

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

CRIMINAL WRIT PETITION NO.878 OF 2021

- 1) Gangaprasad S/o Govindrao Yannawar,
Age-43 years, Occu:Business,
R/o-Near Nagreshwar Mandir, Kandhar,
Tq-Kandhar, Dist-Nanded,
- 2) Madhukar S/o Madhavrao Dange,
Age-45 years, Occu:Business,
R/o-Lungare Galli, Kandhar,
Tq-Kandhar, Dist-Nanded,
- 3) Bhagwan S/o Shankar Rathod,
Age-39 years, Occu:Agriculture,
R/o-Dhaku Tanda, Shekapur,
Tq-Kandhar, Dist-Nanded,
- 4) Venkati S/o Aabaji Nagalwad,
Age-50 years, Occu:Business,
R/o-Sultanpura, Kandhar,
Tq-Kandhar, Dist-Nanded,
- 5) Nilesh S/o Manoj Singh Gour,,
Age-28 years, Occu:Business,
R/o-3-34, Near SBI Bank,
Gaikwad Galli, Kandhar,
Tq-Kandhar, Dist-Nanded,
- 6) Balaji S/o Manika Totwad,
Age-41 years, Occu:Agriculture,
R/o-Bahaddarpura,
Tq-Kandhar, Dist-Nanded,
- 7) Prakash S/o Venkatrao Ghorband,
Age-45 years, Occu:Service,
R/o-Kalambar (kh.), Kandhar,
Tq-Loha, Dist-Nanded.

...PETITIONERS

VERSUS

- 1) The State of Maharashtra,
Through Chief Secretary,
Law & Judiciary Department,
Mantralaya, Mumbai-32,
- 2) The Director General of Police,
Police Headquarters,
Old Council Hall,
Shaheed Bhagat Singh Marg,
Mumbai, Pincode-400001,
- 3) The Commissioner of Police,
Commissioner of Police office,
Mill Conrner, Aurangabad,
Dist-Aurangabad,
- 4) The Superintendent of Police,
Office of Superintendent of Police,
Vazirabad Chowk, Nanded,
Dist-Nanded,
- 5) Police Inspector,
Through Kandhar Police Station,
Dist-Nanded,
- 6) Shyamsundar S/o Dagdoji Shinde,
Age-66 years, Occu:Member of Legislative
Assembly, R/o-Halda, Tq-Kandhar,
Dist-Nanded,
- 7) Gopal Chandrapal Indrale,
Age-Major, Occu:Service(Police Sub Inspector),
R/o-Kandhar Police Station,
Tq-Kandhar, Dist-Nanded,
- 8) Viswnath Zunzare,
Age-Major, Occu:Service (Police Inspector),
R/o-Kandhar Police Station,
Tq-Kandhar, Dist-Nanded.

...RESPONDENTS

...
Mr.Dhananjay M. Shinde Advocate for Petitioners.
Mr.A.M. Phule, A.P.P. for Respondent Nos.1 to 5, 7 and 8.
Mr.A.M. Gaikwad Advocate for Respondent No.6.
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**CORAM: SMT. VIBHA KANKANWADI AND
RAJESH S. PATIL, JJ.**

DATE OF RESERVING ORDER : 17th AUGUST 2022

DATE OF PRONOUNCING ORDER : 30th SEPTEMBER 2022

ORDER [PER SMT. VIBHA KANKANWADI, J.] :

1. By invoking the constitutional powers of this Court under Article 21, 226 and 227 of the Constitution of India as well as inherent powers under Section 482 of the Code of Criminal Procedure, the petitioners are seeking quashment of the First Information Report as well as the entire proceedings against them.

2. Respondent No.6 had lodged First Information Report (for short "FIR") vide Crime No.199 of 2021 on 28th June 2021 with Kandhar Police Station, District-Nanded, for the offence punishable under Sections 353, 352, 143, 147, 149 of the Indian Penal Code. It appears that during pendency of the present Petition the investigation was complete and charge-sheet came

to be filed on 20th August 2021 against the petitioners, however, at the time of filing of the charge-sheet, it has been filed only under Sections 352, 143, 147, 149 of the Indian Penal Code, thereby deleting Section 353 of the Indian Penal Code. At this stage it will have to be observed that when the petitioners were permitted to amend the Petition, they had not molded the body of the Petition taking into consideration the deletion of Section 353 of the Indian Penal Code. However, the ultimate amended prayer is in respect of the quashment of the entire charge-sheet that was then filed before the learned Judicial Magistrate First Class, Kandhar, District-Nanded.

3. Heard Mr. Shinde, learned Advocate for the petitioners, Mr. Phule, learned APP for the State and Mr. Gaikwad, learned Advocate for Respondent No.6.

4. It has been vehemently submitted on behalf of the petitioners that when the Petition was filed at that time Section 353 of the Indian Penal Code was invoked in the FIR. Respondent No.6 was the Member of the Legislative Assembly and he cannot be said to be a public servant and this point is not *res integra* as has been concluded in **R.S. Nayak vs. A.R. Antulay**, decided by the Constitutional Bench of the Hon'ble

Supreme Court in **(1984) 2 SCC 183**. It has been specifically held that, " MLA is neither in the pay of the Government in the sense of executive Government nor remunerated by fees for performance of any public duty by the executive Government. Therefore, he is not comprehended in the expression 'public servant' within the meaning of the expression in clause Twelfth (a). He is thus not a public servant within the meaning of the expression in that clause. " Further, it is also held that, MLA is not comprehended in clause Seventh of Section 21 of the Indian Penal Code so as to be a public servant. Under such circumstance, the FIR could not have been registered for the offence punishable under Section 353 of the Indian Penal Code.

