

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

CRIMINAL WRIT PETITION NO. 188 OF 2022

**DR. PRAVIN SAMADHAN BORSE
VS
DR. TUKARAM SHRIPATRAO BIRAJDAR**

Mr. Shambhuraje V. Deshmukh, Advocate for the petitioner
Mr. Ajay G. Talhar, Advocate for the respondent

**CORAM : KISHORE C. SANT, J.
RESERVED ON : 13th DECEMBER, 2022
PRONOUNCED ON : 16th FEBRUARY, 2023**

P. C.

1. This criminal writ petition is by the original applicant who filed an application seeking direction under Section 156(3) of the Code of Criminal Procedure in the court of learned JMFC, Dharangaon. During the pendency of the application under section 156(3) an application came to be filed by an accused below Exh.11 in the said proceeding for initiating the proceeding under Section 340 of the Cr. P. C. Learned JMFC, instead of passing an order on the main application has allowed the application Exh.11 and the accused is directed to lead all the

evidence in respect of his allegations for the purpose of section 340 of the Cr. P. C.

2. The facts in short are as under:-

a] The petitioner is working as a Assistant Professor in the Arts, Commerce and Science College, Dharangaon since 2012. The respondent No.1 is the Principal of the said college since 2003. Respondent No.2 is the son of respondent No.1 who also is serving in the said college. It is alleged by the petitioner that both the respondents-accused have committed an offence punishable under Sections 420, 467, 468, 406, 408 read with Section 34 of the Indian Penal Code. The allegation is that when the petitioner was appointed as an Assistant Professor in the college, the respondent No.1 fabricated the appointment order by overwriting in the order that the petitioner is initially appointed for two years on probation and therefore, the petitioner is deprived of the seniority and also has to suffer financial loss. Further allegation is that for the year 2013-2014

the respondent No.2 was appointed on clock-hour basis without any resolution passed to that effect by the management. Respondent No.2 was thus appointed by various orders dated 15-12-2010, 07-06-2011, 12-12-2011, 09-07-2016 & 27-11-2016 and has paid salary to respondent No.2 from time to time. In the case of one R. M. Kendre the accused persons paid him only Rs.1500/- towards honorarium instead of Rs.3000/- and utilized the remaining amount for their own use etc. On these allegations a complaint was filed on 11-09-2019.

b] The learned JMFC by order dated 16-10-2019 recorded finding that case is filed belatedly and recorded that no case is made out to send the matter for investigation under Section 156(3) and directed the case be put up for verification and prayer for direction to police to investigate has been rejected.

c] A report under Section 202 was also called and same was submitted on 26-10-2020. The police made an pursuant to order u/s 202 and filed a report in the court concluding that in

and enquiry the petitioner and other persons have given statements consistent to the allegations of the petitioner. The police filed voluminous documents on record alongwith said report.

d] The respondent though was not summoned suo-motu appeared and filed an application exh.11 in Criminal M. A. No. 237/2019 stating that the petitioner has placed false evidence on record and prayed for initiation of action against the petitioner under Section 340 of the Cr. P. C. This petitioner filed a reply to the said application that the respondent has no locus to file any application as no summons is issued by the court against the respondents and therefore his application exh.11 be rejected. Learned JMFC however allowed the application and passed an order for inquiry on the application below exh.11 and thereby directed the accused to produce evidence prior to any further order in the main proceeding. The parties were directed to file an evidence in respect of their submission on this point. By order dated 17-01-2022. It is this

order against which the petitioner has come to this court on various grounds that the respondents does not have locus to file such an application. The application exh.11 is not maintainable. The matter was at the stage of passing order of issuance of process after submission of report under Section 202 etc.

e] The question therefore before this court is that 1] whether the respondent has any locus to file an application in the proceeding before issuance of process; 2] whether the learned JMFC can take cognizance of application below exh.11 and can direct action under Section 340 of the Cr. P. C. even before initiating the proceeding against the accused persons.

3. Learned advocate for the petitioner in support of petition argued that accused has no right to participate in the proceeding till the process is issued. In this case it is clear that till now even the process is not issued by the learned court and before that the application exh.11 is filed. He further submits that the learned court below has clearly committed an error of

law and has wrongly taken cognizance on an application filed by the respondents.

4. Learned advocate for the respondents stated that when the complaint is filed on the basis of false and fabricated documents, it is clear that action needs to be taken under Section 340 and therefore, the court has rightly taken the cognizance on application below exh.11. It is further submitted that if prima facie court comes to the conclusion that documents submitted in the proceeding are false and fabricated therefore, certainly has jurisdiction to proceed to take an action under Section 340 of the Cr. P. C.

5. Learned advocate for the petitioner in support of his case placed reliance on the following judgments:

1. *Securities and Exchange Board of India Vs Hindustan Lever Ltd. and another reported in 2002 ALL MR (Cri) 2142.*
2. *Sau. Kamal Shivaji Pokarnekhar Vs The State of Maharashtra and Ors reported in 2019 ALL MR (Cri) 1702 (SC)*
3. *Manharibhai Muljibhai Kakadia and another Vs Shaileshbhai Mohanbhai Patel and others reported*

in (2012) 10 SCC 517

4. *Smt. Nagawwa Vs Veeranna Shivalingappa Konjalgi and others reported in AIR 1976 Supreme Court 1947.*

6. Learned advocate Mr. Talhar in support of his case placed reliance on the following judgments:

1. *Suresh Kumar Bhikamchand Jain Vs Pandey Ajay Bhusahn and others reported in (1998) 1 SCC 205*

2. *Mohinder Lal and others Vs State of Bihar reported in 2002 (3) Crimes 239.*

7. Before going to the main contention and the judgments it is necessary to keep in mind that it is well settled that the accused has no role to play in the criminal proceeding before passing any order of issuance of process. The accused will not have any locus even to appear in the proceeding much less to make an application. Thus what requires to be considered is that whether the learned court below was right in entertaining application filed by the accused for initiating action under Section 340 prior to issuance of process.

8. In the judgment of Securities and Exchange Board of

India (supra) this court has held that the proposed accused cannot even legally be called upon to participate in the proceeding under Section 202 of the Code. In that case the proposed accused had filed an application raising objection for issuance of process.

9. In the case of Smt. Nagawwa (supra) the Hon'ble Supreme Court has considered the scope of inquiry under Section 202 and issuance of a process under Section 204. The Hon'ble Apex Court held that only in the following cases order under Section 204 of the Code can be passed:

1. Where the allegations made in 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 ever reaches 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 complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like

10. Thus, it is clear from the judgment that it is only on the basis of complaint and report any complaint can be quashed in the situations referred above.

11. In the case of *Sau. Kamal Shivaji Pokarnekar (supra)* it was held that at the stage of issuance of process that the order of Magistrate under Section 204 cannot be set aside by the High Court by entering into the merits of contention when prima facie case discloses commission of an offence. In this case the trial court had issued process to the accused. The accused persons filed revision challenging the order of issuance of process that was dismissed. The High Court however, allowed the writ petition holding that dispute is of civil nature and proceeding against respondent would be an abuse of process of law. The High Court while recording this finding examined the

disputed documents. The Hon'ble Apex Court in that view has held that this exercise cannot be undertaken at the stage of issuance of process. The order of setting aside the issuance of process was thus, set aside. The judgment in the case of Manharibhai Muljibhai Kakadia (supra) relied upon by the petitioner the Hon'ble Apex Court has again considered all the aspects involved in respect to the scheme of sections 200 to 204 and held that hearing of the accused is not contemplated before issuance of process.

12. Learned Advocate for the respondent Mr. Talhar, submits that powers under Section 340 of the Cr. P. C. are totally different and separate and stand independently. The court can invoke the said power whenever it is noticed by the court that said action is necessary. He submits that therefore, the court was right in initiating the proceedings under Section 340. This power is not restricted depending upon the stage of proceeding. In the case of Suresh Kumar Bhikamchand Jain (supra) which was mainly on the point of sanction for prosecution, it was held that

point of sanction touches the jurisdiction of the court and it can be raised at any stage of the proceedings. It is held that accused is not debarred from producing relevant documentary materials which can be legally looked into without any formal proof to show that acts were committed in discharge of public duties. This case is however of no use to the respondent.

13. Thus, considering the submissions this court has to examine as to whether the learned trial court was right in initiating an action under Section 340 based upon the documents produced by the proposed accused at the stage when process is yet to be issued. It is well settled that the accused does not have any role till the summons is issued to him. The accused cannot take part in the proceeding before summons is issued to him. Even while framing the charges those are to be framed only on the basis of material on record produced by the prosecution or the complainant. The court cannot go into the documents even at that stage if are produced by the accused persons. The Larger Bench of the Hon'ble Apex court in the case of State of

Assam Vs Debendra Nath Pandhi reported in 2000 AIE (SCW) 6813 has held that the accused even at the stage of framing of charge or discharge cannot look into the material produced by the accused. Here in the case in hand not only that the court has allowed the accused to participate but has also looked into the application below Exh.11 filed by the accused and directed to parties to lead all the evidence in respect of his allegations within the scope of section 340. this is opening all the floodgates by keeping aside the main complaint. Looking to the scheme of Section 340 which reads as below:

340. Procedure in cases mentioned in section 195.

(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub- section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary:-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non- bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

14. Thus it is confined only to the offence punishable

under Section 195. This section only prescribes the procedure as to who the inquiry is to be made in respect of offence punishable under Section 195. Section 195 provides that prosecution for contempt of lawful authority of public servant, for offences against public justice and for the offences relating to the documents given in the evidence. Section 195 clearly prescribed that no court shall take cognizance of any offence under Section 172 to 188 of the IPC or abatement to commit such offence in respect of complaint in writing of the public servant concerned. In this case, further the question also comes as to whether the respondent can be said to be a public servant who is accused in the application below Exh.11. There is no averment as he is a public servant. His allegation is only that while issuing direction under Section 202 no evidence is placed on record and there is suppression of material facts.

15. After considering all the aspects it is clear that the learned court below has traveled beyond its jurisdiction by considering application exh.11. Section 195 of the Cr. P. C. requires that

offence is taken place in respect of documents when the documents were in custody of the court. It does not prescribe any inquiry in respect of the documents which are produced by the parties in the proceeding by way of evidence. Certainly this was not a stage where the provision of section 195 are attracted. Clause-2(ii) of clause-b of Sub-section 1 requires that such offence is committed in respect of documents produced or given in the evidence in any proceeding in any court, thus, yet there is no allegations that documents are fabricated or are nothing has done when the document is produced and given in the evidence. Thus the learned Magistrate has clearly committed a mistake. This court, therefore, holds that on two counts first is that he has directed inquiry under Section 340 on an application by person who till that time had no locus to take part in the proceeding and secondly by directing the said inquiry prior to any further order in the main proceeding when the main proceeding is yet to be commenced. Therefore, the impugned order deserves to be quashed and set aside. Hence, the following order:

ORDER

- a] The criminal writ petition is allowed.
- b] The impugned order dated 17-01-2022 passed by the Learned Civil Judge Junior Division, Dharangaon on application exh.11 in Criminal Misc. Application No.237/2019 is hereby quashed and set aside.

[KISHORE C. SANT, J.]

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