



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1401 OF 2021

Dr. Rekha w/o Gowardhan Gaikwad ... PETITIONER

VERSUS

1. The State of Maharashtra
through its Principal Secretary,
Home Department, Mantralaya,
Mumbai-32.
2. The Additional Chief Secretary,
Public Health Department,
New Mantralaya, GT Hospital Premises,
Mumbai.
3. The Director General of Police,
Maharashtra State, Mumbai.
4. The Assistant Commissioner of
Police and Investigation Officer,
Aurangabad Division, Aurangabad
5. The Investigation Officer,
ACP Cantonment
In Crime No.40 of 2019,
Aurangabad.
6. In-charge of Police Station,
Vedant Nagar, Aurangabad
7. Dr. Swapnil S/o Vishnu Lale
8. Mrs. Ratnakala Martandrao Mohite,
9. Dr. Govind S/o Pandit Choudhari ... RESPONDENTS

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Advocate for petitioner : Mr. V.D. Sapkal Senior advocate i/b.
Mr. S.R. Sapkal and Mr. A.S. Sakhare
Addl.PP for respondent Nos.1 to 6 : Mr. M.M. Nerlikar

Advocate for respondent No.8 : Mr. Amol G. Kale h/f. Mr. S.S. Tope
Advocate for respondent No.9 : Mr. Jagdish V. Deshpande and
Mr. Shivaji N. Dudhate

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**CORAM : MANGESH S. PATIL &
SHAILESH P. BRAHME, JJ.**

**RESERVED ON : 06.05.2024
PRONOUNCED ON: 11.06.2024**

JUDGMENT (MANGESH S. PATIL, J.) :

Heard. Rule. Rule is made returnable forthwith. Learned APP and the learned advocates for the respective respondents waive service. At the joint request of the parties, the matter is heard finally at the stage of admission.

2. Shorn of the verbiage, the circumstances leading to the filing of this writ petition are to the effect that the petitioner has been serving as a Medical Officer Class – I and on the date of petition was posted in the office of Health and Family Welfare and Training Centre, Aurangabad. Respondent No.9 is the superior officer, whereas, respondent No.7 was her colleague and respondent No.8 was also serving in the same establishment as an Administrative Officer and were allegedly aware that she belonged to a scheduled caste ‘Mahar’. Respondent No.9 allegedly subjected her to humiliation and also used to make overtures since 03.06.2016. She approached Vedant Nagar Police Station and lodged a detailed complaint on 29.01.2019. Since initially it was not accepted she had to approach the Commissioner of Police and thereafter her complaint

was received and Crime No.40/2019 was registered for the offences punishable under Section 506 and 509 read with Section 34 of the Indian Penal Code and for the offence punishable under Section 3 of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (herein after the Atrocities Act) against respondents No.7 to 9.

3. Since the Investigating Officer was not filing any final report, the petitioner filed Criminal Writ Petition No.402/2020 seeking a direction for filing the report. Simultaneously, respondent Nos.7 to 9 filed separate applications under Section 482 of the Code of Criminal Procedure seeking quashment of the crime.

4. It transpires that the Investigating Officer solicited sanction to prosecute respondents No.7 to 9, in the light of Section 197 of the Code of Criminal Procedure. It was pointed out to this Court that pursuant to such requisition by the Investigating Officer, by communication dated 17.02.2021, which is under challenge in this Writ Petition, the Investigating Officer was informed by the Under Secretary in the Public Health Department of the State that the competent authority (Hon'ble Chief Minister) had refused to accord sanction for the time being. In view of such supervening event in view of the stand of the State and the Investigating Officer pointing out his inability to file a final report/charge-sheet, by the common order dated 23.08.2021, the criminal applications of respondents No.7 to 9 for quashment were disposed of granting them liberty to again apply for quashment if the

charge-sheet was filed, in case the decision refusing to accord sanction was set aside. To this later stage, by recording the submission of the learned Senior advocate for the petitioner in respect of Writ Petition No.402/2020, informing that the petitioner was still to decide if to challenge the order/decision refusing to accord a sanction, and by observing that the petitioner could challenge that decision, even that writ petition was disposed of.

