried to be raised like authority of learned Special Judge appointed under A.C. Act to make order under Section 156[3] of Cr.P.C., but during arguments, the learned counsel for the applicants conceded that the Special Judge has such powers.

6. The rival contentions show that it is not disputed that the work which was allotted to the Contractor as per the approval given by the authority and mentioned in the work order, was not executed by the Contractor. It is also admitted that the amount which was agreed in respect of the said work was actually paid to the Contractor. Though it was submitted that the Contractor subsequently returned the amount, this submission cannot be considered as a ground of defence at least at this stage. Some steps were shown to be taken, but they were taken after giving report to police by first informant. There is specific procedure for allotment of funds by the State in respect of particular work, allotment of work to Contractor, ascertainment of execution of work and then making payment in respect of the work to the Contractor. As it is contended that after giving of

the report to police, action was taken against both; the Contractor and the Private Engineer, it can be said that the contentions made by complainant about non-execution of work is not disputed by the applicants. So far as legal points are concerned, it can be said that there is no force in the ground of absence of sanction mentioned in Section 197 of Cr.P.C. That point is now well settled. If the act of public servant cannot be said to be the act done in discharge of the duty, law does not require sanction under Section 197 of Cr.P.C. Further, when there is allegation of misappropriation of public money after hatching conspiracy for the same and after creation of the false record of the same, acts done for execution of the conspiracy cannot be called as acts done in discharge of public duty. On this point, the position of law is made clear by the Apex Court in the case reported as **AIR 2007 S.C. 1274 [Parkash Singh Badal and Anr. v. State of Punjab and Ors.]** The Apex Court has further laid down in this case that "the question relating to the need of sanction under S. 197 of Cr.P.C. need not be considered as soon as the complaint is lodged on the basis of allegations made in the complaint and such question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage." In the present matter, the relevant

portion of allegations, the offences involved and admitted facts are mentioned. In view of the facts and circumstances of the present matter, this Court has no hesitation to hold that atleast at the stage of registration of crime or making of order under Section 156 [3] of Cr.P.C., there was no necessity of sanction under Section 197 of Cr.P.C.

7. On the point of tenability of private complaint before Special Judge appointed under P.C. Act and the necessity of sanction for entertaining complaint in view of provision of Section 19 of A.C. Act, following cases were referred :-

- [i] AIR 1984 SC 718 [A.R. Antulay vs. Ramdas Shrinivas Nayak];
- [ii] AIR 1998 SC 889 [Vineetnarain vs. Union of India];
- [iii] AIR 2012 SC 1185 [Subramanian Swamy vs. Manmohan Singh and another];
- [iv] AIR 2014 SC [Supp]1801 [Anil Kumar & Ors. v. M.K. Aiyappa & Anr.]; and
- [v] 2018 DGLS [SC] 224 [Manju Surana vs. Sunil Arora and others].

8. In the cases of **A.R. Antulay** and **Anil Kumar**, cited *supra*, the point of tenability of private complaint for offences punishable under P.C. Act along

with offences punishable under Indian Penal Code is decided. In the present proceeding, this point was conceded during argument. The power of the learned Special Judge appointed under P.C. Act to make order under Section 156 [3] of Cr.P.C. is not disputed.

9. In the present matter and in the similar matters, it can be said that ordinarily the accused persons try to use the observations made by the Apex Court in the Case of **Anil Kumar**, cited *supra*, to support their contention that there needs to be sanction under Section 19 of this Act before making of order under Section 156 [3] of Cr.P.C. The facts of Anil Kumar's case, cited *supra*, shows that the private complaint was filed under Section 200 of Cr.P.C. before the learned Special Judge. While considering the point raised, the Apex Court made observations in paragraph Nos.9, 10, 11 and 14 and they are as under :-

9. We will now examine whether the order directing investigation under Section 156 (3) Cr.P.C. would amount to taking cognizance of the offence, since a contention was raised that the expression "cognizance" appearing in Section 19 (1) of the PC Act will have to be construed as post-cognizance stage, not pre-cognizance stage and, therefore, the requirement of sanction does not arise prior to taking

cognizance of the offences punishable under the provisions of the PC Act. The expression "cognizance" which appears in Section 197 Cr.P.C. came up for consideration before a three-Judge Bench of this Court in *State of Uttar Pradesh v. Paras Nath Singh* (2009) 6 SCC 372 : [AIR 2009 SC (supp) 1615 : 2009 AIR SCW 3712), and this Court expressed the following view:

"6.And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far as public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, 'no court shall take cognizance of such offence except with the previous sanction'. Use of the words 'no' and 'shall' makes it abundantly clear that the bar on the exercise of

power of the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of. According to Black's Law Dictionary the word 'cognizance' means 'jurisdiction' or 'the exercise of jurisdiction' or 'power to try and determine causes'. In common parlance, it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty.

xxx	xxx	xxx
xxx	xxx	xxx"

In State of West Bengal and Another v. Mohd. Khalid and Others (1995) 1 SCC 684 : (AIR 1995 SC 785: 1995 AIR SCW 559), this Court has observed as follows:

"It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."

