
(2017) 04 BOM CK 0260
In the Bombay High Court
Case No : 4878 of 2016

Alka Udhav Khaire & Ors.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-04-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Code of Criminal

Citation : (2017) 04 BOM CK 0260

Hon'ble Judges : S.S. Shinde, K.K. Sonawane

Bench : DIVISION BENCH

Advocate : M.V. Ghatge, P.V. Diggikar, Ramprasad Madhavlal Porwal

Judgement

1. Rule. Rule made returnable forthwith. Heard finally with the consent of counsel appearing for both sides.

2. This application is preferred by the applicants invoking remedy under Section 482 of Cr.P.C. read with Articles 226 and 227 of the Constitution of India and thereby prayed to quash and set aside the impugned FIR bearing Crime No. 199 of 2016 registered under Sections 406, 409, 420, 468, 471, 477 r/w. 34 of IPC at police station, Partur, Dist. Jalna. The impugned FIR came to be registered pursuant to the directions of the learned Magistrate under Section 156(3) of the Cr.P.C. issued in a private criminal complaint filed under Section 200 of the Cr.P.C. by the respondent No.2 Dr. Ramprasad Mohanlal Porwal.

3. It has been alleged that the applicants being employee of the Municipal Council, Partur have indulgence in the offence of forgery for the mischief of cheating and misappropriation of public funds and thereby committed the Criminal Breach of Trust etc. According to respondent No.2/complainant, in the year 2013-14, there were two vehicles of the Municipal Council, Partur for public utility services. The applicant No.2 Shri Manohar Tunganwar, Sanitary Inspector,

used to maintain the log book of these vehicles. The applicant No.1 Smt. Alka Khaire was the Chief Officer of the Municipal Council, Partur during the relevant period of year 2013-14 and applicant Nos. 3 and 4 were the drivers deputed on these vehicles of the Municipal Council.

4. The respondent No.2/complainant ventilated the grievances that under the Right to Information Act, he procured the relevant documents of log book and the fuel purchased for the vehicles of Municipal Council as well as the amount paid to the concerned dealer for supply of fuel. It was transpired that in the year 2013-14, the Municipal Council purchased the fuel/diesel for these two vehicles of quantity 3310 liters and as per the log book, both the vehicles were shown used for a distance of 1862 Kilometers. According to respondent No.2/complainant, the quantity of fuel purchased and the distance of the vehicle being driven, indicate that these two vehicles of the municipal council consumed about 1.5 liters fuel per kilometer, throughout the year which is highly improbable and suspicious one. Moreover, the record of the Municipal Council demonstrate that the payment of Rs. 8,76,161/- was paid to Sandip Automobiles towards purchase of fuel for the two vehicles. These suspicious circumstances reflect the foul play on the part of the applicants. It has been alleged that the applicants in connivance with each other, for wrongful gain or monetary benefits, caused loss to the Government and public, by committing the mischief of cheating. Therefore, respondent No.2 Dr. Porwal approached to the learned Magistrate Partur and filed private criminal complaint under Section 200 of the Cr.P.C. bearing Criminal Misc. Application No. 172 of 2016 for requisite directions to investigate into the allegations under Section 156(3) of Cr.P.C. The learned Magistrate, verified the allegations as well as relevant documents on record and bade the police of Partur Police Station to investigate under Section 156(3) of Cr.P.C. Pursuant to the directions of the learned Magistrate, the Partur police registered the FIR bearing Crime No.199 of 2016 and set the investigation into motion. The validity and propriety of the impugned FIR is put into controversy on behalf of applicants in the present application.

5. Mr. Ghadge, learned counsel for the applicants, vehemently submitted that the allegations nurtured on behalf of respondent No.2/complainant are false, baseless and rest on the figment of imagination. The allegations are so absurd and inherently improbable to draw the inference of mischief of forgery and cheating on the part of the applicants. The complainant did not comply with the basic requirement of law as contemplated under Section 154 of the Cr.P.C. He had not approached to the police by filing FIR under Section 154 of the Cr.P.C. nor he approached to the superior police personnel to ventilate his grievances. The learned counsel also assailed that the present applicants, being public servants, as defined under Section 21 of the IPC, prior sanction under Section 197 of Cr.P.C. is necessary, to initiate any criminal proceedings against them. But, the respondent No.2/complainant did not obtain sanction for prosecution against these applicants and, therefore, the criminal proceedings initiated against the applicants is liable to be quashed and set aside.

