IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL WRIT PETITION NO.405 OF 2022

Dr. Surekha W/o Keshav Mendhe,
Aged 63 years, Occ- Retired (Pensioner),
R/o 14, Sawali, Yashwant Colony,
Nandura Road, Khamgaon, Tq. Khamgaon, Dist. Buldhana … Petitioner

// **VERSUS** //

1. State of Maharashtra through Police Station Officer, Police Station, Malkapur City, Tq. Malkapur, Dist. Buldhana.
2. Rajesh S/o Mukundrao Ingle, Aged about 60 years, R/o Vakil Wadi, Malkapur, Tq. Malkapur, Dist. Buldhana. … Respondents

Shri Akshay A. Naik, Advocate for Petitioner.
Ms Shamsi Haider, A.P.P. for the Respondent/State.

CORAM : ANIL S. KILOR, J.

DATED : 16th NOVEMBER, 2022.

ORAL JUDGMENT

1. Heard.

2. **RULE**. Rule returnable forthwith. Heard finally by consent of the parties.

3. This is a writ petition filed under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, raising a challenge to the judgment and order dated 04.05.2022 passed by the learned Additional Sessions Judge, Malkapur in Criminal Revision Application No.07 of 2021, confirming the judgment and order dated 01.09.2021 passed by the learned Judicial Magistrate First Class, (Court No.1), Malkapur, issuing process against the petitioner for the offences punishable under Sections 409, 420, 468 and 471 of the Indian Penal Code, 1860, in Regular Criminal Case No.47 of 2005.

4. The brief facts of the present case are that, at the relevant time, the petitioner was working as Medical Superintendent, Cottage Hospital, Malkapur and the respondent No.2 filed a complaint before the learned Judicial Magistrate First Class, Malkapur alleging that the petitioner misappropriated Rs.8,44,315/-. Thereupon, the learned Magistrate directed the Deputy Superintendent of Police, Malkapur to conduct the investigation personally under Section 156(3) of the Code of Criminal Procedure. On completion of investigation, the charge-sheet came to be filed on 21.04.2005 and on 01.09.2021, the learned Judicial

Magistrate First Class, Malkapur issued process, of which validity was challenged in the Criminal Revision No.07 of 2021, which came to be dismissed vide impugned judgment and order dated 04.05.2022.

5. I have heard Shri Naik, learned counsel for the petitioner and Ms Shamsi Haider, learned A.P.P. for the respondent/State.

6. Though the respondent No.2 is served long back nobody appears for the respondent No.2.

7. Shri Naik, learned counsel for the petitioner makes following submissions:

a) The informant, the respondent No.2 who claims to be a social worker has no locus or authority to file a complaint against the petitioner for the offence under Section 420 of the Indian Penal Code (IPC) as he is not the person who can said to have deceived by the alleged act of the petitioner. To substantiate his argument he has relied upon the judgment of the Hon'ble Supreme Court of India in the case of *Mohammed Ibrahim and others Vs. State of Bihar and another*[1].

b) There is no sanction under Section 197 of the Code of Criminal Procedure though the alleged illegal act is connected with the official duty of the petitioner. Therefore, in absence of

1 (2009) 8 SCC 751

sanction, issuance of process is illegal. In support of his submission he has placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of *Indra Devi Vs. State of Rajasthan and another*[2].

c) The petitioner was asked for explanation by the employer and on submission of the same, the departmental enquiry was dropped and as such, the prosecution cannot be continued against the petitioner. For this purpose, he has relied upon the judgment of the Hon'ble Supreme Court of India in the case of *Ashoo Surendranath Tewari Vs. The Deputy Superintendent of Police, EOW, CBI & Anr.*[3] and followed by the Division Bench of this Court in the case of *Keshav Vs. The State of Maharashtra.*

d) Even if the allegations are taken on its face value, no offence attracts under Sections 409, 420, 468 and 471 of the Indian Penal Code.

8. On the other hand, learned A.P.P. strongly opposes the present petition and supports the order of issuance of process and dismissal of criminal revision filed by the petitioner.

2 (2021) 8 SCC 768
3 In Cri.Appeal No.575/2020 (Arising out of SLP (Cri.) No.5422/2015) dtd.08.09.2020.

9. It is submitted that both the Courts have considered the material available on record and on *prima facie* satisfaction the process was issued. Thus, according to her no illegality or error committed by both the Courts below. Accordingly, she prays for dismissal of the present writ petition.

10. In the light of the submissions made by the rival parties, I have perused the writ petition, the documents filed along with it, reply filed by the State, impugned orders and judgments cited.

11. Before examining the matter on merit, it would be appropriate to refer to the admitted facts which are as follows:

i) The respondent No.2 who is the informant and claims to be a social worker and the Divisional Chairman of the Republican Party of India, Malkapur.

ii) He is no way connected with the Health Department and it is not his case that, he was deceived the petitioner by the alleged act.

iii) The petitioner was working as Medical Superintendent, Cottage Hospital, Malkapur and the allegations are related with her official duty.

iv) No sanction under Section 197 of the Code of Criminal Procedure was obtained.

v) The explanation was sought from the petitioner in the departmental proceeding and on submission of it the departmental inquiry was dropped.

12. In the backdrop of the above referred admitted facts, I will now proceed to examine the correctness and legality of the impugned orders.

13. In this case, the process was issued for the offence punishable under Sections 406, 409, 420, 468 and 471 of the Indian Penal Code.

14. It is a settled law that, the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The application of mind is best demonstrated by disclosure of mind on the satisfaction. The Magistrate would be judicious in exercising discretion lest it would be an instrument in the hands of the private complainant as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice, but it would not be the means to wreak personal vengeance as it is a serious matter affecting one's dignity and reputation in the society.

15. The submission of the learned counsel for the petitioner, that considering the nature of the allegations, the complaint under Section 420 of the IPC and allied offences, at the instance of third person who is not connected with the Health Department, cannot be entertained, needs to be examined in the light of the Judgment of the Hon'ble Supreme Court of India in the case of *Mohammed Ibrahim and others (Supra)* wherein it is held thus:

> *"18. Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows:*
>
> *(i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission;*
>
> *(ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and*
>
> *(iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.*
>
> *19. To constitute an offence under section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived*
>
> *(i) to deliver any property to any person, or*
>
> *(ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security).*

> *20. When a sale deed is executed conveying a property claiming ownership thereto, it may be possible for the purchaser under such sale deed to allege that the vendor has cheated him by making a false representation of ownership and fraudulently induced him to part with the sale consideration. But in this case the complaint is not by the purchaser. On the other hand, the purchaser is made a co-accused."*

16. In this case, it has come on the record that on 11.08.2003, the Deputy Director of Health Services, Akola, Circle Akola, granted permission to make expenditure from the Personal Expenditure Account and on 19.10.2003 *post facto* approval was given to it. Thus, it cannot be said that there was no approval or without permission the expenditure was made and thereby, the amount was misappropriated, as alleged in the complaint.

17. Moreover, it is not the case of the respondent No.2 that the petitioner dishonestly induced him or he was deceived by the petitioner by the alleged act. Thus, it is difficult to accept that offence under Section 420 of the IPC, as alleged, would attract against the petitioner.

18. At this juncture, it is pertinent to note that in the departmental proceeding, the petitioner was asked to submit her explanation which accordingly submitted by her and thereupon, the State has not proceeded against the petitioner in departmental enquiry.

19. The learned A.P.P. on instruction fairly made a statement that no departmental enquiry was conducted against the petitioner. Thus, I have no hesitation to hold that after submission of explanation by the petitioner and on satisfaction of the employer State, the departmental enquiry was dropped.

20. The Hon'ble Supreme Court of India in the case of *Ashoo Surendranath Tewari (Supra)* had an occasion to examine the yardstick to judge as to whether the allegations in the adjudication proceedings as well as the proceeding for prosecution is identical and on exoneration of the person concerned in the adjudication proceeding on merit, whether the trial of the person concerned shall be abused of process of the Court. The Hon'ble Supreme Court of India after considering the numerous judgments on this point has observed thus:

> *"31. It is trite that the standard of proof required in criminal proceedings is higher than that required before the adjudicating authority and in case the accused is exonerated before the adjudicating authority whether his prosecution on the same set of facts can be allowed or not is the precise question which falls for determination in this case."*
>
> *After referring to various judgments, this Court then culled out the ratio of those decisions in paragraph 38 as follows:-*
>
> *"38. The ratio which can be culled out from these decisions can broadly be stated as follows:*
>
> *(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;*

> *(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;*
> *(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;*
> *(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;*
> *(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure, 1973;*
> *(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and*
> *(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases."*

It finally concluded:

"39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."

From our point of view, para 38(vii) is important and if the High Court had bothered to apply this parameter,

> *then on a reading of the CVC report on the same facts, the appellant should have been exonerated."*

21. The Division Bench of this Court relied upon the above refereed judgment, in the case of *Keshav Vs. The State of Maharashtra and other(Supra)* and has held thus:

