

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

CRIMINAL WRIT PETITION NO.739 OF 2019

1. Shri Naroji s/o Yadavrao Korke,
Age. 40 years, Occu. Service as Junior Engineer,
Panchayat Samiti, Umari,
Ta. Umari, Dist. Nanded.
2. Shri Ramesh H. Papanwar,
Age. 61 years, Occu. Service as Assistant Account
Officer (at Present Retired), Panchayat Samiti, Umari,
Ta. Umari, Dist. Nanded.
3. Shri Subhash Mohan Pagalwad,
Age. 50 years, Occu. Service, Ex-Gram-Sevak,
Grampanchayat, Undha, Ta. Umari,
Dist. Nanded.
4. Shri Jairam L Hiwarale,
Age. 48 years, Occu. Service as Junior Engineer,
Panchayat Samiti, Umari,
Ta. Umari, Dist. Nanded.

... PETITIONERS
(Orig. Respondents)

VERSUS

1. The State of Maharashtra,
through Police Station, Umari,
Ta. Umari, Dist. Nanded
2. Shri Pandharinath s/o Baliram Hundekar,
Age. 64 years, Occu. Pensioner,
R/o. Hunda (Umari Patti), Ta. Umari,
Dist. Nanded.

... RESPONDENTS
(Respondent no.1 is
Orig. Applicant)

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Advocate for Petitioners : Mr. Patil Indrale Anand V.
APP for Respondent no. 1- State : Mr. B.V. Virdhe
Advocate for Respondent No.2: Mr. Mahesh S. Taur

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CORAM : **MANGESH S. PATIL, J.**
Reserved on : **09.10.2019**
Pronounced on : **06.11.2019**

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. The learned APP for the respondent no. 1 and learned advocate Mr. M.S. Taur for the respondent no.2 waive service. At the request of both the sides the matter is heard finally at the stage of admission.

2. In this Writ Petition under Article 227 of the Constitution of India the petitioners are impugning the judgment and order passed by the learned Additional Sessions Judge, Bhokar in Criminal Revision No.15/2018 dated 23.04.2019.

3. The respondent no.2 filed Miscellaneous Criminal Application No.42/2017 against the petitioners and few other officers who all were at the material time working as Sarpanch, Gram Sevak, Block Development Officer, Clerks, Engineers and Auditors in Panchayat Samiti Umri, Taluka Umri District Nanded. He *inter alia* alleged that all of them in furtherance of their common intention had misappropriated Government funds which were meant for village development by indulging in forgery. While implementing an employment guarantee scheme some works were undertaken with the use of machines and by preparing a bogus record about the work

having been done by engaging laborers and showing some bogus individuals as the recipients of the employment. He therefore sought a direction under Section 156(3) of the Code of Criminal Procedure for carrying out investigation.

4. After hearing the submissions of the learned advocate representing the respondent no.2 the learned Magistrate passed following order:

“Perused the record. Also had heard the Advocate for applicant/complainant. This court vide order below Exh.1 on 28.03.2018 called upon the advocate for complainant to show how the C.O. Zilla Parishad is the appropriate authority to grant sanction to prosecute accused Nos. 3 and 9 who are Block Development Officers. But, the Advocate for complainant has not produced anything to support. The accused Nos. 3 and 9 are Block Development Officers and they are governed by the Gram Vikas Mantralaya and the Secretary to that Mantralaya is the appropriate authority to accord sanction. Now the present complainant/applicant has made proposal for sanction to C.O. Zilla Parishad who is not the appropriate authority to accord sanction. Due to this the applicant/complainant has not complied with the amended Section 156(3) Cr.PC. Hence the complaint/application is rejected.”

5. Being aggrieved by such rejection of his application the respondent no.2 preferred the criminal revision. By the impugned

judgment and order, the learned Additional Sessions Judge allowed the revision partly. He directed police to carry out investigation by registering crime against the petitioners and other proposed accused except the respondent nos. 3 and 9 therein. Hence this Writ Petition.