6. Mr. Ghadge, learned counsel also criticized the impugned order passed by the learned Magistrate under Section 156(3) of the Cr.P.C. and contended that the learned Magistrate without application of judicious mind, and without verifying the facts and circumstances on record, in its proper perspective, passed the impugned order in a mechanical manner. According to learned counsel Mr. Ghadge, the preliminary enquiry on the part of learned Magistrate into the allegations was imperative prior to any direction under Section 156(3) of Cr.P.C. Therefore, the impugned FIR is totally imperfect, unsustainable and not within the purview of law. He prayed to quash and set aside the impugned FIR bearing Crime No. 199 of 2016 registered against the applicants. In support of his arguments, he relied upon the exposition of law laid down in the case of Anil Kumar and others Vs. M.K. Aiyappa and another reported in (2013)10 SCC 705.

7. Per contra, respondent No.2/complainant appeared in person and vociferously opposed the contentions put forth on behalf of applicants. He submitted that the applicants, taking disadvantage of their position, being public servants, fabricated and manipulated the record of the Municipal Council for purchasing fuel of the vehicles. The complainant procured the documents under the Right to information Act and it was revealed that the applicants in the year 2013-14 purchased the total quantity of 3310 liters diesel, for these two vehicles and entries made in the log book shown that the fuel was utilized only for 1862 kilometer distance. After mathematical calculations, it was found that the vehicles consumed 1.5 liters diesel for 1 kilometer distance. According to complainant, these suspicious circumstances demonstrate the foul play on the part of the applicants and they, by fabricating and preparing fake documents, for their wrongful gain misappropriated the public funds under the guise of purchase of fuel for vehicle of Municipal Council. He also pointed out that in the year 2013-14, the amount of Rs. 8,76,161/- was being paid at the behest of applicants towards the purchase of fuel. The respondent No.2 blamed that the act of mis-appropriation of public funds, forgery and cheating would not be part of official duties of the applicants. Therefore, the prosecution sanction under Section 197 is not necessary to initiate the criminal proceedings against them. The respondent No.2 kept reliance on the observations of Honourable Supreme Court in the case of "Shambhunath vs. State of Uttar Pradesh" (1997)5 SCC 326. The respondent No.2 explained the circumstances in detail and prayed to dismiss the application for want of merit.

8. Learned APP for respondent No.1 State also stepped into the shoe of respondent No.2 complainant and submits that the allegations made in the FIR against the applicants, prima facie, constitute the cognizable offences. In view of the nature of allegations of forgery and misappropriation, sanction under Section 197 is not required in this case. Learned APP, therefore, prayed to reject the application.

9. We have considered the arguments canvassed on behalf of both sides. We have also delved into the relevant documents and investigation papers produced

on behalf of learned APP. It is clear from the aforesaid factual aspects and submissions made on behalf of both sides, primarily, the issues raised for consideration in the present application are :- [1. Whether prior sanction in terms of Section 197 of Cr.P.C. is essential to prosecute the applicants, who are admittedly the public servants, as envisaged under Section 21 of the IPC ?. [2. Whether allegations nurtured in the impugned FIR against the applicants are so absurd and inherently improbable that no prudent man can even reach a just conclusion that there are sufficient grounds to proceed further against the applicants ?.

10. In order to examine the first issue, as referred (supra) relating to the requirement of prosecution sanction in terms of Section 197 of Cr.P.C. it would be essential to appreciate the nature of allegations contained in the FIR against the applicants. According to complainant, the applicants, in connivance with each other, prepared and fabricated fake record for purchasing the fuel of the vehicles of Municipal Council. They also forged documents to make excess payment to the fuel supplier i.e. M/s. Sandip Automobiles and caused loss to the Government while discharging their official duties. It has been alleged that the applicants committed criminal breach of trust, and misappropriated the public funds, thereby cheated the Govt. and the public at large.

11. It is to be borne in mind that the essential requirement for sanction in terms of Section 197 of Cr.P.C. to prosecute the public servants is that offences levelled against public servant must have been committed while acting or purporting to act in discharge of his official duty. It is not every offence committed by public servant that requires prosecution sanction as contemplated under Section 197 of Cr.P.C. It is the quality of the act done by the public servant while discharging his official duties which is important and same is decisive factor for requirement of prior sanction to prosecute the public servant. After considering the nature of allegations, if it falls within the ambit of his official duties, the protection under Section 197 of the Cr.P.C. will be made available to the public servant, but, where the alleged act or omission is unconnected with the official duties of the public servant, then, the shield of section 197 cannot be extended to such public servant, who committed the act contrary to law. The ultimate object for protection conferred under Section 197 of Cr.P.C. is the public interest with a view that official acts do not lead to vexatious or frivolous prosecution of public servant.

