

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.808 2020

Vishnudas Sambhaji Honmane,
Age 56 yrs., Occ. Service,
R/o Yashwant Nagar, Degloor,
Tq. Degloor, Dist. Nanded.

... Petitioner

... Versus ...

- 1 The State of Maharashtra
Through Mukramabad Police Station,
Dist. Nanded.
- 2 Saroja w/o Hanmant Kyodarkunthe,
Age 30 yrs., Occ. Household,
R/o Walanki, Tq. Mukhed,
Dist. Nanded.

... Respondents

...

Mr. P.D. Bachate and Mr. A.D. Khot, Advocates for the petitioner

Mr. S.W. Munde, APP for the respondent No.1

Mr. K.P. Rodge, Advocate for the respondent No.2

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 16th MARCH, 2021

PRONOUNCED ON : 17th JUNE, 2021.

JUDGMENT :

1 Rule. Rule made returnable forthwith. By consent of parties,
taken up for final disposal.

2 Present writ petition has been filed invoking the constitutional
powers of this Court under Article 227 of the Constitution of India, by the
original accused, for challenging the order passed by learned Additional
Sessions Judge-2, Kandhar, Link Court Mukhed on 09.03.2020, in Criminal
Revision Application No.33/2015, whereby the said revision came to be
dismissed, which was preferred by the present petitioner. In the said revision
the present petitioner had challenged order dated 10.06.2015 passed by
learned Judicial Magistrate First Class, Mukhed in Regular Criminal Case
No.31/2015 (old number - Other Miscellaneous Criminal Application
No.48/2015). By the said order dated 10.06.2016 the learned Judicial
Magistrate First Class had issued process against the present petitioner for
the offence punishable under Section 420 of the Indian Penal Code.

3 The background of the litigation is required to be considered.
Present respondent No.2 had filed an application under Section 156(3) of the
Code of Criminal Procedure bearing Other Miscellaneous Application
No.48/2015 for taking action for the offence punishable under Section 420 of
the Indian Penal Code against the accused i.e. present petitioner. After
hearing the original complainant that prayer of sending the matter for

investigation under Section 156(3) of Cr.P.C. came to be rejected and the application was directed to be registered as Regular Criminal Case. Thereafter, the verification was recorded, statements of certain witnesses were also recorded and taking into consideration the material before him it was observed by the learned Magistrate that the prima facie case for the offence punishable under Section 420 of the Indian Penal Code has been made out and accordingly process was issued. It will not be out of place to mention here that it appears that present petitioner had directly approached this Court by filing Criminal Writ Petition No.1004 of 2015 challenging the said order. However, that petition came to be withdrawn on 07.08.2015 by giving liberty to the petitioner to approach the Revisional Court. Thereafter, the present petitioner appears to have filed Criminal Revision Application No.33/2015 challenging the order of issuing process against him. However, that revision came to be dismissed on 09.03.2020. Hence, the petitioner is before this Court in this writ petition. Further, it also appears from the record that has been produced that the original complainant had lodged a complaint/complaint application with the police on 22.10.2014 prior to the lodging of the complaint before learned Judicial Magistrate First Class. Inquiry appears to have been held by the police officer. Statements of witnesses were recorded. It appears that statement of petitioner was also recorded and thereafter ASI Mr. Gudsurkar attached to Police Station,

Mukramabad has given report to his superior on 11.12.2014, wherein he has opined that since there is no sufficient material against the petitioner, the complaint application filed by the present respondent No.2-original complainant deserves to be disposed of without taking any action against the petitioner-accused.

4 Heard learned Advocate Mr. P.D. Bachate for the petitioner, learned APP Mr. S.W. Munde for the respondent No.1 and learned Advocate Mr. K.P. Rodge for the respondent No.2.

5 It has been vehemently submitted on behalf of the petitioner that petitioner has been falsely implicated, as there is dispute between the Trust members. Petitioner is member of Sant Gadgebaba Shikshan Prasarak Mandal, Degloor. There were two groups in the management trying to catch hold of the entire management. Elections were held of the Trust on 12.12.2002. After the members were elected, another meeting was held on 13.12.2002, wherein the office bearers had elected amongst the members of the managing committee. The said change report was accepted by the learned Assistant Charity Commissioner. However, that order came to be reversed in appeal by learned Joint Charity Commissioner. The learned District Judge accepted the Change Report No.137/2003. Now, that

acceptance of change report is the subject-matter before this Court in Second Appeal No.339 of 2014. Thereafter the Second Appeals are converted into First Appeal Nos.2212 of 2016 to 2215 of 2016. They are still pending. It is further submitted on behalf of the petitioner that the Change Report No.923/2009, which was filed on the basis of election held in meeting dated 05.06.2009, the present petitioner was shown as Treasurer by one Sangram Malge. Further, the order dated 08.05.2012 accepting the change report was challenged in Appeal No.15/2012. The appeal came to be allowed and the inquiry in Change Report No.923/2009 was remitted to the Court of Assistant Charity Commissioner by order dated 02.05.2014. All these things could show that there is still the dispute pending between the management committees. The First Information Report appears to have been lodged at the instance of the rival parties of the petitioner. He had never accepted any amount from anybody. There was absolutely no documentary evidence produced by the complainant to show that such an amount, which is stated to be to the tune of Rs.7,00,000/-, was accepted by the present petitioner under the promise that he would make arrangements to give service in their institution for the original complainant. Both the Courts below have not considered the prima facie facts coupled with law. The order of issuance of process is defective and illegal and deserves to be set aside.

6 Learned Advocate for the petitioner has relied on the decision in **VP. Shrivastava vs. Indian Explosives Limited and others, 2010 (10) SCC 361**, wherein it has been held that in the complaint when there is not even a whisper let alone a specific averment that the appellants/original accused had dishonestly induced the party complainant to enter into said agreement. On the contrary, when the complainant clearly revealed that his company was fully conscious of the precarious financial health of FCIL at the time they had decided to enter into contract with FCIL and BCCL to ensure to regular supply of their basic raw material. Therefore, even if we take the allegations in the complaint as it is, yet, at the most it may amount to breach of terms of contract, criminal action is not contemplated.

6.1 Further reliance has been placed on **Vesa Holdings Private Limited and another vs. State of Kerala and others, 2015 (8) SCC 293**, wherein it has been held that -

“Every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was no any deception played at the very inception.”

6.2 Further reliance has been placed on the decision in **Ram Biraji Devi and another vs. Umesh Kumar Singh and another, 2006 (6) SCC 669**,

wherein, how the ingredients of Section 420 of the Indian Penal Code are not attracted in that particular case has been discussed. Similar is the case in respect of Judgment in **Samir Sahay @ Sameer Sahay vs. State of U.P. and another, AIR 2017 SC 5327.**

6.3 Further reliance has been placed on the decision on **The Commissioner of Expenditure Tax, A.P. vs. PVG Raju, Rajah of Vizianagaram, AIR 1976 SC 140**, wherein word “Donation” has been tried to be defined. It is observed that -

“When a person gives money to another without any material return, he donates that sum. An act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another, without any consideration, is a donation. A gift or gratuitous payment i.e. in simple English, a donation.”

As regards the word ‘donation’ is concerned, it is to be noted that in her complaint in paragraph No.3 it is stated that present petitioner gave promise stating that he is the Treasurer of the institution and after they had the conversation. It was decided that the original complainant would pay Rs.16,00,000/- as donation and the token was to be given to the extent of Rs.7,00,000/-. Therefore, if the amount is given by the respondent No.2 was her own voluntarily act, then that does not amount to ‘cheating’ as

contemplated under Section 415 of the Indian Penal Code. Learned Advocate for the petitioner, therefore, prayed for the setting aside of the order passed by learned Revisional Court, so also, setting aside the order passed in respect of issuance of process against the present petitioner.

7 Per contra, the learned Advocate appearing for the respondent No.2-original complainant vehemently submitted that the petitioner had made representation to the husband of the complainant that since he is the Treasurer of the Trust, he would do everything for the job of the respondent No.2 in the school of the Trust. In presence of witness, it was decided that the complainant would give amount of Rs.16,00,000/- and then on 02.07.2013 an amount of Rs.7,00,000/- was given to the petitioner. It was also decided that rest of the amount would be given after she is taken in service. However, inspite of several meetings, respondent No.2-original complainant was not given any appointment letter. It was avoided on one or the other pretext. Later on he refused to act as per promise. Therefore, the complainant had no option but to lodge the complaint. Though she had given the complaint application to police and police had made inquiry, yet, no action of registering the offence was taken by police. Taking into consideration the material, that was placed before the learned Magistrate, process has been issued. Only prima facie case was required to be considered

by the learned Magistrate at that stage. He was not suppose to consider whether there would be conviction of the accused at the end of the trial or not. Said order does not require any interference. The decisions relied by the learned Advocate for the petitioner are not applicable here, as all the ingredients of the offence under Section 415 of the Indian Penal Code have been fulfilled.

8 At the outset, from the impugned Judgment i.e. the Criminal Revision Application No.33/2015 though the Revisional Court in para No.1 has specifically stated that the revision is filed challenging the order dated 10.06.2015 passed by the learned Magistrate, yet most of the part of the Judgment has been consumed as to how the order passed for sending the matter for investigation under Section 156(3) of the Code of Criminal Procedure, was correct. In fact, the order passed by learned Judicial Magistrate First Class on 10.06.2015 was in respect of taking cognizance of the offence punishable under Section 420 of the Indian Penal Code and thereby issuing process against the accused. Only in para No.10, which is the last para, a statement has been made that the 'order dated 01.04.2015 passed by the learned Trial Judge while passing the order considered all the facts and documents and, therefore, the directions under Section 156(3) of the Code of Criminal Procedure were not warranted and, proceeded further as

provided under Section 200 of the Code of Criminal Procedure. After recording statement of complainant and witnesses, impugned order dated 10.06.2015 has been passed and it does not suffer from any illegality, impropriety or incorrectness'. The Revisional Court totally erred in not considering what was the material before the learned Magistrate when the order dated 10.06.2015 was passed and taking into consideration that material whether the order of issuing process was justified. The learned Revisional Court was supposed to weigh the material before the learned Magistrate, in order to come to a conclusion that the conclusion arrived at by the Magistrate was correct. That weighing of evidence is totally missing in the impugned order by the Revisional Court. What are the contentions in the complaint, whose statement has been recorded apart from the verification and whether any supportive documentary evidence is produced or not, is absolutely not scrutinized. If we consider the record, then the complaint paragraph No.3 states that accused was friend of the husband of complainant. Taking into consideration the fact that complainant was in search of job though she had the qualification of B.A. D.Ed., her husband had talks with accused. Accused told confidently that in his institution there would be vacancies of Teachers and the posts would be filled. He is working as Treasurer and serving as Clerk. He has every knowledge about the institution. Complainant's husband kept faith on the accused and in the said

talks it was demanded by the accused that amount of Rs.16,00,000/- should be given as **donation** and token of Rs.7,00,000/- be given. This is the translation of para No.3, however, for the sake of convenience paragraph No.3 is reproduced -

“3) हे की, फिर्यादी सुशिक्षित असून तिचे शिक्षण बी.ए. डी.एड्. झाले आहे. फिर्यादी ही सुशिक्षित बेकार असल्यामुळे तिचे पती हाणमंत क्यॉदरकुंठे हे पत्नीच्या नौकरीच्या शोधात होते. त्याची व आरोपीची चांगली ओळख व मित्रत्वाचे संबंध असल्यामुळे उभयंतात त्या संबंधाने चर्चा झाली असता, आरोपीने विश्वासात घेवून आमच्या संस्थेत शिक्षकांच्या जागा निघणार आहेत, मी संस्थेचा कोषाध्यक्ष असून लिपीक म्हणून काम करतो, मला संस्थेची सर्व माहिती आहे असे सांगितल्यामुळे फिर्यादीच्या पतीने आरोपीवर विश्वास ठेवून बोलणे केले असता त्यावेळी आरोपीने **डोनेशन** म्हणून रक्कम रु.16,00,000/- (अक्षरी रुपये सोळा लाख फक्त) ची मागणी केली व टोकण म्हणून रोख रु.7,00,000/- (अक्षरी रुपये सात लाख फक्त) देण्याचे ठरले.”

