

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

CRIMINAL APPLICATION NO. 5173 OF 2012

**BABANRAO DATTARAO LONIKAR
VS
THE STATE OF MAHARASHTRA AND OTHERS**

Mr. Niteen V. Gaware, Advocate for the applicant
Mr. D. R. Kale, learned APP for the respondents/State
Mr. M. S. Deshmuky, Advocate for the respondent Nos.
2,6,8,11,12,13,17,19,21
Mr. U. L. Momale, Advocate for respondent Nos.
7,10,14,18,22,24
Mr. N. B. Khandare, Advocate for respondent No. 20

**CORAM : KISHORE C. SANT, J.
RESERVED ON : 12th FEBRUARY, 2023
PRONOUNCED ON : 20th MARCH, 2023**

P. C.

1. Heard the learned advocates for the parties. The matter is taken up for final disposal by consent of the parties.

2. This is an application filed taking an exception to the judgment and order dated 05-11-2012 passed by the learned Sessions Judge, Aurangabad in Criminal Revision Application No. 258/2012. The learned Sessions Judge by way of impugned judgment and order has set aside the order dated 19-10-2012

passed by the learned JMFC, Aurangabad, passed under Section 156(3) of Cr. P. C. directing the police to investigate into an offence on the compliant bearing No.1820/2012. On the basis of which now FIR is also registered.

3. The petitioner is a person active in social & political life. He noticed certain irregularities are committed by respondents who happen to be officers in the Public Works Department. The other respondents are the then Chief Secretary of State of Maharashtra and Principal Secretary, Finance Department, State of Maharashtra. It is alleged that on Godavari river 11 barrages were constructed in the districts of Parbhani, Jalna and Aurangabad. Initially budget of the project in the year 2007 was only Rs.20 Core. However, Senior Officers, the then Political Leaders and the Contractors in connivance raised the budget to above Rs.100 coreres from time to time by grant of administrative sanctions. All these administrative sanctions are granted without following due process of law. Location of some of the barrages have been shifted to other districts. In the construction of the barrages inferior quality material is used. Targeted object is not achieved because of the irregularities and the alleged acts. Thus, it is alleged that respondents-accused have committed offence punishable under Section 407, 409, 120-B read with Section 34 of the Indian Penal Code. The learned JMFC on going through the complaint and verification of the petitioner/complainant issued direction by order dated

19-10-2012.

4. The order passed by the learned JMFC came to be challenged by the respondents by way of filing Criminal Revision No. 258/2012 in the court of learned Additional Sessions Judge, Aurangabad. Learned revisional court by judgment and order dated 05-11-2012 quashed and set aside the order passed by the learned JMFC mainly on the count that no prima-facie case was made out showing cognizable offence. It is observed that the order does not reflect that the learned Magistrate has applied his mind showing that he has arrived at conclusion that prima-facie case is made out. It is also held that no specific role is attributed to any of the accused. There are no averments to show that as to which of the accused exactly took decision to shift location of barrages. There is no evidence to show who permitted and sanctioned increase in the cost. It is not shown in the complaint that who has purchased the material for barrages. Some of the accused have not even served in the area still they are made accused persons etc. The petitioner has therefore, approached this court praying that the impugned order passed by the learned Revisional Court be quashed and set aside. Further direction is sought to the police authority to act upon the order passed by the learned JMFC and investigate into an offence.

5. Learned advocate for the petitioner vehemently argued that the learned Sessions Court has committed error of

law in allowing the revision application. The learned court though has observed that learned Magistrate has passed an order without showing the application of mind has still ventured to discuss the case on merits. The revision application was not maintainable only to the extent of challenging the direction under Section 156(3) of the Cr. P. C without challenging of the lodging of the FIR which was already lodged. The illegality and misappropriation are clearly seen in the complaint. Certainly a case is made out to direct the investigation at the hands of police. Collecting of the evidence can only be done by the police using powers under Cr. P. C. The observations made by the learned Sessions Judge that there is no evidence is totally against the record. The learned Sessions Court has further made discussion about PIL that was filed by the petitioner. Said discussion was not required since in the PIL there were various prayers made by the petitioner. Only one of the prayers was to lodge an offence. There is no question of res-judicata in the matters of the penal action. It was necessary for the sessions court to go into the allegations in the complaint. Though the question of maintainability was raised by the petitioner, there is no discussion by the learned Sessions Judge on this point. He submits that the petitioner had rightly approached the concerned police station earlier on 27-09-2012 and since the police did not take cognizance he had approached the Commissioner of Police Aurangabad on 08-10-2012 & thus had complied with the provision of law and it is only thereafter he

filed the complaint in the court of learned JMFC. The learned Sessions Judge has considered the documents which were not part of the compliant.

6. Learned advocate Mr. Deshmukh, for the respondent submits that the petitioner while lodging the complaint has not produced sufficient material making out the offence. There is no report of quality control department saying that inferior quality material was used for the construction. There is no averment in the complaint that the petitioner had complied with the requirement under Section 154 (3) before approaching the court of learned CJM. He submits that the requirement is that in the complainant itself there has to be an averment about taking recourse of the earlier procedure. He submits that assuming that the letter was given to the Commissioner of Police, however, on the very day he has lodged the compliant in the court. Thus, there is nothing on record to show that there was failure on the part of the police machinery to register an offence. All the allegations are without any foundation. The petitioner had also filed PIL in this court with similar prayers and same was pending in this court, however, the petitioner has suppressed this fact from the court. On the basis of PIL action taken report was also filed. It is therefore, not permissible for the petitioner now to agitate his grievance. He further pointed out that action taken report was later on accepted by the Government and at that time the petitioner himself was Minister before whom the action

taken report was placed and still there was no grievance made. On maintainability he submits that revision was maintainable, and rightly therefore, entertained by the learned Sessions Judge.

7. Mr. Khandare, learned advocate for other respondents submits that before coming to a conclusion that this court has to see from the averments of the complaint as to whether prima-facie case is made out. Whether allegations made in the complaint disclosed any offence. At the most it can be said that it is the case of improper administration. He also submits that when the petitioner was Minister of the concerned department still did not take any action in this regard. So far as changing of the locations of the barrages etc. he submits, is for the concerned authority to take a decision. All the actions against which complainants are made have now been regulated by the government. On the basis of complaint made by the petitioner the committee was constituted by the Government. First committee submitted its report. Thereafter another committee was also appointed and thereafter action taken report was prepared and the said was accepted. He further submits that this court by invoking powers under Section 482 can even now quash the FIR registered on the basis of the order passed by the learned JMFC. As the powers under Section 482 are vide and can be used even to give direction in absence of prayers. He submits that in this case malafides of the petitioner are writ large and demonstrate that the petitioner is abusing the process

of law. He relied upon the judgment in the case of Avinash Trimbakrao Dhongade Vs State of Maharashtra and another reported in 2016 All MR (Cri) 985 wherein this court has held that section 156 (3) order is revisable and revision against the said order is maintainable. Learned Sessions Judge has therefore rightly entertained the revision and has passed the order. Both the sides have relied upon the various judgments. In view of the submission of the learned advocate and the judgments relied by them following questions are arose for consideration of this court:

- 1. Whether the learned trial judge was right in issuing direction under Section 156(3) of the Cr. P. C.;*
- 2. Whether the revision application was maintainable before the Sessions Court;*
- 3. Whether the Sessions Court has rightly passed the order;*

8. This the court has to consider this in the light of the judgments cited by the parties before the court. In the judgment of the Hon'ble Apex Court in the case of Anil Kumar and Others Vs M. K. Aiyappa and Another reported in (2013) 10 SCC 705. Hon'ble Apex Court considered the scope of section 156(3) by considering the judgment in the case of Maksud Saiyed Vs State of Gujrat reported in (2008) 5 SCC 668. It is held that the learned Magistrate is required to apply his mind. The Special Judge/Magistrate cannot refer the matter under Section 156(3)

against the public servants without valid sanction order against the accused person if it is required. The application of mind should be reflected in the order. Mere wording 'as gone through the complaint, documents and heard the complainant', as such, as reflected in the order will not be sufficient. It is necessary to discuss as to what weighed with the Magistrate to order an investigation under Section 156(3). This should be reflected in the order though a detailed expression of his views is neither required nor warranted.

9. It is held in the judgment reported in (2015) 6 SCC 287 in the case of Priyanka Srivastava and Another Vs State of Uttar Pradesh and others that power under Section 156(3) warrants application of judicial mind. The litigant at his own whim cannot invoke authority of the Magistrate. It is further held that there has to be prior application under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The application should be supported by an affidavit so that the persons making the application should be conscious and also endeavour be made to see that no false affidavit is made.

10. In the case of Maksud Saiyed Vs State of Gujrat and others reported in (2008) 5 SCC 668 which is already referred to in the judgment of Anil Kumar and others (supra). It was a

case whether the complaint was filed against the Director and Managing Director of the company where the accused was shown to be a company. In that case it is held that the learned Magistrate had failed to pose himself as to whether the complaint taken at its face value and taken to be corrected would lead to conclusion that the respondents herein were personally liable to any offence.

11. In the case of Babu Venkatesh and others Vs State of Karnataka reported in (2022) 5 SCC 639 the Hon'ble Apex Court after analyzing the law discussed the power under Section 156(3). The Hon'ble Court had also discussed the case of Priyanka Shrivastawa (supra) and held that lodging of the complaint/application under Section 154 (1) and 154 (3) are the prerequisites for exercise of the power under Section 156 (3) and further held that the application seeking investigation without affidavit duly sworn by the complainant cannot be entertained by the court.

12. In the case of Deepak Gaba and others Vs State of Uttar Pradesh and another reported in 2023 SCC Online SC 3 the Hon'ble Apex Court held in that case that the complainant had failed to establish the penal liability set out under Sections 405, 420, 471 of the I.P.C. In that case the allegations were pertaining to contractual obligations. It is further held that to invoke the jurisdiction of criminal court by filing vexatious

criminal complaints by camouflaging allegations which were ex facie outrageous or pure civil claims. These attempts are not be entertained and such complaint should be dismissed at the threshold.

13. Learned advocate Khandare further relied upon the judgment of Chandran Ratnaswami Vs K. C. Palanisamy and others reported in (2013) 6 SCC 740 to submit that this court can quash the proceeding by exercising the power under Section 482, if the court comes to conclusion that the complainant with malafide intention is converting the civil matter into criminal court.

14. The learned advocate for the respondent submits that in view of the judgment of this court in the case of Avinash (supra) has clearly held that the order passed under Section 156(3) is revisable.

15. Coming to the case in hand, it is seen that the petitioner initially had filed public interest litigation bearing PIL No. 23/2021 in which prayers were as below:

a] This petition may kindly be allowed with costs.

B] To pass appropriate order/direction and to appoint any retired Judge of this Hon'ble Court or any other independent expert person or Committee

and to get the matter inquired in respect of allegations made in this petition and to fix the responsibility on the corrupt persons;

C] Issue writ of mandamus and /or any appropriate writ or direction in the like nature and the Central Bureau of Investigation agency may kindly be directed to make the investigation into the issue of corruption committed by the respondents, other officials, contractors and politicians and concerned persons in the construction of the eleven (11) barrages mentioned in paragraph No. 2 of this petition.

D] By issuing writ of mandamus or any other writ or order, direction in the like nature, the respondents may kindly be directed to take stern legal action against the corrupt and file criminal cases and recover the illegally gained money from them;

E] By issuing writ of Mandamus or any other writ or order, directions in the like nature, the respondents may kindly be directed to take strict legal action to initiate the departmental inquiry against the concerned guilty authorities.

F] By issuing writ of Mandamus or any other writ or order, directions in the like nature, the respondents may kindly be directed to make the M. K. Kulkarni, Inquiry Committee's report public and publish it;

G] Any other suitable and equitable relief may kindly be granted for the ends of justice.