5. The present petition has been preferred with following prayers :

- “B] To quash and set-aside the order/communication dated 17.02.2021 passed by the under secretary Government of Maharashtra in complaint bearing No.2018/pra.kra.57(bhag-1)/seva 4 a By issuing appropriate writ, order direction as the case may be.*
- C] To hold and declare that sanctioned under section 197 of Cr.PC. is not necessary in crime no.40 of 2019 registered with Vedant-nagar police station Aurangabad. By issuing appropriate writ, order direction as the case may be.*
- D] To direct the investigation agency to complete investigation and file final report under Section 173 of Cr.PC. in crime no.40 of 2019 registered with Vedant-nagar police station Aurangabad. By issuing appropriate writ, order direction as the case may be.*
- E] To hold and declare that decision taken by the authority refusing permission to submit charge-sheet in court in crime No.40/2019 registered with Vedant-nagar Police Station Aurangabad is illegal and contrary to the provisions of law by issuing appropriate writ, order direction as the case may be.*
- F] To direct the investigation agency to complete investigation and file final report under Section 173 of the Cr.PC. in crime no.40 of 2019 registered with vedant-nagar police station Aurangabad. Pending hearing and final disposal of this criminal writ petition.”*

6. There being repetition of prayers, it can easily be gathered

that the petitioner is now putting up a challenge to the decision/communication dated 17.02.2021 and as a consequence soliciting a direction to the Investigating Officer to submit a charge-sheet/final report. In the process, she is also soliciting a declaration that the sanction under Section 197 of the Code of Criminal Procedure is not required at all.

7. During pendency of this petition, pursuant to the observations of the Court recorded from time to time the prosecutor was directed to take instructions in view of the fact that the impugned communication merely stated that the sanction was being refused for the time being, to ascertain if some final decision was to be taken. Pursuant thereto, the learned APP tendered across the bar written communication received by him dated 12.04.2024 from the Deputy Secretary of the Public Health Department of the State together with the annexures containing the office note, bearing signatures of the hierarchy of the officers right up to the Secretary, as also of the learned Minister and the decision taken by the Hon'ble Chief Minister under his signature approving the office submission and refusing sanction to prosecute respondents No.7 to 9 finally.

8. The learned Senior advocate Mr. Sapkal would vehemently submit that in view of specific wording of Section 197 of the Code of Criminal Procedure, a Magistrate cannot take cognizance of the offence unless there is a sanction accorded by the competent authority as

respondents No.7 to 9 are the public servants. He would further submit that in view of explanation to Sub-Section 1 of Section 197, even it is clear that no sanction shall be required for proceeding against a public servant for the offences *inter alia* punishable under Section 509 of the Indian Penal Code. He would further submit that since the offence was registered even under the Atrocities Act, bar contained under Section 197 cannot be read into the provisions of that Act which is a special statute and which does not contain any such rider or precursor for taking cognizance of the offence committed under that Act by a Special Judge.

9. He would then submit that assuming that sanction was required for taking cognizance of the offence punishable under Section 506 of the Indian Penal Code, there should not have been any impediment for the Investigating Officer to undertake the investigation and depending upon the material collected by him to file a final report/charge-sheet excluding that section, may be to the extent of Section 509 of the Indian Penal Code and for the offence punishable under Section 3 of the Atrocities Act. The impugned decision/order refusing to accord sanction would not completely prohibit the Investigating Officer in carrying out the investigation and submitting a final report for the offences which do not require any sanction to prosecute the public servants.

10. Mr. Sapkal would then submit that in fact, when the law requires the competent authority to grant or refuse the sanction, there

should have been a speaking order. The impugned communication dated 17.02.2021 is devoid of any reasons for want of which the petitioner has been deprived of an opportunity to objectively challenge that decision, causing a serious prejudice to her. He would submit that the communication placed on record by the learned APP dated 12.04.2024 (supra) is only an office note endorsed by hierarchy of officers, the learned Minister and a one line decision by the competent authority (Hon'ble Chief Minister) approving the office note and refusing sanction. He would submit that there is no order. These office submissions approved by Hon'ble Chief Minister cannot be taken as an order.

11. Mr. Sapkal would submit that in any case, when the law does not require any previous sanction to prosecute a public servant for the offence punishable under Section 509 of the Indian Penal Code and Section 3 of the Atrocities Act, Hon'ble Chief Minister could have clarified the decision by expressly mentioning so and in that case, the Investigating Officer could have then proceeded to submit a final report under Sections 169 or 173 of the Code of Criminal Procedure.

12. Mr. Sapkal would then take us through the specific allegations contained in the FIR and even the office note to buttress his submission that what has weighed with the competent authority, was the fact that respondents No.7 to 9 were granted bail by the High Court and the allegations levelled by the petitioner could not be substantiated in the internal inquiry and in fact were found to be unsustainable and the

allegations in the FIR are the same as were the allegations inquired into by the internal committee. He would submit that these could not have been valid reasons for refusing sanction. Besides, these are now being supplemented by the subsequent communication dated 12.04.2024 which could not have been done in the light of **Mohinder Singh Gill and Anr. Vs. Chief Election Commissioner, New Delhi and Ors.; (1978) 1 SCC 405**. Mr. Sapkal would, therefore, submit that the writ petition be allowed and the Investigating Officer be directed to file a final report.

13. The learned Additional Public Prosecutor Mr. Nerlikar would vehemently submit that the law merely speaks about previous sanction of the competent authority to prosecute a public servant. It is an administrative decision and the competent authority is not under any obligation to pass a reasoned order in strict sense. It is a matter of decision making process. When the office submissions are put before the competent authority after those were endorsed by several other responsible officers and even the learned Minister, the decision cannot be said to have been taken without any material. It is a matter of decision making process and no objection can be raised on the ground that it is not in any particular format. The reasons can easily be gathered and the petitioner is aware about it. He would, therefore, submit that since now the sanction has been refused by the competent authority, no direction can be given to the Investigating Officer to submit a final report.

14. Having heard both the sides and having perused the record,

it is evident that there cannot be a dispute about the fact that the competent authority (Hon'ble Chief Minister) by the impugned communication had refused to accord sanction to prosecute respondents No.7 to 9. Though it was initially being informed that the decision was not final since a specific word 'तूतसि' (for the time being) was used in the impugned communication, as is observed herein above, during pendency of this writ petition, the learned APP has received written communication dated 12.04.2024 together with annexures which have been placed on the record. It is abundantly clear that a detail office note was put up and finally, the competent authority has refused to accord sanction to prosecute. In spite of our specific query to Mr. Sapkal, as to if the petitioner was not intending to challenge this final decision, he would persist in submitting that there is no decision to be challenged inasmuch as there is no speaking order.

15. It is trite that the sanction to prosecute as contemplated under Section 197 of the Code of Criminal Procedure is an administrative decision and not a quasi judicial one. The whole purpose and object of providing for such a condition precedent for launching the prosecution against a public servant, is to prevent unscrupulous complaint being lodged against them which would demoralize them and would create obstacles in their day to day functioning. It is like a filter. If the competent authority objectively takes some decision either way, it would

be purely an administrative decision and it cannot be expected that he would pass the detail order as if he was discharging a judicial or quasi judicial function. A reference can be made to the decisions in the matter of **Surjit Singh Vs. State of Punjab; 1979 SCC OnLine P&H 64 (Punjab and Haryana High Court)** and **State of Assam Vs. Niranjan Ghosh; MANU/GH/0071/1994**.

16. When, as is observed herein above, the decision was taken pursuant to the office note conveying the reasons and it was duly approved by the competent authority, it cannot be said that the decision suffers from any vice merely because no specific and separate order in a particular format was passed by the competent authority (Hon'ble Chief Minister). We, therefore, hold that the submission of Mr. Sapkal on this count is not sustainable in law.

17. However, all such discussion regarding sustainability or otherwise of the decision of the competent authority, in either granting or refusing sanction proceeds on the premise that in fact, the law mandates such previous sanction to be preceded before cognizance is taken by a Magistrate or a Special Court.

18. As is evident from the explanation to sub-Section 1 of Section 197, it contains list of certain offences where the legislature has clearly explained that no previous sanction to prosecute a public servant for these offences would be required. It contains *inter alia* offence punishable under Section 509 of the Indian Penal code which is one of

the offences registered pursuant to the FIR lodged by the petitioner.

19. Simultaneously, an offence has also been registered under Section 3 of the Atrocities Act. A bar contained in Section 197 cannot be read into the provisions of the Atrocities Act which does not contain any such condition precedent. It is an offence under a special statute and though the Special Judge would take cognizance, he would be doing so pursuant to a specific provision contained in Section 14 of the Atrocities Act and not under Section 190 of the Code of Criminal Procedure. Besides, in view of the provision contained in Section 18-A of the Atrocities Act, the Investigating Officer shall not require approval for registration of an FIR and for arrest of the accused and cannot resort to a procedure other than that is provided under the Act.

“18-A. No enquiry or approval required.—

(1) For the purposes of this Act,—

(a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or

(b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply.

(2) The provisions of Section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court.”

20. In this context, suffice for the purpose to refer to and rely upon the decision of the Supreme Court in the matter of **Union of India**

Vs. State of Maharashtra; (2020) 4 SCC 761. Relevant paragraphs read as under :

“63. By the guidelines issued, the anomalous situation may crop up in several cases. In case the appointing authority forms a view that as there is no prima facie case the incumbent is not to be arrested, several complications may arise. For the arrest of an offender, may be a public servant, it is not the provision of the general law of CrPC that permission of the appointing authority is necessary. No such statutory protection is provided to a public servant in the matter of arrest under IPC and CrPC as such it would be discriminatory to impose such rider in the cases under the 1989 Act. Only in the case of discharge of official duties, some offence appears to have been committed, in that case, sanction to prosecute may be required and not otherwise. In case the act is outside the purview of the official discharge of duty, no such sanction is required.

