

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.649/2018

1] Dhondu s/o Renaku Khatade,
age 68 yrs., occu.Pensioner,
r/o 4, Unnati Nagar, Deopur.
Dhule - 424002.

2] Nivrutti s/o Sonaji Sable,
age 69 yrs., occu.Pensioner,
r/o 34, Shankar Appa Nagar,
Pimprala, Jalgaon 425002.

.....Petitioners..
(Org.accused nos.1 & 2)

VERSUS

1] Tulsiram s/o Laxman Naik,
age 71 yrs., occu.agri.,
r/o Nalve Khurde, Tq. & Dist.Nandurbar.

2] Om Prakash,
age major, Post Master General,
Aurangabad-431602.
Tahsil - District Nandurbar.

...Respondents..
(No.1 org. complainant
No.2 org.accused no.3)

Shri D.D. Chaudhary, Advocate for petitioners.
Shri C.V. Joshi, Advocate for respondent no.1.

CORAM: V.L. ACHLIYA, J.

DATE: 08.08.2019

JUDGMENT :

1] Rule. Rule made returnable forthwith. By consent, heard

finally.

2] Being aggrieved by order dated 3.2.2018 in Criminal Revision Application No.6/2014 passed by learned Additional Sessions Judge, Nandurbar, the petitioners - original accused nos.1 & 2 have preferred this petition under Article 227 of the Constitution of India. By the impugned order, the learned Additional Sessions Judge, Nandurbar, has allowed the revision petition filed by the respondent no.1 and set aside the order dated 4.1.2014 passed by the learned Judicial Magistrate, First Class (Court No.2), Nandurbar, in Regular Criminal Case No.323/2007 and remanded the case to trial Court with certain directions. Aggrieved by order dated 3.2.2018, the petitioners - original accused nos.1 & 2 have preferred this petition.

3] Heard learned counsel for the petitioners - accused and respondent no.1 - original complainant. Perused the copy of complaint, report submitted u/s 202 of the Cr.P.C., the order dated 4.1.2014 passed by the learned Magistrate to dismiss the complaint and the order dated 3.2.2018 passed by the revisional Court.

4] Before adverting to deal with the submissions advanced, it is useful to refer the facts leading to filing of this petition.

[i] The respondent no.1 - complainant filed private complaint in the Court of Judicial Magistrate, First Class, Nandurbar, alleging

therein that the petitioners and the respondent no.2 have committed offence u/s 420 r/w 34 of the Indian Penal Code. It is alleged that the respondent no.1 - complainant had served with the Postal Department in the capacity as a Supervisor for the period of 40 years. According to the case set out by the complainant and allegations made in the complaint, the complainant proceeded on medical leave. Initially, the leave was granted. However, the medical leave granted was subsequently canceled and amount of Rs.17,777/- was recovered from his salary due and payable for the period from October 2001 to January 2002. After making deduction of Rs.17,777/-, the amount of Rs.5291/- was due and payable to the complainant towards salary of the said period. The accused have communicated vide letter dated 23.3.2003 that the complainant is entitled to receive amount of Rs.5291/-. It is alleged that in spite of the amount due and payable and the complainant having repeatedly made requests, the said amount was not paid by the accused persons. In this background, the complainant has alleged that the accused have willfully avoided to pay the amount of Rs.5291/- and thereby they have committed an act of cheating within the meaning of Section 420 r/w 34 of the Indian Penal Code. The complainant has claimed that no prior sanction as contemplated u/s 197 of the Cr.P.C. is required to prosecute the

petitioners - accused for the reason that the act alleged against them does not fall within the scope of discharge of their official duties.