5. Further, it has been submitted on behalf of the petitioners that perusal of the FIR as well as entire charge-sheet would disclose that initially it appears that respondent No.6 had directed the revenue officers to lodge the FIR, however, when it was found that they are not taking any action, he himself lodged the FIR. In the FIR, he stated that he was present at about 2.00 p.m. on 28th June 2021 at a function which was organized by Public Works Department and in that function, which was a Government function, the petitioners and others without giving any intimation, started disputing as to how such programme is

organized. By using arrogant language they rushed towards the person of respondent No.6 and obstructed the function. When respondent No.6 was informing the petitioners that they should agitate through proper channel, yet by rushing towards him, they had obstructed the function. These facts do not indicate any such offence under which now the charge-sheet is also filed. However, the statements of witnesses would show that the officers of Public Works Department are denying a fact that it was the Government function. In fact no invitation cards were published. The witnesses state that some persons were making agitations that the protocol has not been followed and they were protesting against respondent No.6. It appears that by some highhanded act on the part of respondent No.6, he had compelled the Government officers to take that function, may be to get credit of the work, which was opposed. Opposition to the function cannot amount to an offence. The statement of the police officers who were present, are also on the same line. Further no overt act is attributed to any of the petitioners. Under such circumstance, it will be futile exercise to ask the petitioners to face the trial and therefore the FIR as well as the entire charge-sheet deserves to be quashed and set aside.

6. Per contra, the learned APP as well as learned Advocate for Respondent No.6 strongly opposed the Petition and submitted that since it was later on found that Section 353 of the Indian Penal Code could not be attracted in the present facts of the case, the charge-sheet has not been filed under that Section. But as regards the other Sections i.e. 352, 143, 147, 149 of the Indian Penal Code are concerned, there is strong evidence against the present petitioners. Their names have been taken by respondent No.6 in his FIR. So also witnesses by name, Shaikh Husain @ Sherubhai Pashamiya, Dnyaneshwar Baliram Chonde, Arun Bapusaheb Kadam, Shamrao Balaji Pawar, Aniket Jomegaonkar would show that all the petitioners were present and had arrogantly behaved and rushed towards the person of respondent No.6. The other witnesses, who appear to be officials of Public Works Department and Police Department, who were present at the spot, also states that such function was organized and there was chaos. Now, conveniently certain persons are saying that they were at the different place and reached the spot later, but then the Police Officers are saying that they had removed those persons from the pandal who were creating chaos in the pandal. Definitely they would be identified at the time of trial. Under such circumstance, this is not a fit case

where constitutional or even the inherent powers should be exercised by this Court.

7. At the outset, it is now required to be observed that though the FIR was also lodged under Section 353 of the Indian Penal Code, it appears that the mistake has been corrected at the time of filing of the charge-sheet. Respondent No.6 is the Member of Legislative Assembly and in view of ***R.S. Nayak vs. A.R. Antulay*** (supra), he cannot be considered as a public servant and therefore, there is no question of invoking Section 353 of the Indian Penal Code.

8. Now it is required to be seen as to whether the ingredients of the other offences are prima facie made out from the FIR as well as the evidence that has been collected. The contents of the charge-sheet would certainly show that a function was held. Whether it was organized at the cost of Government expenditure by Public Works Department or not, would be the matter of evidence, but certainly the said function appears to be that of foundation laying ceremony of the building of sub-divisional office within the premises of the office of Tahsildar. Tahsildar, other revenue officers, officers from the Public Works Department as well as Police Department were present in the

pandal. No doubt, conveniently some of them are saying that at the later point of time they went somewhere else. But it can be seen that some of them were reached to the spot when the chaos was made. The FIR as well as the statement of above witnesses, whose names have been earlier reflected, shows that they have taken the names of the petitioners and they specifically stated that by asking arrogantly as to how respondent No.6 is taking the said function, the petitioners had rushed towards him. Section 352 of the Indian Penal Code deals with punishment for assault or criminal force otherwise than on grave provocation. In the FIR itself it is stated that there is no intimation earlier given by the petitioners about the agitation. For considering the offence under Section 352 of the Indian Penal Code, we will have to consider Section 351 of the Indian Penal Code, which defines 'assault'. It has been prescribed that whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault. Section 350 of the Indian Penal Code defines 'criminal force' as, whoever intentionally uses force to any person, without that person's consent, in order to

the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other. Thus, on the conjoint reading of Sections 350, 351 and 352 of the Indian Penal Code, it can be said that rushing towards the person of a person, prima facie would amount to an assault as defined under Section 351 of the Indian Penal Code. Since the petitioners were more than five, it is alleged that they had formed unlawful assembly and they had come together there with preparation to commit offence.

9. In view of the fact that prima facie case is made out for the offence punishable under Sections 352, 143, 147, 149 of the Indian Penal Code, there is no question of quashment of the FIR or the charge-sheet. The Writ Petition stands rejected.

[RAJESH S. PATIL]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE