

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

CRIMINAL WRIT PETITION NO. 1109 OF 2022

Dr. P. Anbalagan,

Age : 50 years, Occu. Chief Executive Officer

at Maharashtra Industrial Development

Corporation "Udyog Sarathi",

Andheri East, Mumbai – 400093.

Petitioner...**Versus**

1. The State of Maharashtra

Copy to be served on Government Pleader

In the High Court of Judicature of Bombay

Bench at Aurangabad.

2. Harun Hasim Bardoliya,

Age : 60 years, Occu. Prop. Faizan

Poultry Farm and Agriculture,

R/o. Chinchpada, Tal. Navapur,

District Nandurbar.

Respondents...

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Advocate for Petitioner : Senior Counsel Mr. V. D. Sapkal with Mr. Bhojraj
i/by Elixir Legal Services.

APP for Respondent No.1/State : Smt. D. S. Jape

Advocate for Respondent No.2 : Smt. M. S. Mhase h/f Lex Aquila

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CORAM : KISHORE C. SANT, J.**DATE : 24th JANUARY 2023.**

ORAL JUDGMENT :

1. Heard the learned Advocates for the respective parties at length. The matter is taken up for final hearing at the stage of admission by consent of the parties.

2. A petition is by the then Chief Executive Officer, Zilla Parishad, Nandurbar challenging an order of issuance of process dated 23.12.2021 passed by the learned Judicial Magistrate First Class, Navapur for the offences punishable under Sections 120-B, 406, 420, 427, 429, 467, 468, 471, 166 read with Section 34 of the Indian Penal Code.

3. Respondent no.2 lodged a complaint in the Court of learned JMFC, Navapur against five accused persons i.e. (i) The Commissioner, Animal Husbandry, Pune (ii) Then Livestock Development Officer, Taluka Dhadgaon (iii) Then Deputy Commissioner, Nandurbar (iv) Then Animal Husbandry Officer, Panchayat Samiti, Navapur (v) Head Officer, Zilla Parishad. It is alleged that the complainant is having a business of Poultry Farm at Village Chinchpada in land gut no. 85 to the

extent of 1H 67R. In the year 2006, there was a epidemic disease developed in the birds namely 'Bird Flue'. The State of Maharashtra, in view of epidemic had issued notification directing to eradicate the Bird Flue and for that it was directed to destroy the poultry farms. Various other majors also were taken by the State including vaccination of the birds etc. Certain guidelines were issued in the Gazette dated 18.01.2006 that the poultries run within the radius of 3 Kms. to 10 Kms. from the Municipal area were to be culled.

4. It is alleged that the poultry of the complainant is 17 km. away from Navapur and therefore there was no question of culling of the birds in his poultry farm. It is alleged that however on 21.02.2006, the accused persons had been to the poultry farm in the morning. Accused no.2 told the complainant that the team has come for killing of the birds. The complainant requested that his birds are not infected by any disease and his poultry farm is not situated within the radius prescribed under the notification. He also requested to first conduct a test on his birds and if it is found that birds are having disease then only to take action. On that, the members of the team told that they have to act as

per the oral direction of the Superiors and as per the directions, they are acting. It is alleged that the accused no.1 assured the complainant that he would get a compensation saying that he is responsible officer of the Government and he has come from Pune.

5. The members of the team thereafter culled 19633 birds and destroyed 96000 eggs. They also destroyed 90,000/- kgm. Birds' food etc. and it is for this, complaint came to be lodged by the complainant.

6. Initially the learned Magistrate, Navapur passed an order on 16.10.2019 specifically holding that no offence is made out under Sections 120-B, 406, 420, 467, 468, 471 of the IPC. It is further observed that though the offences punishable under Sections 427, 429 and 166 of the IPC prima facie appears to have been made out and since those are being non-cognizable, he directed the complainant to examine himself under Section 200 of the Cr.P.C. In the said order, it is also observed that the complainant before lodging the complaint had approached this High Court. He had also filed a civil suit, which is decreed. Thus it appears to be a civil dispute. Though he had

approached this Court from time to time, there is no order passed by this Court directing to register any offence etc.

7. The learned Magistrate after examining the complainant, issued process against the petitioner by order dated 23.12.2021. It is this order, which is under challenge in this petition.

8. At the outset, learned Advocate for respondent no.2 raised an objection about the maintainability of this petition. The learned Senior Counsel for the petitioner submits that availability of alternative remedy is not an absolute bar. He relies on the judgments delivered by the Hon'ble Apex Court in the case of **Dhariwal Tobacco Products Ltd. Vs. State Of Maharashtra & Anr.**, reported in AIR 2009 (SC) 1032. He invited attention of this Court to paragraph no.8 of the said judgment to show that the very same question was considered by the Hon'ble Supreme Court. He further invited attention to paragraph no.12 where the Hon'ble Apex Court has concluded that though the alternative remedy available still the High Court can be approached by invoking powers vested in the Court by virtue of power under Section 482 of the

Cr.P.C. as well as under Article 227. This Court satisfies that this petition is maintainable in view of this judgment.

9. The learned Senior Counsel further submits that by looking at the complaint except in its paragraph no.2, there is no reference to his name or even to his role in the entire action. In paragraph no.2, it is stated that the present petitioner was working as Chief Officer at the relevant time of the Zilla Parishad Nandurbar. In the entire complaint thereafter, nothing is stated about any role of the petitioner. His next submission is that when the Magistrate had specifically passed an order dated 16.10.2019 applying his mind, wherein he specifically held that no case is made out under Section 120-B, 406, 420, 467, 468 and 471 of the IPC., now the order under challenge dated 23.12.2021 is clearly against the said conclusion. Further from the impugned order, no application of mind is seen on the part of the learned Magistrate and simply process is issued against the accused persons. He lastly submits that there is no prior sanction obtained by the respondent before filing an application under Section 156(3) as the petitioner happens to be a Government Servant.

10. He further pointed out that the allegations are in respect of the incident of 2006. Thereafter the respondent no.2 had filed a civil suit bearing Special Civil Suit No.40/2008 seeking compensation against the defendants therein. Even in that suit neither Zilla Parishad, nor this petitioner is shown as defendant. The said suit came to be decreed on 16.04.2012 and even appeal is pending against that judgment in this Court. Thus he submits that even to the knowledge of the respondent no.2, it was clearly a civil dispute and there is no criminal act involved of this petitioner still only with the oblique motive to harass the petitioner, he has filed a complaint that too after 12 years of the incident and 7 years after the suit is decreed.

11. The next point on which he argued is of violation of procedure as prescribed under Section 202 of the Cr.P.C. He submits that this petitioner and other accused persons are residing beyond territorial jurisdiction of the Court of learned JMFC, Navapur. In view of this, it was necessary for the learned Magistrate to conduct an enquiry by himself or to direct the police to conduct the investigation and it was only thereupon, the learned Magistrate could have issued a process

against the accused persons. He submits that though in the complaint it is not necessary to plead the role of accused in detail, however basic minimum facts are certainly required to be stated. In this case, even such basic required facts are not stated. There is no concept of vicarious liability in the criminal act. Unless the offences are under special laws. So far as Section 34 is concerned, he submits that even there basic minimum requirement is to show that the accused was at least present or was a part of the team. Even this averment is lacking in the entire complaint.

12. The learned Senior Counsel relied upon the judgment reported in AIR 2017 SC 299 in the case of **Abhijit Pawar Vs. Hemant Madhukar Nimbalkar** to submit that there is no application of mind on the part of Magistrate and secondly that there is violation of Section 202 of the Cr.P.C. He further relied upon the judgment reported in AIR 2022 SC 5151 in the case of **Lalankumar Singh Vs. State of Maharashtra** to submit that the order of issuance of process is not an empty formality and the Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not by pointing

out paragraph nos. 18 and 16 as well as 21 of the said judgment.

13. The learned Advocate for the respondent vehemently opposed the petition saying that when Section 34 of IPC is mentioned, there is no question of specifying any role of every individual accused. She submits that the FIR or the complaint is not an encyclopedia of the allegation. The minimum facts are required to be stated. In this case, it is clear that the petitioner was working as Chief Executive Officer of the Zilla Parishad. Thus he is having over all controlling powers over the Zilla Parishad. He is responsible for the functioning and working of the Zilla Parishad. She submits that the staff from the Animal Husbandry Department of the Zilla Parishad was also forming part of the team, which took alleged action and therefore his role is clearly spelt out in the complaint. It is moreso as the action is clearly a highhanded action which could not have been taken without the orders from the Superior Officer like the present petitioner. She submits that even the Civil Court has given a finding that the highhanded action of the members of the team is beyond executive powers. It has clearly come that there were no orders in writing or there was no proper authorization given in

favour of the team to take action of destroying the poultry and thus the act is clearly a criminal act with criminal intent. She submits that the criminal intent is very clear from the fact that the poultry is situated at a distance of more than 17 Kms. and was not covered under the notification. The complainant had even requested the Officers that a testing of the birds may be conducted before taking action by telling that there was not a single infected bird in the poultry. In spite of telling all these things, still the action is taken. This clearly shows that the intention was clear to destroy the birds affecting the livelihood of the complainant by entering the premises without any authorization. She points out that there is an averment in paragraph no. 7 of the complaint that a team led by accused no.1 and 2 and other employees. She submits that thus this averment is sufficient to make out a case against the petitioner. From paragraph no.18, she pointed out that a clear averment is there to show that all the Officers in connivance with each other have taken the action and by thus Section 34 is clearly invoked.

. So far as submission under Section 202, she submits that the Magistrate has clearly recorded a statement of the complainant on oath

and after going through the same, he has issued the process in the case is sufficient compliance. She relies on the proviso to subsection 1 of Section 2 and stated that the complainant has been examined on oath under Section 200 and therefore that compliance is a sufficient compliance and thus there was no question of postponement of the issuance of process. She submits that the order passed under 156(3) was passed taking into consideration the complaint as it is. Any observations made while passing order will not bind the Court?, while passing order under Section 202, which needs to be passed by independently applying the mind and in her submission that there is no merit in the submissions of the petitioner that the Magistrate could not have passed the order taking different view under Section 202. She submits that in the order what needs to be shown is that there was application of mind. She lastly submits that in the civil suit, there is clear finding that the Officers have violated the guidelines issued by the State and their action was highhanded action.

14. Having considered all these submissions and the judgments, this Court finds that the impugned action is of 2006. Till filing of the

complaint and for the first time, the respondent no.2 sought to obtain permission under Section 197 of the Cr.P.C. from the Superior Officer in the year 2018. Though she had approached this Court even earlier by filing Writ Petition No.2301/2007, still there was nothing to show that the action was sought to be taken under Criminal Law. Merely because now the Civil Court recorded the findings that the Officers were responsible will not give a cause of Officer. The findings by the Civil Court are also recorded in the year 2012. Thus approaching the Criminal Court after 12 years certainly shows that the complainant was not vigilant. Though the sections under the offences alleged under Section prescribed the punishment of more than three years and thus no limitation as provided under Section 460 is applicable still proprietary required facts that the Criminal Court should have been approached withing reasonable time.

. Reading the complaint as it is, as rightly pointed out by the learned Senior Counsel that there is no specific averment against the petitioner that is accused no.5. There is no avernment even to suggest that he was the member of the team which had been to the poultry of the respondent no.2. There is nothing in the complaint to show that

there was oral order passed by this petitioner, which make the team to take such an action. The notification was issued by the Government of Maharashtra. It does not show that the Zilla Parishad was the implementing agency or it was this petitioner, who was directed to take action under the notification.

15. Considering all these, this Court finds that certainly a case is made out showing that the impugned order dated 23.12.2021 at-least to the extent to this petitioner is without application of mind. No case was made out against this petitioner to issue process. This Court finds that the petition deserved to be allowed. The petition is thus allowed in terms of prayer clause 'A' and disposed off accordingly.

[KISHORE C. SANT, J.]