Interim Relief Prayed for:

A] Pending the hearing and final disposal of this Public Interest Litigation, the independent expert

person or Inquiry Committee of the appropriate persons may kindly be appointed to make the enquiry in the issue raised in this petition and to get the report of the same as early as possible.

16. This court by judgment and order dated 26-07-2017 had disposed off the PIL. The learned Advocate General submitted that the committee was appointed one Shri M. K. Kulkarni. It is reported that thereafter again one more committee was appointed under the Chairmanship of Dr. Chitale. On the basis of reports there was one more committee was appointed viz: Modak Committee. The State Government had decided to take disciplinary action by the parent department i.e. department of Water Resources Government of Maharashtra. The committee was also formed wherein the public spirited citizens even from the entire state including the petitioner if has any grievance the same could be raised before the committee and in view of that it was assured that their grievance would be redressed by the said committee. As assured by the learned advocate general it is seen that before such committee no grievance was raised by the present petitioner. On the contrary it is submitted that when the committee was formed some recommendations were made and the government accepted the same and the work was regularized. When the government accepted those recommendations it was this petitioner who was Minister of the concerned department. Even that time he did not raise any grievance.

17. This court finds that in the entire complaint there is no averment as regards filing of the complaint in the police station and when it was not registered the petitioner had approached the Superintendent of Police under Section 154(3). Though it is sought to be shown that copy was given to the Superintendent of Police, Aurangabad still that averment is lacking. It is rightly pointed out that the complaint was lodged in the court on 08-10-2012 and alleged letter given to Superintendent of Police also is of the same date which clearly shows that no reasonable time was given to the authorities to take action and immediately complaint was lodged. This court finds that in view of the judgment in the case of Priyanka Shrivastawa (supra) & Baby Venkatesh (supra) it was necessary to make averments as regards compliance under Section 154(1) and 154(3) of the Cr. P. C. On looking to the order passed by the learned Magistrate, this court finds that it does not show application of mind.

18. Looking at the allegations in the complaint it is seen that the complaint was lodged in the year 2012 about the work done in the year 2007. Thus, it was belated. By that time, the government had already appointed the committee of M. K. Kulkarni for giving suggestions to the government and the same was communicated to M. K. Kulkarni who had retired from the post of Chief Secretary Water Resources Department by letter

dated 10-12-2008. Pursuant to a decision taken by the government vide government decision under Ashwasan *2008/392/2008/mapra-2* on looking at the government decision it is clearly seen that decision was taken pursuant to the questions raised by this writ petitioner in the assembly as the petitioner was then MLA it is thus, at proper stage in proper manner grievance were redressed by the government. It is further seen that the reports submitted by the committee were accepted by the government when this petitioner was working as Minister of the concerned Department. About maintainability of the revision this court finds that the revision was maintainable in view of the judgment of this court in the case of Avinash Galande (*supra*).

19. In view of discussion this court finds that no specific discussion is necessary as to whether filing of the complaint was abuse of process of law.

20. This court has also gone through the reasoned order given by the learned Sessions Judge while deciding the revision application. The learned Sessions Judge has rightly considered that the petitioner did not resort to the provision of the Section 154 and that was a condition precedent to invoke the powers of the learned Magistrate under Section 156(3). The learned Sessions Judge had also considered that this very petitioner had filed PIL for prayer for investigation in the High Court & the

same was pending. The Sessions Court also considered that the complainant did not appear before the committee that was formed for making inquiry into the allegations made by him. It is observed that he was repeatedly called by the inquiry officer. However, he did not appear before the said inquiry officer. No specific role is attributed to any of the accused persons so as to make out the case as to who exactly committed the alleged act. That some of the accused were not even connected with the said construction etc. This court finds that learned Sessions Judge has rightly passed the order by considering all the relevant factors involved in the present matter. It is rightly held that no case was made out to issue direction against the respondents. This court holds that the impugned order passed by the learned Sessions Judge is rightly passed and no interference is called for. Hence, this criminal application stands dismissed.

[KISHORE C. SANT, J.]

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