The word ‘donation’ has been stressed here. Important point to be noted is that in her complaint dated 22.10.2014, same words have been repeated. Those are also appearing in the statements of the witnesses recorded by police. In the verification as well as in the statements of witnesses before learned Magistrate also the same fact appears to be mentioned. Now, the question is, why the word ‘donation’ has been used ? Complainant had not come with a case that either she herself or any of her family member wanted admission in the school/college of the Institution, where accused was Treasurer. It was for the complainant to explain the further aspect about the talks, as to whether that donation was agreed to be

given to the institution. When the word 'donation' is used, then definitely in view of the decision in **The Commissioner of Expenditure Tax, A.P. vs. PVG Raju, Rajah of Vizianagaram, AIR 1976 SC 140**, it is an amount given voluntarily by a person to another. The meaning has been reproduced earlier. If it was the voluntary payment, then how it could amount to "cheating" as contemplated under Section 415 of the Indian Penal Code? Another fact, which the complainant and the witnesses including the husband of the complainant have not explained, as to how the amount of Rs.7,00,000/- was raised and in which form that amount was given to the accused, why no receipt was taken on the same date. In her complaint dated 22.10.2014 it is stated that, that amount of Rs.7,00,000/- was given in cash on 02.07.2013. The question is, then why she kept quiet and did not ask for any receipt for the said payment till 22.10.2014 ? All these facts have not been considered by both the Courts below. Neither complainant nor her husband explained as to why they had decided to give such huge amount in cash. While arriving at the conclusion that prima facie case has been made out, all the facts should be considered and its probability should also be checked. Those facts have direct bearing on the ingredients of the offence under Section 415 of the Indian Penal Code. Here, except the bare words of the complainant and her witnesses there is nothing on record which would support their contention about parting of amount of Rs.7,00,000/- in cash. Another aspect, that is,

missing is, though it was allegedly represented by the accused to the complainant or her husband that he is a Treasurer of the institution, yet, whether they had made any kind of inquiry, as to whether accused can single handedly do their work. Believing in the representation depends upon what representation is made, it was for the complainant and/or her husband to cross check what the accused is saying, whether any information was taken by them, as to whatever the accused is saying is a true fact or not and then to believe in his word or not. No doubt, further merits of the case can not be gone into at the prima facie stage, but here the complainant has not given all those facts which led her husband and herself to believe in the representation made by accused. The facts disclosed in the complaint show that there was no direct dialog between accused and complainant.

9 The said fact can also be considered from another angle. Complainant says that she was a qualified Teacher or in other words, she has acquired the qualification to become a Teacher. We cannot presume that she would be ignorant about the process or procedure, that is, required to be taken by any institution while filling up of the vacancies, that too under The Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 or for the secondary education the various rules, those are governing the recruitment of a Teacher. A genuine candidate will definitely

compete with the similarly placed qualified persons. The intention of the complainant and her husband in agreeing to part with the amount to get a job can only be said that it is an illegal act and amount to bribing a person to get something in their favour. It appears that the complainant had no intention to compete and wanted the job by illegal means. Complainant has also not come with a case that the said amount was given after the advertisement for the recruitment of teachers was published by the Institution. Complaint gives an impression that an impression was given by accused that whenever the vacancies would arise and recruitment would be undertaken, he would do the work for complainant. It could not have been a contingent contract. If that amount was given for such illegal means, then it cannot be said that it any way fulfills the ingredients of Section 415 of the Indian Penal Code. The order of issuing process passed by the learned Magistrate does not make any kind of such discussion and, therefore, it appears that there is absolutely no proper application of mind by the learned Magistrate. It would be necessary to consider as to what are the requirements and duties of the Magistrate before taking cognizance/issuing process. In **Manharibhai Muljibhai Kakadia and another vs. Shaileshbhai Mohanbhai Patel and others**, (2012) 10 SCC 517 (Three Judge Bench) following are the observations -

“Section 202 Cr.P.C. has twin objects; one, to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an unnecessary, frivolous or meritless complaint and the other, to find out whether there is some material to support the allegations made in the complaint. The Magistrate has a duty to elicit all facts having regard to the interest of an absent accused person and also to bring to book a person or persons against whom the allegations have been made. To find out the above, the Magistrate himself may hold an inquiry under Section 202 Cr.P.C. or direct an investigation to be made by a police officer. The dismissal of the complaint under Section 203 is without doubt a pre-issuance of process stage. Cr.P.C. does not permit an accused person to intervene in the course of inquiry by the Magistrate under Section 202.