12. In the case of Shambhunath Mishra (referred supra) the Apex Court, enunciated that the requirement of sanction by competent authority or appropriate Government, is an assurance and protection to the honest officer, who does his official duties to further public interest. However, the performance of official duty under the colour of public authority cannot be camouflaged to commit the crime. Their Lordships of the Honourable Supreme Court, in para.5 delineated the ratio that :- "5. The question is when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of

public fund, etc. can he be said to have acted in discharge of his official duties. It is not the official duty of the public servant to fabricate the false records and misappropriate the public funds, etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund, etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction, as was believed by the learned Judge. Under these circumstances, we are of the opinion that the view expressed by the High Court as well as by the trial court on the question of sanction is clearly illegal and cannot be sustained."

13. The Honourable Supreme court, in the case of Rajib Ranjan and others Vs. R. Vijay Kumar reported in (2015)1 SCC 513, laid down a similar proposition of law. In para. 18 it has been observed as under :- "18. The ratio of the aforesaid cases, which is clearly discernible, is that even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanour on his part is not to be treated as an act in discharge of his official duties and therefore, provisions of Section 197 of the Code will not be attracted. In fact, the High Court has dismissed the petitions filed by the appellant precisely with these observations, namely, the allegations pertain to fabricating the false records which cannot be treated as part of the appellant's normal official duties. The High Court has, thus, correctly spelt out the proposition of law. The only question is as to whether on the facts of the present case, the same has been correctly applied."

14. In the case of Punjab State Warehousing Corporation Vs. Bhushan Chander and others, reported in (2016)13 SCC 44, the Honourable Apex Court, dealt with the various judicial pronouncements relating to prosecution sanction under Section 197 of Cr.P.C. and it has been held that the prosecution sanction in terms of Section 197 of Cr.P.C. for the offence under Sections 406, 409, 420, 467, 468, 471, 120-B of IPC, is not necessary for taking cognizance of the allegations by the Court. Extract of observations in para. 19 is reproduced hereinbelow :- "19. In State of Kerala Vs. V. Padmanabhan Nair³² it has been held that when no sanction under Section 197 is necessary for taking cognizance in respect of the offences under Section 406 and Section 409 read with Section 120-B IPC. Similar principle has been laid down in State of H.P. Vs. M.P. Gupta³³. In Parkash Singh Badal Vs. State of Punjab¹¹ it has been ruled that the offence of cheating under Section 420 or for that matter offences relatable to Sections 467, 468, 471 and 120-B can by no stretch of imagination by their very nature be regarded as having been committed by any public servant while acting or purporting to act in discharge of official duty. In such cases, official status only provides an opportunity for commission of 32 (1999)5 SCC 690 33 (2004)2 SCC 349 11 (2007) 1 SCC 1

the offence. Similar principle has been reiterated in Choudhary Parveen Sultana Vs. State of W.B¹⁰ wherein the Court referred to the authority in Bhagwan

Prasad Srivastava Vs. N.P. Mishra³⁴ and ruled thus : (Choudhary Parveen Case SCC p 402, para 12) "12. It was also observed in Bhagwan Prasad Srivastava that Section 197 has been designed to facilitate effective and unhampered performance of their official duty by public servants by providing for Scrutiny into the allegations of commission of offence by them by their superior authorities and prior sanction for their prosecution was a condition precedent to the taking of cognizance of the cases against them by the courts. It was finally observed that the question whether a particular act is done by a public servant in the discharge of his official duties is substantially one of the facts to be determined in the circumstances of each case."

15. In the background of aforesaid analysis, it is evident that an allegation of the indulgence of the applicants in the illegal activities of manipulation and fabrication of record of the municipal council, for wrongful gain to themselves and loss to the Government and public, as well as an allegation of the mischief of cheating and misappropriation of public funds, would not be considered as an integral part of their official duties. It cannot be said that the allegation of the forgery, misappropriation of public fund, cheating etc. on the part of applicants are committed while discharging their official duties. It is worth to mention that, as alleged in the complaint their official duty was not to manipulate or fabricate the record of the municipal Council for misappropriation of public funds, while purchasing the fuel for 10 (2009)³ SCC 398 34 (1970)² SCC 56 vehicles and cause loss to the Government. Under such circumstances, we find that the prior sanction to prosecute the applicants for the charges leveled against them is not necessary in this case and, therefore, the FIR cannot be quashed and set aside on this count at the instance of applicants. Moreover, in the case of Prakash Singh Badal vs. State of Pubjab, reported in (2007)¹ SCC 1 in para.38 the Honourable Apex Court delineated the guidelines as under : "38. The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceedings. The question whether sanction is necessary or not may have to be determined from stage to stage."