[ii] Since the complaint was filed at Nandurbar against the accused residing and posted at Dhule and Aurangabad i.e. beyond the local jurisdiction of learned Magistrate, the learned Magistrate postponed issuance of process and directed to make investigation through officer of concerned Police station as provided u/s 202(1) of the Cr.P.C. Pursuant to the order dated 7.4.2008 passed by the learned Judicial Magistrate, First Class, Nandurbar, the Police Inspector, Nandurbar Taluka Police Station conducted investigation and submitted inquiry report on 9.8.2008. While conducting investigation, the Inquiry Officer approached to complainant to record his statement. However, the complainant refused to make statement. The Inquiry Officer made enquiry with the witnesses cited by the complainant in support of complaint. None of those witnesses supported the allegations made against the accused in the complaint filed by the complainant. On the contrary, they have made the statement that the amount of Rs.5291/- was twice offered to the complainant. However, the complainant has not visited Post Office to collect the amount of salary for more than six months. Hence, the said amount has been deposited with the Post Office at

Dhule. The Inquiry Officer has categorically mentioned in his report that the complaint is baseless and no offence is made out against any of the accused.

[iii] After the order dated 7.4.2008 passed by the learned Magistrate u/s 202 of the Cr.P.C., the Advocate representing the complainant requested to refer the complaint for investigation in exercise of powers u/s 156(3) of the Cr.P.C. The learned Magistrate refused to entertain said request after perusing the report of enquiry received u/s 202 of the Cr.P.C. and directed the complainant to adduce evidence in support of the complaint. Thereafter, the learned Magistrate vide order dated 4.1.2014 dismissed the complaint in exercise of powers u/s 203 of the Cr.P.C.

[iv] The respondent no.1 - complainant preferred revision before the Sessions Court at Nandurbar against the order dated 4.1.2014. By judgment and order dated 3.2.2018, the learned Additional Sessions Judge, Nandurbar, allowed the revision petition and remanded the case to trial Court for deciding the matter afresh after recording the evidence of the complainant and his witnesses on oath. Being aggrieved, the petitioners - original accused nos.1 & 2 have preferred this petition under Article 227 of the Constitution of India.

5] Learned counsel for the petitioners assailed the

impugned order with contention that the revisional Court has exceeded its jurisdiction u/s 397 of the Cr.P.C. to interfere with the order passed by the learned Magistrate. By referring to overall scope of interference in exercise of revisional jurisdiction u/s 397 of the Cr.P.C. by the revisional Court, the learned counsel submits that in absence of any illegality, impropriety and irregularity in the order passed, the learned Additional Sessions Judge should not have interfered with the order passed by the learned Magistrate. By referring to overall facts of the case and more particularly the allegations made in the complaint, the learned counsel submits that on the face of allegations made and attributed to petitioners, no case has been made out to issue process u/s 420 r/w 34 of the IPC. It is submitted that if the allegations made in the complaint are assumed to be true and correct and accepted as true, still no case is made out to issue process u/s 420 r/w 34 of the IPC. It is submitted that in the complaint, no specific allegation is made against accused that any of them had acted with dishonest intention to cheat the complainant. It is submitted that as per the case pleaded in the complaint itself, only grievance made against accused that they have not paid him the amount of Rs.5291/- forming part of his salary. It is further submitted that there is no dispute that the accused are public servants within the meaning of Section 21 of the

Indian Penal Code and no prior sanction obtained to prosecute them. By referring to the order passed by the learned Magistrate, the learned counsel submits that the order is reasoned and calls for no interference in exercise of revisional jurisdiction.

6] On the other hand, learned counsel for the respondent no.1 supported the impugned order passed by the learned Additional Sessions Judge, Nandurbar. It is submitted that the learned Additional Sessions Judge has rightly observed that at the stage of issuance of process, the scope of enquiry to be conducted is very limited and the report of investigation conducted u/s 202 of the Cr.P.C. is not binding, the Magistrate has to confine the scope of enquiry to consider the allegations made in the complaint together with evidence, if any, make out *prima facie* case for issuance of process. No detailed enquiry contemplated at the stage of issuance of process.

7] I have carefully considered the submissions advanced in the light of overall facts of the case and more particularly the allegations made in the complaint, the order passed by the learned Magistrate to dismiss the complaint and the order passed by the revisional Court. In my view, the impugned order passed by the learned Additional Sessions Judge is not sustainable in law for the sole reason that the learned Additional Sessions Judge has

exceeded his jurisdiction u/s 397 of the Cr.P.C. to interfere with the order passed by the learned Magistrate. The order passed by the learned Magistrate suffers from no illegality, impropriety or perversity so as to call for interference in exercise of writ jurisdiction.