The procedural scheme in respect of the complaints made to Magistrates is provided in Chapter XV Cr.P.C. Chapter XV uses the expression, “taking cognizance of an offence” at various places. Although the expression is not defined in Cr.P.C., but it has acquired definite meaning for the purposes of Cr.P.C. The word, “cognizance” occurring in various Sections in Cr.P.C. is a word of wide import. It embraces within itself all powers and authority in exercise of jurisdiction and taking of authoritative notice of the allegations made in the complaint or a police report or any information received that an offence has been committed. In the context of Sections 200, 202 and 203, the expression “taking cognizance” has been used in the sense of taking notice of the complaint or the FIR or the information that an offence has been committed on application of judicial mind. It does not necessarily mean issuance of process.”

9.1 Further, in another Three Judge Bench decision in **Sunil Bharati Mittal vs. C.B.I., AIR 2015 SC 923** it has been observed -

“A wide discretion has been given as to grant or refusal of process under Section 204 and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction. However, the words “sufficient grounds for proceeding” appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against accused, though the order need not contain detailed reasons. A fortiori, the order would be bad-in-law if the reason given turns out to be ex-facie incorrect. However, there has to be a proper satisfaction in this behalf which should be duly recorded by the Special Judge on the basis of material on record. When no such exercise is done, the order summoning accused persons would be liable to be set aside.”

9.2 Further, in another case **Bhushan Kumar and another vs. State (NCT of Delhi) and another, (2012) 5 SCC 424** following observations are made -

“Section 204 Cr.P.C. does not mandate the Magistrate to explicitly state the reasons for issuance of summons. Section 204 Cr.P.C. mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in Section 204 that the explicit narration of the same is mandatory, meaning thereby that it is not a prerequisite for deciding the validity of the summons issued. Therefore, the order passed by the Magistrate cannot be faulted with only on the ground that the summoning order was not a reasoned order.”

Therefore, though in this case above observations are made that the order is not a reasoned order, yet, what was expected from a Magistrate, is, that his order should reflect the application of mind.

9.3 Further, in **Chandra Deo Singh vs. Prakash Chandra Bose alias Chabi Bose and another**, AIR 1963 SC 1430 following ratio has been laid down.

“No doubt, one of the objects behind the provisions of Section 202, Cr.P.C. is to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave

allegations are made.

For determining the question any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. As stated in sub-section (1) of S. 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements on oath made by the complainant and the statements made before him at the enquiry which would naturally mean the complaint itself, the statement made before him by person examined at the instance of the complainant.”

Therefore, after taking into consideration these pronouncements and the documents on record, it can be seen that not only the Magistrate erred in not considering the material in proper aspect and the fact that except the bare words there is nothing, the purpose for which the amount was allegedly paid, it shows non application of mind. So also, this aspect has not been considered by the Revisional Court. Another fact to be noted is that the learned Magistrate as well as Revisional Court had not even taken note of the inquiry made by Police on the complaint application filed by the complainant. Though the said report by Police was not binding on the learned Magistrate, yet, some discussion as to how still a prima facie case has been shown, was

expected.

10 Documents have been produced by the petitioner before this Court showing that there are internal litigations between the Trustees and office bearers and the change reports are under challenge. It was tried to be contended that taking into consideration this dispute it is hard to believe that such a representation would have been made by the petitioner that he would make every arrangement for the recruitment of the complainant. On this point the Court is not with the petitioner, for the simple reason that it was not expected from the complainant that she should know about the litigation in the Trust. The documents produced at the stage of revision or at the stage of writ petition by the accused cannot be gone into to non suit the complainant. However, as aforesaid, when the complainant herself has not adduced even prima facie evidence about parting of such huge amount, that too, in cash for some illegal purpose, then it will definitely not attract the ingredients of Section 415 punishable under Section 420 of the Indian Penal Code. The writ petition deserves to be allowed. Accordingly, it is allowed in terms of prayer clause "B". Rule is made absolute in above terms.

(Smt. Vibha Kankanwadi, J.)