6. The learned advocate for the petitioners submitted that so far as facts are concerned, the respondent no.2 had simultaneously lodged a complaint with the superiors of the petitioners. The superior authorities had conducted an inquiry. Statements of various persons were recorded and it was ultimately found that there was no substance in the allegations and a report to that effect was also submitted by the Block Development Officer, Grade-I on 17.03.2017. In spite of such fact finding report, the respondent no.2 lodged the present complaint after lapse of enormous time. Therefore, there was no sufficient material before the Magistrate to direct investigation by invoking the powers under Section 156(3) of the Code of Criminal Procedure.

7. The petitioners were all Government Employees who were not removable from the office except after holding an inquiry. Therefore, even no direction under Section 156(3) of the Code of Criminal Procedure could have been issued without obtaining previous sanction under Section 197 of the Code of Criminal Procedure. The respondent no.2 had not applied to the Chief Executive Officer of Zilla

Parishad, Nanded seeking any such sanction to prosecute them. Therefore even for this reason, the Magistrate could not have issued any direction under Section 156(3) of the Code of Criminal Procedure. The learned advocate would submit that ignoring all these factual and legal aspects the learned Additional Sessions Judge has straight away directed an investigation under Section 156(3) of the Code of Criminal Procedure. The impugned judgment and order suffers from gross illegality. In fact, the learned Additional Sessions Judge has not at all considered the factual aspects and has passed the order without following the directions issued by the Supreme Court from time to time in the case of **Priyanka Srivastava and Anr. Vs. State of U.P. and Ors. ; 2015 AIR (SC) 1758, Anil Kumar and Ors. Vs. M.K. Aiyappa and Anr.; (2013) 10 SCC 705** and the principles as culled down by the Division Bench of this Court in case of **Sayed Anwar Ahmed and Anr Vs. State of Maharashtra and Anr.; 2018 (1) Mh.L.J (Cri) 324.**

8. The learned APP by referring to the facts in reply of Police Sub-Inspector, Umri Police Station, Nanded supported impugned judgment and order passed by the learned Additional Sessions Judge and submitted that only because of the pendency of the present Criminal Writ Petition he has not been able to obey the directions in the impugned judgment and order.

9. The learned advocate for the respondent no.2 referring to his affidavit in reply supported the impugned judgment and order and submitted that the learned Magistrate had not at all considered the factual aspects, the allegations made and the material produced to substantiate those. The Magistrate had simply dismissed the complaint/application for the sole reason that the respondent nos. 3 and 9 therein were Block Development Officers, who were removable from office by the Rural Development Department of the Government. Whereas, the respondent no.2 had applied to the Chief Executive Officer of Zilla Parishad seeking permission to prosecute them. The Magistrate ought to have considered that independent of the respondent nos. 3 and 9 therein, the present petitioners and the other respondents could have been proceeded against under Section 156(3) of the Code of Criminal Procedure. The order passed by the Magistrate was grossly erroneous, perverse and arbitrary and has been rightly interfered with and reversed for objective reasons by the learned Additional Sessions Judge.

10. I have carefully gone through the papers. As can be seen from the order passed by the learned Magistrate reproduced herein above, in fact he had not at all appreciated the allegations levelled by the respondent no.2 in his complaint/application. Simply by seeking an explanation as to how even the proposed accused nos.3 and 9 could

have been proceeded against without seeking sanction, perhaps under Section 197 of the Code of Criminal Procedure from the concern Secretariate and on failure of the respondent no.2 to give any explanation, the Magistrate had dismissed the complaint/rejected the application. There is absolutely no whisper in this order touching the factual aspects. If this was the state of affairs, the order was indeed grossly erroneous and clearly demonstrated that there was absolute non application of mind by the learned Magistrate. He had clearly abdicated his responsibility.

