

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO. 19 OF 2011**

Shri Mahesh Chandra Agrawal,
 Major, resident of, 1101-02,
 1A Green Acres, Lokhandwala Complex,
 Andheri (W), Mumbai-53
 Proprietor of M/s. Shyama Charan Agarwal &
 Sons represented herein by his attorney,
 Shri Manish Agarwal,
 having office at SD-4, Woodrose Building,
 Lokhandwala Complex,
 Andheri (W), Mumbai – 53.

... Petitioner

V e r s u s

1. Mr. Rishi Kumar,
 Chief Engineer, Military Force,
 Allahabad.
2. Mr. R. Venkatselu,
 SE, SO, I Legal Headquarters) In view of order dtd. 25.7.17 the
 Northern Commd, Engineering) petition stands dismissed against
 Branch, C/o 56, A.P.O, Jammu and) Respondent no.2.
 Kashmir.
3. CAPT. KVGK Rangaraju,
 Chief Engineer, Navy (Mumbai),
 Assaye Building, Colaba, Mumbai-40005.
 (Respondent is being processed under
 section 299 of the Criminal Procedure Code)
4. Mr. B. Chikaputtiah,
 Chief Engineer, Navy (Mumbai),
 Assaye Building, Colaba, Mumbai-40005.
 (Respondent is being processed under
 section 299 of the Criminal Procedure Code)
5. Mr. C. Rajan,
 Chief Engineer, Navy (Mumbai)

Assaye Building, Colaba, Mumbai-40005.
(Respondent is being processed under
section 299 of the Criminal Procedure Code)

6. Mr. A. K. Patil,
Himachal Pradesh Headquarters,
C.W.E. C/o Camp District,
Kohgne, Himachal Pradesh -176052.
7. Mr. Kadam,
Chief Engineer, Navy (Mumbai),
Assaye Building, Colaba, Mumbai-40005.
(Respondent is being processed under
section 299 of the Criminal Procedure Code)
8. Mr. Swami,
Chief Engineer, Navy (Mumbai),
Assaye Building, Colaba, Mumbai-40005.
(Respondent is being processed under
section 299 of the Criminal Procedure Code).
9. Mr. K. R. Sateesan,) Deleted vide order dated
R/o Shreyas, House No.49/2079,) 27/1/2012 in CRMA 21/2012.
Therupaarambath Road,)
Kadavanthara, Kochi, Kerala)
682020.
10. Mr. C. T. Mathew,) Deleted vide order dated
65-A, Annavella,) 02/08/2012 in CRMA No.145/2012
Kanigampuna Road, Kerala)
11. The BSO,
Chief Engineer, Navy (Mumbai),
Assaye Building,
Colaba, Mumbai – 40005.
(Respondent is being processed under
section 299 of the Criminal Procedure Code)
12. Mr. P. Bhaskaran,) Deleted vide order dated 2/8/2012
Puthiyadath,) in CRMA no.145/2012
Kerala)

13. Mr. Sani,
Chief Engineer, Navy (Mumbai),
Assaye Building, Colaba, Mumbai-40005.
(Respondent is being processed under
section 299 of the Criminal Procedure Code).

14. Chandrakant Naik- Labourer,
Patrong, Baina, Vasco-Goa.

15. K. Chamdna Mohan-Labourer,
House No.12316, Mongor Nagar,
MES Quarters, Vasco.

16. Naresh Pednekar- Labourer,
House No.115 Wella, Naik Wado,
Mapusa-Goa.

17. Thomas Furtado – Labourer,
House No. 152-C,
Near Dabolim Airport, Vasco.

All working in Garrison Engineer (P) NW Office.

18. Mr. Nabi Byadagi Meth,
Chief Engineer, Navy (Mumbai),
Assaye Building, Colaba, 40005.

19. Mr. Balwant Singh Yadav,
Contractor,
Virginia Apartment, Airport Road,
Chicalim-Vasco.

20. The State of Goa,
through the Public Prosecutor,
High Court of Bombay at Goa,
Panaji-Goa.

.... Respondents

Shri S. G. Bhobe, Advocate with Adv. R. Menezes for the Petitioners.

None for the Respondent/State.