64. The appointing authority cannot sit over an FIR in case of cognizable, non-bailable offence and investigation made by the police officer; this function cannot be conferred upon the appointing authority as it is not envisaged either in CrPC or the 1989 Act. Thus, this rider cannot be imposed in respect of the cases under the 1989 Act, may be that provisions of the Act are sometimes misused, exercise of power of approval of arrest by the appointing authority is wholly impermissible, impractical besides it encroaches upon the field reserved for the legislature and is repugnant to the provisions of general law as no such rider is envisaged under the general law.”

21. The net result would be that when by virtue of explanation to Sub-Section 1 of Section 197 of the Code of Criminal Procedure, no previous sanction is required in respect of the offence punishable under Section 509 and when even no such sanction is required in respect of offence under the Atrocities Act, the perception of the Investigating Officer in treating the impugned decision as preventing him from filing any report and the stand of the State to that effect is grossly erroneous

and unsustainable in law. When no previous sanction is required for carrying out investigation and filing a final report in respect of offence punishable under Section 509 of the Indian Penal Code and Section 3 of the Atrocities Act, the Investigating Officer is under statutory duty to submit a final report before the Special Court and the latter would not be debarred from taking cognizance thereof for want of sanction or because of the decision, not to accord the sanction.

22. We would refer to and rely upon the decision of the Supreme Court in the matter of **A. Sreenivasa Reddy v. Rakesh Sharma, (2023) 8 SCC 711**. Relevant paragraphs read as under :

- “59. Thus, although in the present case, the appellant has been discharged from the offences punishable under the PC Act, 1988 yet for IPC offences, he can be proceeded further in accordance with law.*
- 60. From the aforesaid, it can be said that there can be no thumb rule that in a prosecution before the Court of Special Judge, the previous sanction under Section 19 of the PC Act, 1988 would invariably be the only prerequisite. If the offences on the charge of which, the public servant is expected to be put on trial include the offences other than those punishable under the PC Act, 1988 that is to say under the general law (i.e. IPC), the court is bound to examine, at the time of cognizance and also, if necessary, at subsequent stages (as the case progresses) as to whether there is a necessity of sanction under Section 197 Cr.PC.*
- 61. There is a material difference between the statutory requirements of Section 19 of the PC Act, 1988 on one hand, and Section 197 Cr.PC., on the other. In the prosecution for the offences exclusively under the PC Act, 1988, sanction is mandatory qua the public servant. In cases under the general penal law against the public servant, the necessity (or otherwise) of sanction under Section 197 Cr.PC. depends on the factual aspects. The test in the latter case is of the “nexus” between the act of commission or omission and the official duty of the public servant. To commit an*

offence punishable under law can never be a part of the official duty of a public servant. It is too simplistic an approach to adopt and to reject the necessity of sanction under Section 197 Cr.PC. on such reasoning. The “safe and sure test”, is to ascertain if the omission or neglect to commit the act complained of would have made the public servant answerable for the charge of dereliction of his official duty. He may have acted “in excess of his duty”, but if there is a “reasonable connection” between the impugned act and the performance of the official duty, the protective umbrella of Section 197 Cr.PC. cannot be denied, so long as the discharge of official duty is not used as a cloak for illicit acts.”

23. In view of such state of affairs, in our considered view, the impugned order though, cannot be said to be wholly erroneous or illegal, it can only be treated as refusing to accord sanction wherever it is required by law like for the offence punishable under Section 506. Therefore, we do not find any flaw in the decision making process leading to refusing to accord sanction and the reasons therefor considered by the competent authority (Hon’ble Chief Minister).

24. In view of the above, we allow the writ petition partly as under :

- i. It is declared that no previous sanction as contemplated under Section 197 would be necessary for carrying out investigation and filing a final report in respect of offence punishable under Section 509 of the Indian Penal Code and Section 3 of the Atrocities Act.
- ii. The Investigating Officer shall complete the investigation and submit a final report except for the offence punishable under Section 506.

- iii. It would always be open for respondents No.7 to 9, in accordance with the liberty granted by this Court (supra) to apply for quashment of the charge-sheet by resorting to Section 482 of the Code of Criminal Procedure.
- iv. The investigation shall be concluded and final report shall be filed as expeditiously as possible and in any case within six weeks.

25. Rule is made absolute in above terms.

[SHAILESH P. BRAHME]
JUDGE

[MANGESH S. PATIL]
JUDGE

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