

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

CRIMINAL APPLICATION (APL) NO. 1276/2021

**Pundalik Baliram Shinde and ors...Versus... State of Maharashtra and
another**

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Mr. A.B.Moon, Advocate for applicants
Mr. A.R.Chutke, APP for Respondent/State.

CORAM : AVINASH G. GHAROTE, J.

DATE : 14/01/2022

Heard Mr. Moon, learned counsel for the applicants, who challenges the order passed by the learned Magistrate on the private complaint filed by the applicant, refusing to issue process, for offences punishable under the provisions of Sections 477-A, 418, 409, 420, 218, 166, 109, 120-B r/w 34 of the IPC and dismissing the same, as well as the judgment of the learned Sessions Court dated 30.1.2020, dismissing the revision.

2] Mr. Moon, learned counsel for the applicants submits that Non-applicant Nos. 2 to 10, who are and were the officials of the Public Works Department of the State, had floated a tender for repairing the State Highway for a distance of 3 km from chainage 294.00 to 254.00 on Nagpur-Bori-Tulzjapur Road, and the work was awarded to the Non-applicant No.11, by a contract dated 22.3.2012, however, without performing the work, the Non-applicant

Nos. 2 to 10 made payment to Non-applicant No. 11, which has resulted in them committing an offence of the nature as stated above. He submits that the learned Magistrate, in case he was not so satisfied, could have ordered an enquiry under Section 202 of Cr.P.C., however without considering that position, the learned Magistrate by the order dated 17.4.2017, by holding that under Section 197 of Cr.P.C., considering the fact that Non-applicant Nos. 2 to 10 were Government Officials, sanction was necessary and so also on the basis of the documents placed on record, no prima facie ground was made for issuance of the process, has dismissed the complaint. Taking exception to this, Mr. Moon, learned counsel for the applicants submits that the documents on record demonstrated a prima facie case against the Non-applicants of the nature alleged, considering which the learned JMFC ought to have issued process, as the provisions of Section 197 of Cr.P.C. were not attracted. He further submits that the learned Sessions Court has also erred in not appreciating the complaint and the documents filed along with it, in the proper perspective, which had it been done, would have resulted in upsetting the order of the learned Magistrate and issuance of process.

3] Mr. Chutke, learned APP supports the impugned order and contends that since Non-applicant Nos. 2 to 10 were public servants, discharging their official duty, they were squarely covered by the mandate of

Section 197 of Cr.P.C., which required a previous sanction before the court could take cognizance of any complaint, alleging any offence. He further submits that perusal of the complaint and the documents along with it would indicate that the allegations that the work was not done remains unsubstantiated even on a prima facie basis, considering which the impugned orders were correct and proper.

4] The complaint alleges cheating, fabrication of record and misappropriation as against Non-applicant Nos. 2 to 10 in the discharge of their official duty of carrying out the work of repair of the aforesaid road, on the basis of the allegation that though the tender was issued and the contract was awarded to the Non-applicant No.11, the work was not done and the bills were paid, indicating fabrication of documents to demonstrate that the work was done.

5] A perusal of the judgment of the learned Sessions Court indicates that what has been placed on record in support of this allegation, was the work order dated 22.3.2012 and the bills of payment to the tune of Rs. 1,37,30,427/- paid to Non-applicant No.11. Apart from this, nothing else has been placed on record to indicate non-performance of the work. Mr. Moon, learned counsel for the applicants submits that documents in this regard were sought under the Right to Information Act, however

they had not been supplied and therefore, non-supply of the documents itself should make the Court to presume the truthfulness of the allegations in the complaint. I am afraid and I am unable to agree with this contention, for the reason that in every private complaint the existence of a prima facie case, is a *sine qua non* for the purpose of enabling the learned Magistrate to set the criminal law into motion against the persons accused therein.

6] In the instant case it has been found by both the Courts below that there was nothing on record to indicate that the work had not been done, so as to enable the Courts to even take a prima facie view for issuance of process. Nothing has been pointed out to me, to enable me to take a contrary view.

7] That apart, since the Non-applicant Nos. 2 to 10 are admittedly public servants, the mandate of Section 197 of Cr.P.C. would step in preventing the Court from taking cognizance of the offences alleged against them without previous sanction as contemplated therein. The Courts below have therefore rightly refused to interfere in the matter in absence of sanction.

8] In **Chandan Kumar Basu vrs. State of Bihar (2014) 13 SCC 70**, relied upon by Mr. Moon, learned counsel for the applicants, it has been held by relying upon **K.Satwant Singh vrs. State of Punjab, AIR 1960 SC 266**;

Harihar Prasad Vrs. State of Bihar, (1972) 3 SCC 89 and Prakash Singh Badal vrs. State of Punjab, (2007) 1 SCC 1, that it can be no part of the duty of the public servant acting in the discharge of his official duty to commit any of the offences covered by Sections 406, 409, 420 etc and the official status of the public servant can, at best, only provide an opportunity for commission of the offences, therefore, no sanction for prosecution of the public servant for such offences would be required under Section 197 of the Code. **Inspector of Police and anr vrs. Batternapatla Venkata Ratnam and anr, (2015) 13 SCC 87 and Devinder Singh vrs. State of Punjab, (2016) 12 SCC 87,** also hold that sanction is required only where alleged act has a reasonable nexus with official duty. In the instant case, as pointed out above, the action of issuance of tender, awarding of the contract and issuance of the bills, admittedly are all acts, which are done by Non-applicant Nos. 2 to 10 in the discharge of their official duty and in case the applicants required the Court to infer that this was not so, then it was for the applicants to demonstrate this position, which, as noted above, the applicant have failed to do so, as both the Courts have concurrently held that even apart from the plea under Section 197 of Cr.PC., there was no prima facie material on record placed by the applicants, satisfactory for the issuance of process.

9] The contention that the learned Magistrate could have ordered an enquiry under Section 202 of Cr.PC

would also require material on record to prima facie establish a case for doing so. When the Courts below concurrently found absence of such material, even to take a prima facie view, in my considered opinion, even enquiry under Section 202 of Cr.P.C. could not have been ordered.

10] In view of the above discussion, I do not see any merit in the application. The same is accordingly dismissed. No costs.

JUDGE

rvjalit