16. In view of the aforesaid principles of law, the issue of prosecution sanction can also be dealt with and considered by the concerned trial court even after completion of investigation and filing of charge sheet by the I.O. against the applicants into the matter. At this stage, we are not inclined to quash the entire proceeding against the applicants for want of prosecution sanction.

17. Now, turning to the another aspect of the matter, in regard to the nature of allegations pitted against the applicants, the learned counsel submits that the allegations levelled against the applicants are all based on figment of imagination. The fuel which was purchased during the year 2013- 14 was after following the due procedure prescribed for the same. There are vouchers of purchasing the fuel of the vehicles. The accounts of all these transactions were

also maintained and audited by the concerned authority every year. The fuel was not used for vehicles only but also utilized for generators as well as other purposes. Therefore, all the allegations are so absurd and frivolous and not sufficient to draw adverse inference against the applicants.

18. At this juncture, we are unable to persuade ourselves to subscribe the contentions propounded on behalf of learned counsel Shri Ghadge, We would like to mention that the recitals of the impugned FIR, if considered at its face value and accepted in its entirety, prima facie, alleged offences of forgery, cheating and misappropriation of funds etc. are made out against the applicants. There are documents available on record which prima facie fortify the allegations nurtured on behalf of complainant. Therefore, we are not prepared to accept the contention put forth on behalf of applicants. Moreover, the issues in regard to veracity or truthfulness of the allegations would be the subject matter to be determined and tested on the anvil of merit during the detail trial. It is not legally permissible to embark upon an judicial enquiry to evaluate the circumstances to ascertain the correctness, genuineness of the allegations, while exercising the inherent jurisdiction under Section 482 of Cr.C. It is the settled principle of law that for exercise of inherent powers under Section 482 of Cr.P.C. , it is essential to proceed entirely, on the basis of allegations made in the complaint or documents accompanied with it per-se. The Court has no jurisdiction to examine the correctness or otherwise of the allegations. The Apex Court in the matter of State of Haryana Vs. Bhajanlal and others, reported in AIR 1992 SC 604, in para 109, held as under : - "109. We also give a note of caution to the effect that the power of quashing a criminal proceedings should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice."

19. As discussed above, we do not find any merit in the arguments canvassed on behalf of Shri Ghadge in regard to sustainability of allegations made in the FIR. The judicial precedent relied on by the applicants in the case of Anilkumar and others referred supra, is misplaced and not advance the case of the applicants. There were allegations under the Prevention of Corruption Act, 1988 and in view of Section 19(1)(3) of the said Act, the prosecution sanction is imperative under law. But, in the matter in hand, the allegations are relating to offences punishable under the IPC. Therefore, the observations of Honourable Supreme Court in Anil Kumar's case would not render much assistance to the applicants, as same is distinguishable on the facts and circumstances of the present case.

20. The learned counsel Shri Ghadge, further criticized the impugned order of the learned Magistrate passed under Section 156(3) of the Cr.P.C. on the ground that there was no application of judicious mind and impugned order was passed in mechanical manner. Therefore, the impugned FIR is required to be quashed and

set aside as same is registered pursuant to the erroneous and illegal order passed by the learned Magistrate after exercising the discretion under Section 156(3) of Cr.P.C. In support of his submission he relied upon the judicial pronouncement of the Division Bench of this Court, in the matter of Pandharinath Narayan Patil vs. State of Maharashtra and others reported in 2015(2) Bom.C.R. (cri.) 358.

21. The minute scrutiny of impugned order of the learned Magistrate passed after exercising discretion under Section 156(3) of the Cr.P.C. reflects that the arguments propounded on behalf of Shri Ghadge appears not appreciable and comprehensible one. In contrast, the impugned order adumbrates that the learned Magistrate, at the threshold had taken every care and verified the contents of the complainant as well as affidavits Exhibits 11 and 5, appended with the complaint. The learned Magistrate also dealt with the controversial issue of requirement of prior sanction under Section 197 of Cr.P.C. against the applicants public servants. The learned Magistrate expressed the findings that the allegations of misappropriation cannot be considered as part of official duties of the applicants. Therefore, he arrived at the conclusion that the cognizable offence was shown to have been committed. He preferred to exercise the discretion and directed the police to investigate the allegations under Section 156(3) of the Cr.P.C. We do not find any infirmity or error in the impugned order passed by the learned Magistrate.

22. The learned counsel Shri Ghadge, further assailed that the complainant failed to comply with the procedural formalities prescribed under Section 154 of Cr.P.C. The complainant did not lodge the FIR under Section 154 of Cr.P.C. to the police for registration of crime nor he approached to the higher authority of police to redress his grievances under Section 154(3) of Cr.P.C. Therefore, the complainant has no locus to initiate criminal proceeding under Section 200 of the Cr.P.C. against the applicants. Hence, the learned counsel for applicants urged that the impugned FIR is not maintainable in the eye of law and deserves to be set aside.

23. The primary object of the FIR from the point of view of the informant is to set the criminal law in motion and for investigating officer is to obtain information about the alleged criminal activity, so as to enable him to trace out and book the culprit. It is true that there has to be FIR under Section 154 of Cr.P.C. about the commission of cognizable offence and if the officer in-charge of the police station refuse to record the information, the remedy is available to the aggrieved complainant to approach to the higher authority of police under Section 154(3) of Cr.P.C. But, the failure to comply with the procedural formalities under section 154(1) or 154(3) would not divest the jurisdiction of the Magistrate under Section 156(3) of Cr.P.C. There can be cases where the Magistrate can exercise discretion even in non compliance of the provisions of Section 154(1) or 154(3) of Cr.P.C. In the matter in hand, in view of the peculiar facts and circumstances of the case, nature of the allegations nurtured against

the applicants as well as the factual aspect that the complainant launched offensive against the applicants and appeared before this Court in person, we find that the noncompliance of the provisions of Section 154(1) and 154(3) of Cr.P.C. would not be an imediment for exercise of discretion under Section 156(3) of Cr.P.C.

24. The Full Bench of this Court at its Principal Seat, in the case of Panchabhai Popatbhai Butani vs. State of Maharashtra and others, (2010)1 Mh.L.J.421, dealt with the issue, whether in absence of complaint to the police, a complaint can be made directly before the Magistrate and after elaborate discussion and deliberation of the various principles of law, it has been delineated that the provisions of Section 154 of Cr.P.C. should be invoked normally before taking recourse of the power of the Magistrate under Section 156(3) of the Cr.P.C. but this dictum of law is not free from exception and there can be cases, where non-compliance of section 154(3) would not divest the jurisdiction of the Magistrate in terms of Section 156(3) of Cr.P.C. The relevant portion from para.No.64 of the aforesaid precedent, is reproduced hereinbelow :- "64. XXXX

Question No.(i) Whether in absence of a complaint to the Police,a complaint can be made directly before a Magistrate? Answer :

Normally, a person should invoke the provisions of section 154 of the Code before he takes recourse to the power of the Magistrate competent to take cognizance under section 190 of the Code, under section 156(3). At least an intimation to the police of a commission of a cognizable offence under section 154(1) would be a condition precedent for invocation of powers of the Magistrate under section 156(3) of the Code. We would hasten to add here that this dictum of law is not free from exception. There can be cases where non compliance to the provisions of section 154(3) would not divest the Magistrate of his jurisdiction in terms of section 156(3). There could be cases where the Police failed to act instantly and the facts of the case show that there is possibility of the evidence of commission of the offence being destroyed and/or tampered with or an applicant would approach the Magistrate under section 156(3) of the Code directly by way of an exception as the Legislature has vested vide discretion in the Magistrate."

25. In the above premise, we are not inclined to nod in favour of applicants for quashing the impugned FIR filed against them. The allegations contained in the FIR, prima facie, constitute cognizable offence against the applicants. The very nature of offence lodged against the applicants would not be considered as part of the official duties of the applicants/public servants. Therefore, prior sanction in terms of Section 197 of Cr.P.C. is not required to initiate criminal case against the applicants/public servants. The enquiry about the correctness or veracity of the allegations is not amenable within the jurisdiction of this Court while exercising the inherent powers under Section 482 of Cr.P.C. In view of the peculiar circumstances of the matter the non-compliance of the provisions of Section 154(1) or 154(3) would not divest the jurisdiction of the learned Magistrate to

exercise powers under Section 156(3) of Cr.P.C. The ultimate object of registration of crime is to collect the evidence and file report under Section 173 of Cr.P.C. In such circumstances, we do not find any merit in the objections raised on behalf of the applicants to quash and set aside the impugned FIR. In sequel, the application being devoid of merit stands dismissed. Rule is discharged. In view of aforesaid discussion, Criminal Application No. 5680 of 2016 also stands disposed of. No orders as to costs. An observations made herein above are prima facie in nature and confined to adjudication of present application only.