CORAM: C. V. BHADANG, J.

DATE: 9th January, 2018.

ORAL JUDGMENT :

The challenge in this petition under section 482 of the Code of Criminal Procedure (Code, for short) is to the order dated 18/10/2008 passed by the learned Judicial Magistrate First Class at Vasco in Private Criminal Complaint No.78/P/96/B. By the said order, the learned Magistrate has dismissed the complaint filed by the petitioner against the respondent alleging commission of offences under section 379, 380, 382, 403, 415, 407, 427, 447, 448, 451, 452, 461, 506 (Part II) r/w 141 of I.P.C. That order has been confirmed by the learned Sessions Judge vide judgment and order dated 25/1/2010 in Criminal Revision Application No.15/2009.

2. The brief facts are that the petitioner is a proprietor of M/s. Shyam Agarwal & Sons and is carrying on business as Engineers and Builders undertaking civil construction works and other engineering works. The petitioner was awarded three contracts by the Chief Engineer Kochin Zone for construction of residential accommodation at Vernapuri, Vasco. In pursuance of the said contract, the petitioner firm was put in possession of the site at Vernapuri, Vasco. In the course of the construction work, the petitioner

had employed several workers and had purchased and stored construction material in around 15 godowns on the site. The construction work was supervised by the Commander, Works Engineer (CWE) and Garrison Engineers (Project) Naval Works (GE).

3. It appears that certain disputes and differences arose between the parties in respect of the execution of the contract which was referred to the sole arbitrator on 28/2/1994. The arbitrator passed an award in favour of the petitioner, which was made rule of the Court and a decree was accordingly drawn. In so far as the present petition is concerned, it is the case of the petitioner that on 8/4/1996, the petitioner received three letters purportedly canceling the contracts and by a subsequent letter dated 11/4/1996, the Chief Engineer had asked the petitioner to attend the office of the Garrison Engineer at Mangor Hill on 10/4/1996 for carrying out measurements and inventory of the works and materials etc. In the meantime, a Board was formed by the CWE comprising of one representative of the petitioner's firm and five representatives on behalf of the Union of India, who were officers working for CWE and the GE for making inventory and measurements. According to the petitioner, at no point of time any opportunity was granted to the petitioner to take part in the proceedings of the Board and even otherwise according to the petitioner the constitution of the said Board was

illegal. By a telegraphic notice dated 27/4/1996, the GE intimated to the petitioner's firm that on 4/5/1996 on account of the failure of the petitioner's firm to take part in the proceeding of the Board, he shall break open the locks of the stores in the custody of the petitioner's firm and prepare the inventory. That was replied to by the petitioner's firm on 1/5/1996. It would not be necessary to set out the further details. Suffice it to mention that according to the petitioner on 10/5/1996 the officers of the Navy broke open the locks of the godown and had conducted the inventory and the material lying therein was carried away. Further according to the petitioner, on 11/5/1996, the respondents came at the site and continued to take away the material of the petitioner's firm despite protest. The petitioner reported the matter to the Police Station, Vasco, however, no F.I.R was registered. It is in these circumstances that the petitioner filed a private complaint before the learned Magistrate against the respondents alleging commission of the offences as referred above. The learned Magistrate by an order dated 21/5/1996 issued a search warrant which was challenged by the respondent before this Court in Criminal Misc. Application No.551/1996. The respondents inter alia prayed for quashing of the complaint. This Court while dismissing the petition on 8/7/1996 passed the following order:-

“11. In view of the above I am of the opinion that this is not a fit case at this stage to exercise jurisdiction under section 482 Cr.P.C. It goes without saying that the

Magistrate while taking decision on the question of issue of the process shall satisfy himself that the matter before him is not of civil nature and that there was mens rea to commit offence, if any. The Magistrate shall also bear in mind whether the offences complained would require sanction or not. There is no question of interference with the search warrant since the execution of the same and started even prior to the filing of this application and the search was stated to be near completion when the matter was heard.”

4. The learned Magistrate thereafter recorded the evidence of the witnesses of the complainant and by an order dated 18/10/2008 discharged the respondent which order has been confirmed by the learned Sessions Judge in Revision.