11. Suffice for the purpose to observe that after referring to and relying upon various decisions of the Supreme Court including the decision in the case of Priyanka Srivastava and Anil Kumar (supra) the Division Bench of this Court in the case of Sayed Anwar Ahmed (supra) has culled down the principles and has issued following guidelines to be followed by a Magistrate who is called upon to exercise the powers under Section 156(3) of the Code of Criminal Procedure:

“25. To summarise,

(a) While dealing with a Complaint seeking an action under Sub-Section (3) of Section 156 of Cr.P.C, the learned Magistrate cannot act mechanically. He is required to apply his mind to the contents of the Complaint and the documents produced along with the Complaint ;

(b) An Order passed on the said Complaint must record reasons in brief which should indicate application of mind by the Magistrate. However, it not necessary to record detailed reasons;

(c) The power under Sub-Section (3) of Section 156 is discretionary. Only because on plain reading of the Complaint, a case of commission of cognizable offence is made out, an Order of investigation should not be mechanically passed. In a given case, the learned Magistrate can go in to the issue of the veracity of the allegations made in the Complaint. The learned Magistrate must also consider the other relevant aspects such as the inordinate delay on the part of the Complainant. The nature of the transaction and pendency of civil proceedings on the subject are also relevant considerations;

(d) When a Complaint seeking an action under Sub-Section (3) of Section 156 is brought before the learned Metropolitan Magistrate or the learned Judicial Magistrate, it must be accompanied by an affidavit in support as contemplated by the decision of the Apex Court in Priyanka Srivastava. The affidavit must substantially comply with the requirements set out in Chapter VII of the Criminal Manual and especially paragraphs 5 and 8 which are quoted above; and

(e) Necessary averments recording compliance with Sub-Sections (1) and (3) of Section 154 of the Cr.P.C. should be incorporated with material particulars. Moreover, the documents in support of the said averments must filed on record.”

12. A bare look at the order passed by the Magistrate demonstrates that he had failed to follow any of these directions which merely summarizes the law laid down by the Supreme Court in very many cases. Therefore, *ex facie* the order passed by the Magistrate was liable to be interfered with in exercise of powers of Revision under

Section 397 of the Code of Criminal Procedure.

13. However, interestingly, in spite of having referred to the guidelines laid down in the case of Sayed Anwar Ahmed (*supra*) the learned Additional Sessions judge by the impugned judgment and order has committed same mistake. Having held that the Magistrate had not at all followed these guidelines and had not even considered the factual aspects, the learned Additional Sessions Judge himself has not undertaken any such exercise, if he was to reverse the order passed by the Magistrate and to direct an investigation under Section 156(3) of the Code of Criminal Procedure. If the Magistrate had committed an error in not following the guidelines, even the impugned judgment and order passed by the learned Additional Sessions Judge suffers from the same vice. It was expected of the learned Additional Sessions Judge to have independently considered the material and ought to have come with some objective material if he was to exercise the discretion of directing investigation under Section 156(3) of the Code of Criminal Procedure. The learned Additional Sessions Judge simply referred to the allegations from complaint but has not at all followed the guidelines and the principles laid down by the Superior Courts from time to time.

14. The learned Additional Sessions Judge ought to have either

remanded the matter to the Magistrate and should have called upon him to pass a suitable/appropriate order by following the guidelines/principles or should have himself undertaken such an exercise. Nothing of the sort has been done by the learned Additional Sessions Judge. In my considered view in view of peculiar fact situation this Court needs to exercise the powers under Article 227 of the Constitution of India in modifying the order passed by the learned Additional Sessions Judge, by remanding the matter to the learned Magistrate to reconsider the matter from all aspects and pass an appropriate order.

15. The Writ Petition is partly allowed.

16. The impugned judgment and order passed by the learned Additional Sessions Judge to the extent of the petitioners and other proposed accused except accused no. 3 V.R. Kondekar and Accused no.9 M.N. Kendre is quashed and set aside. The matter is remanded to the Magistrate who shall consider the matter afresh, except against Mr. V.R. Kondekar and M.N. Kendre and shall pass appropriate order by following the decisions of the Supreme Court and the High Court referred to herein above.

(MANGESH S. PATIL, J.)