10. The meaning of the said expression was also considered by this Court in Subramaniam Swamy case (supra). The judgments referred to herein above clearly indicate that the word "cognizance" 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. and the next step to be taken is to follow up under Section 202 Cr.P.C. Consequently, a Special Judge referring the case for investigation under Section 156 (3) is at pre-cognizance stage.

11. A Special Judge is deemed to be a Magistrate under Section 5 (4) of the PC Act and, therefore, clothed with all the magisterial powers provided under the Code of Criminal Procedure. 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.

12. xxx

13. xxx

14. Further, this Court in Criminal Appeal No. 257 of 2011 in the case of **General Officer, Commanding v. CBI** and opined as follows:

"Thus, in view of the above, the law on the issue of sanction can be summarized to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him... If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio."

Ultimately, the Apex Court held in Anil Kumar's case [cited *supra*] that the decision of High Court of quashing of the order of learned Special Judge by which investigation was ordered under Section 156 [3] of Cr.P.C. was correct.

10. In subsequently decided case of **Manju Surana** [cited supra], the Apex Court considered the aforesaid observations made in Anil Kumar's case. After considering the observations made by the Apex Court in other matters, the point in dispute is referred to Larger Bench by the Apex Court. For doing that, the Apex Court considered many cases decided by Three Judges Bench on the implication of the order made under Section 156 [3] of Cr.P.C., wherein it is laid down that such order does not take cognizance of offence. The case of Subramanyam Swamy reported as **[2014] 8 SCC 682 [Subramanyam Swami vs. C.B.I.]**, decided by five Judges Bench, is also referred. In this case, the power of police to make investigation of cognizable offence under Section 156 of Cr.P.C. is discussed. On the basis of all these observations made in the past and for making reference to Larger Bench, the Apex Court made observations, which are relevant, and they are as under :-

"26. Despite the aforesaid catena of judgments, a different path has been traversed in two judgments of this Court where the offences alleged are under the P.C. Act read with the I.P.C.

34. The catena of judgments on the issue as to the scope and power of direction by a Magistrate under Chapters

12 & 14 is well established. Thus, the question would be whether in cases of the P.C. Act, a different import has to be read qua the power to be exercised under Section 156 [3] of the Cr.P.C., i.e., can it be said that on account of Section 19 [1] of the P.C. Act, the scope of inquiry under Section 156 [3] of the Cr.P.C. can be said to be one of taking 'cognizance' thereby requiring the prior sanction in case of a public servant? It is trite to say that prior sanction to prosecute a public servant for offences under the P.C. Act is a provision contained under Chapter 14 of the Cr.P.C. Thus, whether such a purport can be imported into Chapter 12 of the Cr.P.C. while directing an investigation under Section 156 [3] of the Cr.P.C., merely because a public servant would be involved, would beg an answer."

11. Present matters cannot be decided only on the basis of aforesaid observations. The learned counsels took this Court through the proviso added by Maharashtra Government to Section 156 [3] of Cr.P.C. in the year 2016. The said amendment is as follows :-

"In its application to the State of Maharashtra in section 156, after sub-section [3], add the following provisos, namely :-

"Provided that, no Magistrate shall order an investigation under this section against a person who is or was a

public servant as defined under any other law for the time being in force, in respect of the act done by such public servant while acting of purporting to act in the discharge of his official duties, except with the previous sanction under section 197 of the Code of Criminal Procedure, 1973 [2 of 1974] or under any law for the time being in force:

Provided further that, the sanctioning authority shall take a decision within a period of ninety days from the date of the receipt of the proposal for sanction and in case the sanctioning authority fails to take the decision within the said stipulated period of ninety days, the sanction shall be deemed to have been accorded by the sanctioning authority."

It is submitted by learned counsel for respondent-complainant that the complainant had made application to the Government for giving sanction/permission on 13.10.2016. This circumstance is considered by the learned Special Judge. The proceeding was filed before learned Special Judge on 07.09.2017 and learned Special Judge made the order of investigation on 23.09.2017. Thus, on the date of the proceeding and on the date of the order, the deemed sanction was there. Thus, there is no room to accused to say that **Anil Kumar's** case, cited *supra*, needs to be used, and on that basis, the relief needs to be granted. This Court

holds that in view of the specific provision of aforesaid nature made for Maharashtra, there is no necessity of sanction from the concerned as the procedure given in aforesaid proviso is complied with. Thus, no relief can be granted in these proceedings and all the three proceedings stand dismissed.

Learned counsels for petitioners and applicant requested for continuation of interim relief for some time, but that is refused.

[SMT.VIBHA KANKANWADI,J.]

[T.V. NALAWADE, J.]