> *"7. The reason why do we say so is to be found in the observations of Hon'ble Apex Court in the case of Ashoo Tewari (supra) wherein, following the decision in the case of P. S. Rajya Vs. State of Bihar (1996) 9 SCC 1, the Hon'ble Apex Court has held that since the standard of proof required for proving a criminal offence is much higher, no criminal case can be allowed to be continued, if it is founded upon same allegations which formed the basis of departmental enquiry proceedings, wherein the delinquent Officer has been exonerated. The Hon'ble Supreme Court held that when upon a given set of facts, an officer is exonerated in departmental enquiry, which requires much lower standard of proof for proving the charge, the criminal proceedings based upon same set of facts must result in the failure as the standard of proof required in a criminal proceeding is much higher. The Hon'ble Supreme Court has also held that what is required to be examined in such a case is whether or not the allegations made in departmental enquiry and the allegations in the criminal complaint are similar and identical and it is found that they are similar, the criminal proceedings must not be allowed to be proceeded further or otherwise, it would be an abuse of the process of the Court.*
>
> *8. In the present case, we find that allegations made in the criminal complaint are similar and identical to the allegations made against this applicant in the departmental enquiry proceedings. In other words, the foundation of the criminal complaint made against the present applicant is a same set of allegations which*

constituted charge no.1 levelled against the applicant in the departmental enquiry proceedings. The departmental enquiry proceedings insofar as charge no.1 is concerned has gone in favour of the applicant and it has, in our view, wiped out the very basis of the criminal complaint filed against this applicant. It then does not appeal to reason to say that while the officer has committed no misconduct on the basis of one set of allegations, the officer has prima facie committed criminal offence on the basis of the same set of allegations. It is pertinent to mention here that the criminal complaint filed against the applicant by informant- Shri Milind Totare does not contain any more allegations than what formed the basis of charge no.1 levelled against the applicant in the department enquiry proceedings held against him in which the applicant has been exonerated of charge no.1. It then follows that the criminal investigation being carried out against the applicant in its present form cannot continue. But, at the same time, if any other enquiry is made by the Investigating Officer and some new material constituting new offence is discovered, the Enquiry Officer would always be at liberty to book the applicant for the new offence prima-facie found against him. But till that time, the complaint in the present form and the investigation based on it cannot be allowed to continue or otherwise it would be nothing but abuse of process of law."

22. In the present matter at hand, as I have already observed that after submission of explanation by the petitioner and on satisfaction of the department that there is no illegality or irregularity committed by the petitioner, the departmental enquiry proceeding was dropped. Therefore, on merit it can be said that, the department had thought it fit not to

proceed against the petitioner as no illegality or irregularity was committed by her.

23. Thus, a trial on the complaint of respondent No.2 with similar allegations would be nothing but abuse of the process of the Court. Consequently, issuance of the process in the present matter and upholding the same in the revision by the revisional Court is not sustainable in the eyes of law.

24. Moving further admittedly there is no sanction granted by the State to prosecute the petitioner. After going through the complaints and the allegations there is not a slightest doubt that all the allegations are connected with the official duty of the petitioner.

25. The Hon'ble Supreme Court of India while examining the object of sanction for prosecution and under what circumstances, sanction is necessary and to lay down a test to decide the law relating to requirement of the sanction to entertain and to take cognizance of offence allegedly committed by the public servant.

26. In the case of *Indra Devi (Supra)* has held thus:

> *"10. We have given our thought to the submissions of learned counsel for the parties. Section 197 of the CrPC seeks to protect an officer from unnecessary harassment, who is accused of an offence committed while acting or purporting to act in the discharge of his official duties and, thus, prohibits the court from taking cognisance of*

> *such offence except with the previous sanction of the competent authority. Public servants have been treated as a special category in order to protect them from malicious or vexatious prosecution. At the same time, the shield cannot protect corrupt officers and the provisions must be construed in such a manner as to advance the cause of honesty, justice and good governance. [See Subramanian Swamy Vs. Manmohan Singh5]. The alleged indulgence of the officers in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty. However, such sanction is necessary if the offence alleged against the public servant is committed by him "while acting or purporting to act in the discharge of his official duty" and in order to find out whether the alleged offence is committed "while acting or purporting to act in the discharge of his official duty", the yardstick to be followed is to form a prima facie view whether the act of omission for which the accused was charged had a reasonable connection with the discharge of his duties. [See State of Maharashtra Vs. Dr. Budhikota Subbarao4)."*

27. As, I have observed herein above that the allegations made in the complaint are connected with the official duty of the petitioner, in my considered opinion, sanction under Section 197 of the Code of Criminal Procedure is required in this case, which is admittedly not obtained. In absence of sanction, issuance of process is illegal and not sustainable in the eyes of law. Thus, on this count as well the petitioner needs to be succeeded.

28. Even otherwise after going through the allegations and even if it is taken on its face value, according to me, no offence attracts as alleged by the respondent No.2. In the circumstances, I pass the following order:

ORDER

a) The Criminal Writ Petition is **allowed**.

b) The order dated 04.05.2022, passed by the learned Additional Sessions Judge, Malkapur in Criminal Revision Application No.7 of 2021 and consequently, order dated 01.09.2021 passed by the learned Judicial Magistrate First Class, Malkapur in Regular Criminal Case No.47 of 2005, are quashed and set aside.

Rule is made absolute in the above terms.

The writ petition is **disposed of** accordingly.

[ANIL S. KILOR, J.]