

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

CRIMINAL WRIT PETITION NO. 1652 OF 2017

Bhimrao Gambhir Salunke,
Age- 66 years, Occu- Pensioner,
R/o Plot No.4, Ramanandnagar, Jalgaon
Tq. & Dist. Jalgaon.

... **PETITIONER**
(Orig. Accused)

Versus

1. The State of Maharashtra
2. Govind s/o Narayan Joshi,
Age 66 years, Occ. Retired,
R/o Sutargalli, Jamner, Tal. Jamner,
Dist- Jalgaon.

... **RESPONDENT**
(R/2 Orig. Complainant)

...
Advocate for Petitioner : Mr. Atmaram J. Patil
A.P.P. for Respondent no.1-State: Mr. S.B. Joshi
Advocate for Respondent no.2 : Mr. Girish V. Wani
...

CORAM : MANGESH S. PATIL, J.
RESERVED ON: 18.09.2019
PRONOUNCED ON: 04.10.2019

JUDGMENT :-

Heard. Rule. The Rule is made returnable forthwith. The learned A.P.P. waives service for respondent-State and the learned advocate Mr. Girish Wani waives service for respondent no.2. With the consent of both the sides the matter is heard finally at the stage of admission.

2. The petitioner is the accused no.2 from S.C.C. No.387 of 2013 from the file of Judicial Magistrate First Class, Jamner impugning the order passed by the learned Magistrate dated 15.09.2014 directing the process to be issued against him for the offence punishable under Section 9 of the Maharashtra Public Records Act, 2005 (hereinafter referred as to the 'Records Act') and dismissal of the Revision preferred by him under Section 397 of the Code of Criminal Procedure by the learned Additional Sessions Judge, Jalgaon by the impugned order dated 27.10.2017. The respondent no.2 is the original complainant.

3. Stated in brief the allegations in the complaint lodged by the respondent no.2 are to the effect that he was a protected tenant. The owner of the land instituted a Tenancy Case No. 10 of 1998. One Gopaikabai was the owner. Since she was a widow, the proceeding under the Maharashtra Tenancy and Agricultural Lands Act was deferred. In fact his father was the original protected tenant on 01.04.1957. After the demise of grand-father his father was the tenant from 1956 to 1967 and after demise of his father he became the tenant from 23.08.1967. Though he was a tenant, neither he nor his mother and sister were made parties to the Tenancy Case No. 10 of 1998 and only the accused no.1 in collusion with his father Laxman were made

parties to that case and only the accused no.1 was declared as deemed owner under Section 32-G of the Maharashtra Tenancy and Agricultural Lands Act by the order dated 05.11.1999. Being aggrieved the respondent no.2 had preferred Tenancy Appeal No. 07 of 1999 before the Deputy Collector. The accused no.1 is the son of that Laxman Joshi who was declared as a deemed owner under Section 32-G. Laxman was the elder brother of the respondent no.2. The appeal was allowed and the accused no.1 preferred a revision before the Maharashtra Revenue Tribunal which confirmed the decision in appeal and by setting aside the decision in the case of Tenancy Case No. 10 of 1998 remanded the case to Tahsildar for decision afresh.

4. It is alleged that since the petitioner who is the accused no.2 was then working as Tahsildar the tenancy case was received by him. However, no notices were issued to the respondent no.2, his mother and sister. The accused no.1 forged the signature of respondent No.2's sister. No statement of the respondent no.2 was recorded. but falsely shown that it was so recorded and decided the tenancy case *ex parte* on 20.01.2003 by forging the signature of the respondent no.2 to show that he was present on the date of hearing i.e. 16.01.2003. The respondent no.2 further alleged that he came to know about this fact when Laxman produced a certified copy of that decision in Special Suit No. 09 of 2000 on 28.11.2005.

5. Again, the respondent no.2 challenged that order before the Deputy Collector in Tenancy Appeal No.11 of 2005. In connection with the appeal the Deputy Collector called for the record and proceeding of Tenancy Case No.10 of 1998 but the petitioner failed to comply with the order and never produced the original record.

6. The respondent no.2 then preferred Writ Petition No.285 of 2008 in this Court and sought a direction against the petitioner to furnish the record and proceeding. In connection with the Writ Petition an affidavit was filed on behalf of the State about Collector having initiated action against the petitioner for loss of the record. By the final order in the Writ Petition a direction was issued to search the record and proceeding or to reconstruct it and to decide the tenancy appeal within three months.

7. It is further alleged that the accused no.3 was at the material time working as Awwal Karkun in the department of Tenancy in Tahsil office where the petitioner was posted. The respondent no.2 therefore alleges that all the three accused in furtherance of their common intention destroyed the record and the proceeding of the Tenancy case. The petitioner and the accused no.3 were responsible being the public servants in whose custody the record and proceeding was to destroy it. They destroyed the evidence about

manipulation and thereby committed the offence under Section 9 of the Records Act.

8. The learned Magistrate recorded the statement of the respondent no.2 under Section 200 of the Code of Criminal Procedure and by the impugned order directed the process to be issued only against the accused nos. 2 and 3 i.e. the petitioner and the third accused and refused to issue process against the accused no.1-Laxman. The petitioner challenged the order of issuance of process by preferring revision and by the impugned order failed to get any favourable order. Hence this Writ Petition.

9. The learned advocate for the petitioner submitted that in fact there is an enormous delay of about eight years in lodging the complaint which has not been explained in the complaint and for this reason alone the learned Magistrate ought not to have taken cognizance since the complaint was barred by limitation.

10. The learned advocate further submitted that under the Records Act, a Record Officer as defined under Section 2(i) is appointment under Section 5 by the record creating agency and the record vests in such Record Officer who is responsible to preserve it. There was no record to show that the petitioner was appointed as a Record Officer. The Magistrate failed to

consider the provisions of the Records Act. The learned advocate would further submit that the petitioner was not working as Tahsildar of Jamner when the record went missing. He was working in that capacity only from 10.04.2000 to 26.05.2003. There was no material to show that the record was lost during this period. When the record was called in Tenancy Appeal he was not working as Tahsildar in that office. He would lastly submit that by virtue of the order in Writ Petition No.285 of 2008 the record has already been reconstructed and therefore the matter has become infructuous.

11. He submitted that a false and concocted complaint has been filed with an intention to harass the petitioner. There was no sufficient material before the Magistrate to take cognizance and the complaint should have been dismissed. Even the learned Additional Sessions Judge has lost sight of all the aforementioned aspects and has dismissed the Revision without application of mind. The learned Additional Sessions Judge failed to note that even accepting the allegations at their face value, the offence punishable under Section 9 of the Records Act could not be made out. He failed to consider that the order passed by the Magistrate was perverse, arbitrary and capricious and still refused to intervene under the revisional jurisdiction.

12. Lastly the learned advocate for the petitioner submitted that since

the alleged offence has been committed in discharge of the official duty, a sanction under Section 197 of the Code of Criminal Procedure was a prerequisite before the Magistrate could have taken cognizance and in the absence of which he had no jurisdiction to take cognizance. Therefore even on this count the complaint is liable to be dismissed.

13. The learned advocate for the respondent no.2 submitted that there was enough material before the Magistrate to *prima facie* show that the petitioner was the Record Officer in whose custody the record and the proceeding of the Tenancy Case was, when it was lost. Such destruction or loss of official record would constitute an offence under Section 9. He further pointed out that it was a specific allegation of the respondent no.2 that after the Tenancy case was remanded by the Maharashtra Revenue Tribunal to the petitioner being the Tahsildar, he was in custody of the record and proceeding and had failed to produce it before the Deputy Collector when the respondent no.2 preferred Tenancy Appeal. Therefore a reasonable inference was deducible that he was responsible for loss of the record and the proceeding and had committed an offence punishable under Section 9. The revisional Court has also considered all these aspects and has rightly confirmed the order directing process to be issued.

14. I have carefully gone through the provisions of the Records Act, the impugned orders and the papers. It is trite that the powers of this Court to invoke the writ jurisdiction is very limited particularly when there are concurrent findings of the two Courts below. Ordinarily this Court would be loath in intervening in such concurrent findings. However, there is no complete bar for this Court to invoke such powers in an appropriate case.

15. It is equally trite that at the time of taking cognizance and issuing process under Section 204 of the Code of Criminal Procedure a Magistrate is not excepted to indulge in a meticulous and detailed inquiry. Availability of sufficient material to proceed is sufficient for him to take cognizance. He is to arrive at such a decision on the basis of some objective material and is expected to use the discretion judiciously.

16. Bearing in mind the above principles, this case presents one such exceptional instances where this Court needs to intervene in the concurrent findings of the two Courts below for variety of reasons as would be demonstrated hereinafter.

17. The respondent no. 2 is alleging that the petitioner was in custody of the record and proceeding of the Tenancy case, which went missing and was not produced before the Deputy Collector in connection with the

Tenancy appeal. Since the dispute pertains to the provisions of the Records Act, it is necessary to reproduce certain definitions and provisions which are relevant for the purpose. The title and the preface of the Act reads as under:

“MAHARASHTRA ACT No.IV of 2006.