8] On due consideration of overall facts of the case and more particularly the complaint filed by the complainant against the accused persons i.e. the public servants, I am of the view that the case in hand is a classic example of gross abuse of process of law at the instance of respondent no.1 - complainant. In fact, the allegations made in the complaint, even if presumed to be true, still make out no case to issue process u/s 420 r/w 34 of the IPC against the accused persons. The accused are public servants working with Postal Department of Government of India. The complaint itself reflects that the complainant has neither applied for sanction nor any sanction to prosecute the accused persons was granted by the competent authority.

9] If we consider the overall allegations made in the complaint, then according to case as set out in the complaint, the complainant has secured the medical leave. The leave which was earlier granted was later on canceled. The amount of Rs.17,777/- deducted from his salary for the period October 2001 to January

2002. After deducting the amount of Rs.17,777/-, the amount of Rs.5291/- was due and payable to the complainant as part of salary. According to the complainant, the complainant has repeatedly requested for payment of said amount of Rs.5291/-. However, the amount was not paid by the accused persons. Thus, the grievance as agitated in the complaint confines to non-payment of part of salary i.e. Rs.5291/-. In that view, if the allegations made in the complaint are taken to its face value and accepted in its entirety to be true and correct, still it make out no case for issuance of process u/s 420 of the IPC. In fact, the complaint ought to have been dismissed at threshold. In absence of any case being made out to entertain the complaint on plain reading of the allegations made in the complaint, the Magistrate should have dismissed the complaint. The conduct of enquiry of such false, frivolous and motivated complaint is not contemplated in law. It appears from the record that there was dispute between the complainant and his employer i.e. Postal Department. The complainant was subjected to face departmental proceedings. In order to take vengeance and settle personal score with the officials of the Department, the complainant has filed false and frivolous complaint to harass them.

10] The report of enquiry conducted u/s 202 of the Cr.P.C. spells out that though the amount sent to concerned Post Office to

make payment to the complainant, in spite of intimation and correspondence, the complainant has not visited the Post Office to collect the amount. Instead of collecting the amount, the complainant has filed false and frivolous complaint against the superior officers. It *prima facie* reflects from the complaint that the complaint has been filed only with a view to harass the accused by setting the criminal law in motion. It is pertinent to note that after filing of the complaint and the report u/s 202 of the Cr.P.C., the complainant moved an application to refer the complaint for investigation by exercising powers u/s 156(3) of the Cr.P.C. Before filing the complaint, the complainant has neither approached nor lodged the complaint with concerned Police Station. When the adverse report received in investigation conducted u/s 202 of the Cr.P.C., the attempt was made to refer the complaint for investigation in exercise of powers u/s 156(3) of the Cr.P.C.

11] During the course of inquiry / investigation conducted u/s 202 of the Cr.P.C., the Inquiry Officer made enquiry with the witnesses cited by the complainant. None of them supported the allegations made in the complaint. The Inquiry Officer has observed in the report that the witnesses cited by the complainant have stated that in spite of amount being offered, the complainant has failed to collect the same. Twice the amount was sent from Head

Post Office, Dhule to concerned Post Office for payment. In spite of intimation, the complainant failed to collect the amount. Since the complainant failed to collect the amount within six months, the amount has been deposited with the Head Post Office at Dhule. In that view, the complaint filed by the complainant is false and frivolous and made with ulterior motive to anyhow harass the accused who are public servants. The act of withholding the part of salary at the most provide cause to take out civil proceeding against the Department for recovery of said amount. The criminal complaint is not maintainable for alleged act of non-payment of salary.

12] The order passed by the learned Additional Sessions Judge is wholly unsustainable. The learned Additional Sessions Judge has failed to consider the scope and ambit of exercise of powers u/s 397 of the Cr.P.C. In exercise of powers u/s 397 of the Cr.P.C., the revisional Court has to satisfy itself whether the impugned order suffers from any perversity, illegality, impropriety, jurisdictional error and resulted into miscarriage of justice so as to call for interference in exercise of revisional jurisdiction. The observations of the learned Additional Sessions Judge that while passing the order of issuance of process, the Court has to guide itself only by allegations made in the complaint are erroneous.

The order of issuance of process results into serious consequences. While exercising powers to issue process, the Court has to guide itself by the provisions contained in the Code of Criminal Procedure and the precedents of law laid down in that regard. In the case of *Pepsi Foods Ltd. & another v. Special Judicial Magistrate & others* reported at **(1998) 5 SCC 749**, the Apex Court has observed in paragraph no.28 as under:-

“28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is *prima facie* committed by all or any of the accused.

13] Thus, the view taken by the learned Additional Sessions Judge that while dealing with the complaint and passing order of issuance of process, the Magistrate has to confine scope of enquiry only to look into the allegations made in the complaint and no scrutiny of the allegations made in the complaint and the evidence is contemplated, is erroneous and unsustainable in law.

14] The order passed by the learned Magistrate is well reasoned and suffers from no illegality, impropriety, perversity and jurisdictional error nor resulted into causing miscarriage of justice. The learned Magistrate has passed the order on due consideration of the allegations made in the complaint, the report of enquiry conducted u/s 202 of the Cr.P.C. and the statements of the complainant and the witnesses examined in the case, duly considered while passing order in due exercise of powers u/s 203 of the Cr.P.C. The learned Magistrate has observed in paragraph nos.5 to 10 as under:-

“5] It is specific case of the complainant that while he was in service of postal department the accused persons who were heads of department at the relevant time intentionally and dishonestly withheld the remaining salary of Rs.5291/- belonging to complainant. Record shows that the complainant has made efforts to recover said amount from the department. It is also seen from the record that

complainant had moved application to the Hon'ble Central Administrative Tribunal, Mumbai against the Chief Post Master General, Maharashtra Circle, the Post Master General, Aurangabad region and Senior Superintendent of Post office Dhule division bearing No.122/2002 against the illegal and arbitrary recovery made from his salary from October 2001 onwards. Copy of order of the Hon'ble Tribunal in said application dated 15-04-2002 reflects that the respondents therein were directed to issue proper show cause notice to applicant therein i.e. the present complainant and gave him full opportunity as to why the recovery should not be made from him. It is further seen that the then Senior Superintendent of Post office, Dhule division Mr. D.R. More had issued show cause notice to the complainant as per the directions of Hon'ble Tribunal whereby complainant was called upon to submit his written say in accordance with the order passed by the Hon'ble Tribunal dated 15-04-2012. However, no such reply given by the complainant or the copy thereof is found on record with the complaint. Learned Advocate Mr. R.D. Girnar appearing on behalf of the complainant submitted at bar that said reply is not filed by the complainant.

6] Furthermore, documents filed by the complainant as well as inquiry officer along with his report at Exh.22 shows that the postal department had issued letters to the complainant from time to time to receive his amount. In spite of that there is nothing on record to show that the complainant had approached to the concerned office to receive the alleged amount.

7] Besides that the witnesses i.e. Baban Bhila Gurav, Pauladsing Gavit, and Mr. Keshav Pingale who were admittedly serving in the postal department have also not stated anything against accused persons in respect of alleged offence. It is evident to note that witness Baban Gurav has specifically stated that on 23-08-2008 money order of Rs.5291/- was received to him in the post office at Karajkupa in the name of complainant Tulshiram Naik from Head office of Dhule. He had gone to the house of complainant at village Nalava to release the money order in his favour. However, there was lock to the house of complainant, therefore, he dropped intimation letter in his house and returned to his office. Complainant did not come to his office to get released money order. Therefore, he sent back the same to the head office at Dhule.

8] Witness Pauladsing Gavit has stated that complainant was suspended from service for some period. There was dispute between complainant and accused No.1 and 2 on the count of salary amount of the suspension period of the complainant. Complainant had given an application to the head office at Dhule in that regard. Accordingly, office at Nandurbar was directed to comply with by head office. Accordingly, office at Nandurbar had given oral as well as written notice to the complainant to remain present for receiving the amount but, complainant did not come for the same. Therefore, his office sent back said amount of Rs.5291/- to the head office at Dhule.

9] Witness Keshav Pingale has also stated that accused No.1 and 2 were serving as Senior

Superintendents in the Post office at Dhule. Some amount of the complainant out of salary was pending in his office at Nandurbar. On the count of said amount there was some dispute between complainant and accused No.1 and 2. However, said witness has specifically stated that he had no knowledge about the said dispute.

10] On minute scrutiny of the complaint filed by the complainant it is seen that complainant has not contended about the posts held by each of the accused at the relevant time in his complaint. No specific allegation appears to be made against the accused persons to show that any one of them had with dishonest intention cheated the complainant. The averments made in the complaint as well as the documents produced on record by the complainant so also the statements recorded by the inquiry officer of Taluka Police station, Nandurbar nowhere reflects that accused were directly or indirectly connected with alleged offence in furtherance of their common intention."

15] The reasoning quoted above recorded by the learned Magistrate itself reflects that the order has been passed after due scrutiny of the allegations made in the complaint, the evidence and report of enquiry received u/s 202 of the Cr.P.C. In absence of any illegality, impropriety, jurisdictional error and perversity in the order, the revisional Court should not have interfered with the order passed by the learned Magistrate. In that view, the learned

Additional Sessions Judge has exceeded his powers u/s 397 of the Cr.P.C. in setting aside the order passed by the learned Magistrate and remanding the case for fresh consideration.

16] Apart from merits of the case, the complaint made by the complainant is also liable to be rejected for want of prior sanction u/s 197 of the Cr.P.C. The alleged act of withholding / non-payment of amount of Rs.5291/- towards salary itself not amounts to act of cheating as defined u/s 420 of the IPC. If the complainant failed to collect the amount, the accused are fully justified to deposit the amount with the Head Office. There is no iota of evidence to support the offence u/s 420 of the IPC. The acts of accused to make deduction from salary, payment of salary, withholding of the salary, deposit of salary with the Head Office on account of failure on the part of the complainant to receive the salary, are well within the scope of official duty of the accused persons. The very purpose of prior sanction u/s 197 of the Cr.P.C. is to protect the public servant from subjecting to false and frivolous prosecution at the instance of disgruntled elements. The learned Magistrate has rightly observed in the order that prior sanction is necessary for filing the complaint. The learned Magistrate has observed in paragraph nos.11 to 13 as under:-

“11] It is also pertinent to note that all the accused were

serving in the Postal Department of India at the time of commission of alleged offence. Therefore all of them are the public servants. Complainant has specifically contended in the complaint that accused have committed the alleged offence out of their official duties therefore there is no need to obtain sanction under section 197 of the Code of Criminal Procedure, for prosecuting the accused for the alleged offence. However, on careful reading of the entire complaint and the documents it is seen that accused had allegedly withheld the amount of salary belonging to complainant. Said alleged conduct of accused appears to be purely within the official duties of accused. The alleged act of the accused cannot be said to be done out of the official duties.

12] Therefore, I am of the considered view that the sanction under section 197 of the Code was required to be obtained by the complainant for initiating the prosecution against accused persons. Needless to state that complaint is pending since year 2007. Complainant has attended the court regularly, produced number of documents on record, also made available the witnesses, though not supporting to him, but has not taken any pains to obtain the sanction under section 197 of the Code.

13] It is clearly seen that complainant has filed the complaint against accused persons without any cause of action. The allegations made in the complaint nowhere reflect the commission of offence under section 420 of the Indian Penal Code as alleged by the complainant. Therefore, I am of the considered view that the

complainant has failed to make out *prima facie* case to issue process against accused persons. Therefore complaint is liable to be dismissed. Hence, the order.”

17] In the result, the writ petition deserves to be allowed. The impugned order passed by the learned Additional Sessions Judge deserves to be set aside as same is unsustainable in law. The learned Additional Sessions Judge has exceeded his jurisdiction u/s 397 of the Cr.P.C. and unnecessarily interfered with the order passed by the learned Magistrate. In absence of any perversity, illegality, impropriety or jurisdictional error resulting into miscarriage of justice, the order passed by the learned Magistrate calls for no interference in exercise of revisional jurisdiction. In that view, the writ petition deserves to be allowed. Accordingly, the writ petition is allowed in terms of prayer clause (A). The order passed by the trial Court to dismiss the complaint is confirmed.

18] Rule made absolute in above terms.

(V.L. ACHLIYA, J.)