5. Heard Shri Bhobe, the learned counsel for the petitioners. None appears for the respondent/State. With the assistance of the learned counsel for the petitioner I have gone through the record and I do not find that any case for interference is made out.

6. It would be significant to note that the dispute essentially was in respect of the contract which was entered into between the parties. Clause 54 of the said contract reads as under:

“54. Cancellation of Contract in part or in full for Contractor's Default-If the Contractor-

(a) makes default in commencing the Works within a reasonable time from the date of the handing over the site, and continues in that state after a reasonable notice from G.E.

or

(b) in the opinion of the GE at any time, whether before or after the date or extended date of completion, makes default in proceeding with the Works with due diligence and continues in that state after a reasonable notice from G.E.

or

(c) fails to comply with any of the terms and conditions of the Contract or after reasonable notice in writing with orders properly issued thereunder;

or

(d) fails to complete the Works, Work order and items of Works, with individual dates for completion and clear the site on or before the date of completion.

The Accepting Officer may, without prejudice to any other right or remedy which shall have accrued or shall accrue thereafter to Government, cancel the Contract as a whole or only such Work Order(s) or items of Work in default from the Contract. Whenever the Accepting Officer exercises his authority to cancel the Contract as a whole or in part under this Condition he may complete the Work

by any means at Contractor's risk and cost, provided always that in the event of cost of completion or after alternative arrangements have been finalized by the Government to get the Works completed, estimated cost of completion (as certified by the Government to get the Works completed, estimated cost of completion (as certified by G.E) being less than the Contract cost, the advantage shall accrue to the Government. If the cost of completion or after alternative arrangements have been finalized by the Government to get the works completed, estimated cost of completion (as certified by G.E) exceeds the moneys due to Contractor under this contract, the Contractor shall either pay the excess amount ordered by G.E or the same shall be recovered from the Contractor by other means. The Government shall also be at liberty to hold and retain in their hands materials, tackle, machinery and stores of all kinds on site, as they think proper and may at any time sell any of the said materials, tackle, machinery and stores and apply the proceeds of sale in or towards the satisfaction of any loss which may arise from the cancellation of the Contract as aforesaid.

The Government shall also be at liberty to use the materials, tackle, machinery and other stores on site of the Contractor as they think proper in completing the work and the contractor will be allowed the necessary credit. The value of the

materials and stores and the amount of credit to be allowed for tackle and machinery belonging to the Contractor and used by the Government in completing the work shall be assessed by the G.E and the amount so assessed shall be final and binding.

In case the Government completes or decides to complete the Works or any part thereof under the provision of this Condition, the cost of such completion to be taken into account in determining the excess cost to be charged to the contractor under this condition shall consist of the cost of estimated cost (as certified by G.E) of materials purchased or required to be purchased and/or the labour provided or required to be provided by the Government as also the cost of the Contractor's materials used with an addition of such percentage to cover superintendence and establishment charges as may be decided by the C.W.E, whose decision shall be final and binding.”

(Emphasis supplied).

7. It can thus be seen that under the said clause the Government was at liberty to use the material, tackle, machinery and other stores on site of the Contractor as they think proper in completing the work and the contractor will be allowed the necessary credit. The learned magistrate after considering the said clause has come to the conclusion and to my mind rightly so that the dispute was predominately of a civil nature. The learned

magistrate also came to the conclusion that there was no mens rea proved and that the respondents were acting as public servants in discharge of their official duty in accordance with the contract and the respondent being public servants, sanction was required under section 197 of Cr.P.C and in the absence of the sanction, the complaint was not maintainable. The said finding has been affirmed by the learned Sessions Judge.

8. The Hon'ble Supreme Court in the case of **Anil Kumar v. M.K. Aiyappa and anr. (2013) 10 SCC 705** has inter alia held that the sanction to prosecute a public servant under section 197 of Cr.P.C would be necessary and in absence of that, the complaint would not be maintainable.

9. I have carefully gone through the impugned order passed by the learned Magistrate and that of the learned Sessions Judge and I do not find that they suffer from any infirmity so as to require interference in exercise of the inherent powers of this Court. The petition is without any merit and it is accordingly dismissed.

C. V. BHADANG, J.

Ap/-