(First published, after having received the assent of the Governor, in the “Maharashtra Government Gazette”, on the 17th January 2006.)

An Act to regulate the management, administration and preservation of public records of the State Government, local authorities, public sector undertakings, statutory bodies and corporations, commissions and committees constituted by the State Government and for matters connected therewith or incidental thereto.

WHEREAS *It is expedient to regulate the management, administration and preservation of public records of the State Government, local authorities, public sector undertakings, statutory bodies and corporations, commissions and committees constituted by the State Government and for matters connected therewith or incidental thereto; it is hereby enacted in the Fifty-sixth Year of Republic of India as follows:-*

1. (1) *This Act may be called as the Maharashtra Public Records Act, 2005.*

“Section 2 (c) “Director” means the Director of the Department of Archives appointed by the State Government and includes any officer authorised by the State Government to perform the duties of the Director;

Section 2 (g) *“public records” includes,-*

- (i) any document, manuscript and file;*
- (ii) any microfilm, microfiche and facsimile copy of a document;*
- (iii) any reproduction of image or image embodied in such microfilm (whether enlarged or not); and*
- (iv) any other material produced by a computer or by any other device, of any records creating agency;*

Section 2 (h) *“records creating agency” includes,-*

- (i) in relation to the State Government, any Department of Mantralaya or office of the State Government;*
- (ii) in relation to the local authority or any statutory body or corporation wholly or substantially controlled or financed by the State Government or commission or any committee constituted by the State Government, the office of the said local authority, statutory body, corporation, commission or committee;*

Section 2 (i) *“records officer” means the officer nominated by the records creating agency under sub-section (1) of Section 5.*

Section 3 (2) *The State Government in relation to the public records of the records creating agencies specified in clause (h) of section 2 may, by order, authorities the Director, subject to such conditions as may be specified in the order, to carryout all or any of the following functions, namely :-*

- (a) supervision, management and control of the Archives;*
- (b) acceptance for deposit of public records of permanent nature after such period as may be prescribed;*
- (c) custody, use and withdrawal of public records;*
- (d) arrangement, preservation and exhibition of public records;*
- (e) preparation of inventories, indices, catalogues and other reference media of public records;*
- (f) analysing, developing, promoting and co-ordinating the standards, procedures and techniques for improvement of the records management system;*
- (g) ensuring the maintenance, arrangement and security to public records in the Department of Archives and in the offices of the records creating agency;*
- (h) promoting utilisation of available space and maintenance of equipments for preserving public records;*
- (i) tendering advice to records creating agencies on the compilation, classification and disposal of records and application of standards, procedures and techniques of records management;*
- (j) survey and inspection of public records;*
- (k) organising training programmes in various disciplines of Archives administration and records management;*
- (l) accepting records from any private source;*
- (m) regulating access to public records;*
- (n) receiving records from defunct bodies and making*

arrangement for securing public records in the event of national emergency;

- (o) receiving reports on records management and disposal practices from the records officer;*
- (p) providing authenticated copies of, or extracts from, public records;*
- (q) destroying or disposal of public records;*
- (r) obtaining on lease or purchasing or accepting as gift any document of historical or national importance.*

Section 4 No person shall take or cause to be taken out of the State of Maharashtra any public records without the prior approval of the State Government:

Provided that no such prior approval shall be required if any public records are taken or sent, out of the State of Maharashtra for any official purpose.

Section 5 (1) *Every records creating agency shall nominate one of its officers as records officer to discharge the functions under this Act.*

Section 6 (1) *The records officer shall be responsible for;-*

- (a) proper arrangement, maintenance and preservation of public records under his charge;*
- (b) periodical review of all public records and weeding out public records of ephemeral value;*
- (c) appraisal of public records, which are more than twenty-five years old, in consultation with the Director with a view to retaining public records of permanent value;*
- (d) destruction of public records in such manner and subject to such conditions as may be prescribed under sub-section (1) of section 8;*
- (e) compilation of a schedule of retention for public records, in consultation with the Director;*
- (f) periodical review for downgrading of classified public records in such manner as may be prescribed;*
- (g) adoption of such standards, procedures and techniques as may be recommended from time to time, by the Director for improvement of record management system and maintenance of security of public records;*
- (h) compilation of annual indices of public records;*
- (i) compilation of organisational history and annual supplement thereto;*
- (j) assisting the Director for public records management;*
- (k) submission of annual report to the Director in such manner*

as may be prescribed;

- (1) transferring of records of any defunct body to the Director for preservation.*
- (2) The records officer shall act under the direction of the Director while discharging the responsibilities specified in sub-section (1).*

Section 7 (1) *The records officer shall in the event of any unauthorised removal, destruction, defacement or allegation of any public records under his charge, forthwith take appropriate action for the recovery or restoration of such public records.*

(2) The records officer shall submit a report in writing to the Director without any delay on any information about any unauthorised removal, destruction, defacement or alteration of any public records under his charge and about the action initiated by him and shall take action as he may deem necessary subject to the directions, if any, given by the Director.

(3)

(3) The records officer may seek assistance from any Government officer or any other person for the purpose of recovery or restoration of the public records and such officer or person shall render all assistance to the records officer.

Section 8 (1) *Save as otherwise provided in any law for the time being in force, no public record shall be destroyed or otherwise disposed of except in such manner and subject to such conditions as may be prescribed.*

Section 9 *Whoever contravenes any of the provisions of section 4 or section 8 shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to ten thousand rupees or with both.*

Section 16 *No suit, prosecution or other legal proceedings shall lie against any person in respect of anything which is in good faith done or intended to be done in pursuance of this Act or the rules made thereunder”.*

18. A careful reading of the preface would reveal that the Act is intended to regulate *inter alia* management and preservation of public records

of the State Government and the Local Bodies. As can be gathered, the State Government has to appoint a Director to perform the duties of the Director prescribed by the Act and the Rules. Section 2(g) then lays down as to what the Public Record would include. Section 2(h) defines Records Creating Agency which includes a Government Office as commonly understood. Section 5(i) then lays down that a Records Officer is to be nominated by the Record Creating Agency, which lays down that every Record Creating Agency has to nominate one of its officers as Records Officer for the discharge of the functions. Section 3 then lays down that the State Government may authorize the Director to carry out various functions which includes supervision, management, control and destruction of public records. Section 4 then lays down a prohibition that no public record shall be taken out of the State of Maharashtra by any person without prior approval of the State Government except for official purpose. Section 6 lays down the duties and responsibilities of the Records Officer which include proper arrangement, maintenance, preservation and giving assistance to the Director. Section 7 then authorizes the Records Officer to take appropriate action for recovery or restoration of public records in the event of unauthorized removal, destruction, alteration etc. He is expected to submit a report in writing to the Director about it. Section 8 mandates that no public record shall be destroyed except in the

manner provided under the Act and the Rules. Section 9 then provides for penalty for violation of provisions of Section 4 and 8 and the offender is punishable with imprisonment up to five years or with fine up to Rs.10,000/- or both. Section 16 then provides immunity to the actions taken by any person in good faith pursuant to the provisions of the Act and the Rules framed thereunder from any civil or criminal action. Bearing in mind these provisions let us now examine the matter in hand.

19. According to the complaint, the Tenancy Case No.10 of 1998 was initially decided. The decision was challenged in Tenancy Appeal. It was allowed and the revision preferred by Laxman before the Maharashtra Revenue Tribunal was also dismissed. The Tenancy case was remanded to the Tahsildar by the order dated 05.03.2001. There are no allegations that prior to 05.01.2001 the petitioner was dealing/handling the file of the Tenancy Case No.10 of 1998. According to the allegations after such remand the petitioner decided the Tenancy case by the order dated 20.01.2003. The respondent no.2 alleges that he came to know about the decision by the petitioner when a certified copy of the order was produced by Laxman in Special Civil Suit No.09 of 2000 on 28.11.2005. It is thereafter that he preferred Tenancy Appeal No.11 of 2005 before the Deputy Collector. It is alleged that when the record of the Tenancy Case No.10 of 1998 was

requisitioned the petitioner had failed to produce it and was therefore liable to be prosecuted for destruction of the record under Section 9 of the Records Act.

20. If such are the allegations, firstly it was necessary for the respondent no.2 to have demonstrated that the petitioner was still continuing as Tahsildar and was having the custody of the record and the proceeding when it was requisitioned by the Deputy Collector in connection with Tenancy Appeal No.11 of 2005, particularly when, according to the petitioner he was officiating as Tahsildar of Jamner only between 10.04.2000 and 26.05.2003, at least to *prima facie* show that he could have been probably in custody of the record and the proceeding. There is no such material and except the statement in the complaint one cannot draw any inference that he was actually in custody of the record and proceeding when it was requisitioned by the Deputy Collector.

21. Again, there is absolutely no material to show that the State Government which is a Record Creating Agency as defined under Section 2(h) had nominated somebody as a Records Officer pursuant to the provisions of Sub-section 1 of Section 5. It is not brought on record even by way of some assertion that some officer was appointed by the State Government as a

Records Officer who could have initiated appropriate action under Section 7 (i) for the alleged loss / destruction. There is no material to show that the respondent no.2 had independently explored this aspect and had made any grievance with the Records Officer or the Director so that cognizance of such loss could have been taken and some responsibility could have been fixed for the loss of the record.

22. Merely because the record and the proceeding was admittedly lost and this Court had to direct its reconstruction pursuant to which the record is recreated and the State Government in that Writ Petition had filed an affidavit that appropriate action was being initiated against the Tahsildar, one cannot find any link between the loss of the record and the petitioner. Assuming that he had decided that Tenancy case in the year 2003, there is no material to show that he was responsible for destruction of the record. Thus except the allegations in the complaint there is absolutely no material to firstly *prima facie* show that the petitioner was holding the custody and secondly to show that he had destroyed the record and proceeding of the Tenancy case much less with necessary *mens rea*.

23. The learned advocate for the respondent no.2 vehemently submitted that since he was alleging about manipulation in the record and

proceeding wherein without serving any notice to him, his sister and mother it was made to believe that they had received the notice and the matter was decided *ex parte*. This was done with a view to destroy the evidence to meet such allegations, that the petitioner has deliberately destroyed the record.

24. At the first blush the submission of the learned advocate seems attractive. However a careful consideration would reveal that there is absolutely no record to show that the respondent no.2 had before filing Tenancy Appeal No.11 of 2005 made any such allegation against him so that the petitioner could have destroyed the record to obliterate the evidence. Therefore the submission of the learned advocate is not acceptable.

25. In the complaint it has been alleged that during the inquiry held by the Collector pursuant to the Writ Petition filed by him for missing of the record, the petitioner and the third accused had submitted their statements in reply to the show cause notice wherein the petitioner had stated about having handed over the record and proceeding to the accused no.3 who was the Awwal Karkum and his subordinate and even the latter in response to the show cause notice in that inquiry adopted the say of the petitioner. Therefore it can be said that it was the accused no.3 who was holding the custody of the record and the proceeding as Awwal Karkum while acting as a subordinate of

the petitioner. If this is to be accepted, it cannot be said that the petitioner was holding the custody of the record and the proceeding so that he could be held answerable for its preservation and/or destruction.

26. Now coming to the provisions of the Records Act, under Section 9, contravention of Section 4 and Section 8 has been made punishable. Section 4 prohibits taking the public record out of the State and under Section 8 no public record can be destroyed except in the manner provided under the Rules. There are no allegations that the record of the Tenancy Case No.11 of 1998 was taken out of the State and there is also no record / material to show that the record and proceeding was destroyed by the petitioner. Thus considering all these facts and circumstances, the allegation in the complaint and the record even if taken at its face value it does not make out all the necessary ingredients for constituting an offence under Section 9 of the Records Act.

27. The learned advocate for the petitioner submits that there is delay in filing the complaint and it is beyond limitation. Assuming that the provisions of Section 468 of the Code of Criminal Procedure are applicable, still since the offence under Section 9 of the Records Act is punishable up to five years of imprisonment, provisions of Section 468 of the Code of Criminal

Procedure would not be applicable which provides for limitation only in respect of the offences punishable up to three years. Therefore this limb of argument is not legally tenable.

28. The principles which govern the stage where an order of issuing process is sought to be recalled has been clearly laid down by the Supreme Court in the case of **Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Ors.**; AIR 1976 SC 1947 which read as under:

“(1) Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused.

(2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused.

(3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and”

29. Applying these principles to the facts in hand, the discussion made herein-above clearly shows that even if the allegations in the complaint are taken at its face value they fall too short to make out all the necessary concomitants for constituting the offence punishable under Section 9 of the Records Act and applying these principles, the impugned orders are liable to be quashed and set aside.

30. The learned Magistrate and the learned Additional Sessions Judge have not at all examined the aforementioned aspects. The impugned orders clearly demonstrate a lack of application of mind and therefore though they have concurred, this Court needs to intervene under the writ jurisdiction.

31. The Writ Petition is allowed. Both the impugned orders are quashed and set aside. The complaint filed by the respondent no.2 is dismissed under Section 203 of the Code of Criminal Procedure. The Rule is accordingly made absolute.

[MANGESH S. PATIL, J.]