

(2017) 04 BOM CK 0216
In the Bombay High Court
Case No : 1247 of 2014

Dr. Ramprasad Madhavlal Porwal

APPELLANT

Vs

Alka Khaire & Others

RESPONDENT

Date of Decision : 25-04-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 156\(3\)](#) - Police officers power to Investigate cognizable case
[Indian Penal Code, 1860](#), [Section 468](#),
[Section 4](#)

Citation : (2017) 04 BOM CK 0216

Hon'ble Judges : T.V. Nalawade

Bench : SINGLE BENCH

Advocate : Pawan B. Patil, H.F. Pawar, V.A. Bagal, P.R. Katneshwarkar, A.A. Jagatkar, P.K. Lakhotiya, V.S. Gondikar, S.S. Rath

Judgement

1. In the first proceeding the order made by the learned Judge of the Special Court Jalna constituted under the Prevention of Corruption Act, 1988 in Special Case No.6/2014 filed by the present petitioner is challenged and in Criminal Writ petition No.242/2015 the order made by the same Special Court in Special Case No.9/2014 is challenged. Both the proceedings were filed as private complaints by the present petitioner for requesting the Court to take action for the offences punishable under sections 7, 8, 13(1)(c)(d),(2) of the Prevention of Corruption Act 1988 ("the Act") and sections 161 and 34 of the Indian Penal Code. In both the matters, prayer was made to give direction to police to make investigation under section 156(3) of the Code of Criminal Procedure. The learned Special Judge has dismissed the complaints by holding that the sanction under provision of section 19(1) and (3) of the Act was not there for making such order.

2. The complainant, party in person was allowed to argue the matters. In view of the intricate question of law involved in the matter, this Court had appointed learned counsel Shri. Pawan B. Pawar to assist the Court as amicus curiae. It needs to be mentioned that he has worked hard and he has assisted the Court by

showing the law developed till this date on the point involved. The learned counsels for the respondents, accused in the private complaints are also heard. Only one Advocate Shri. Hemantkumar F. Pawar did not turn up in Writ petition No.1247/2014. The learned Additional Public Prosecutor was also heard for the State.

3. In private complaint No.6/2014 the petitioner has made allegation against the Chief Officer of Municipal Council Partur, the Sanitary Inspector of the same Municipal Council, one cashier of the same Municipal Council and one contractor, who is in business of scrap material. Allegation is made that huge quantity of scrap belonging to the Municipal Council was there which was weighing more than 10 tons is sold by the accused persons to accused No.4, the purchaser at meagre price. Allegation is made that for this sale, no procedure was followed and even no approval of any committee of general body of the Municipal Council was taken. Allegation is made that when amount of Rs.2.2 lakh was to be recovered, only amount of Rs.66,000/- was paid by the purchaser and remaining amount was never paid. It is the case of the complainant that he has collected necessary information under the Right to Information Act and he had made complaint to the District Collector. Allegation is made that the purchaser had even admitted that the amount was not paid but no action was taken and the Sanitary Inspector ultimately deposited some amount to see that no action is taken. According to the complainant, that conduct of the Sanitary Inspector of depositing some amount itself shows that they had committed offence of misappropriation. With these allegations the complaint was filed for the offences punishable under the Prevention of Corruption Act like sections 7,8, 13. Sections 409, 471 of Indian Penal Code were not mentioned in the complaint though the allegations make out the offence punishable under section 409 of the Indian Penal Code.

4. In private complaint No.9/2014 allegations were made against the Ex-President of Municipal Council, Partur, Clerk of the Electrical Division of the Municipal Council and one businessman of Aurangabad. Allegations were made that even when no electrical material was supplied by the businessman, amount of Rs.6.3 lakh was paid to him by cash as per the instructions of the accused No.1, the President of the Municipal Council. Allegation is made that the procedure for purchasing such material was not followed and in tender notice time of only 10 days was given when the time of 21 days was required to be given for tenders. Allegation is made that false entries were made in various registers to show that said material was actually supplied when the material was not supplied. In this matter also the complainant had made complaint to the District Collector but the Collector has not taken any action. The businessman was uncle of the then President as per the contention of the complainant. He had prayed for taking action under the provisions of the Prevention of Corruption Act and also under sections 165, 161 etc of the Indian Penal Code. Provisions of section 409 etc of the IPC were not mentioned though the allegations constitute that offence.

5. The submissions made and the aforesaid allegations show that the amounts involved were small but the fact remains that irregularity was found in both the matters. Submissions made show that departmental action was taken in one matter and increment of one accused is permanently stopped. As the concerned Department has taken some action this Court wanted to know as to why further step was not taken like giving report to police or granting sanction for prosecution. For that some orders were made by this Court. It appears that respondent No.2 Chandrakant Khanpate from Criminal Writ Petition No.1247/2014 was suspended and such statement was made before this Court on 26-6-2015. It was informed to the Court that the authority was thinking over to give sanction but the authority was waiting for the decision of the departmental enquiry. This Court had expressed that the departmental enquiry is one thing and taking criminal action is other thing. Criminal action cannot be stopped for having decision of the departmental inquiry. In spite of some orders made by this Court of aforesaid nature, till today no criminal action is taken against the concerned by the Government. By order dated 5-4-2017 this Court had asked as to what is the intention of the Government but on that occasion also it was submitted that the office of the Collector and the superior officers are still thinking over the matter. In view of the aforesaid approach of the State Government and the Collector and as the matters are very old, this Court appointed Advocate Shri. Pawan B Pawar as amicus curiae to assist this Court and this Court expressed that this Court would be deciding both the matters.

6. Relevant contentions of the present petitions made in the complaints are already mentioned. It appears that there are allegations that the accused persons committed the offence of misappropriation of public money, offence punishable under section 409 of the Indian Penal Code. There is also allegation of creation of false record which may fall under sections 468, 471 of the Indian Penal Code. Due to misconception, the complainant filed private complaint before the Special Court under the provisions of the Prevention of Corruption Act. In view of the decision of the Apex Court reported as (2013) 10 SCC 705 (Anil Kumar v. M.K. Aiyappa) the learned Special Judge has held that even for making order under section 156(3) of the Code of Criminal Procedure sanction is necessary. As there is no sanction, both the complaints are dismissed. This case was involving the offences under the Prevention of Corruption Act and also the Indian Penal Code and it can be said that due to involvement of the provisions of the Prevention of Corruption Act, 1988 the observations were made by Apex Court that even for making order under section 156(3) of the Code of Criminal Procedure, there needs to be sanction under section 19(1) of the Prevention of Corruption Act, 1988.

7. The learned counsel appointed as amicus curiae took this Court through the observations made in many other cases like : (i) (2012) 3 SCC 64 (Subramanian Swamy v. Manmohan Singh);

(ii) (1998) 1 SCC 226 (Vineetnarin v. Union of India);

- (iii) (2006) 1 SCC 294 (Romesh Lal Jain v. Naginder Singh Rana);
- (iv) (2009) 8 SCC 617 (State of Madhya Pradesh v. Sheetla Sahai);
- (v) (2007) 1 SCC 1 (Prakash Singh Badal v. State of Punjab);
- (vi) (2015) 13 SCC 87 (Inspector of Police v. Battenapatla Venkata Ratnam);
- (vii) (2015) 12 SCC 231 (D.T. Virupakshappa v. C. Subash).

8. Reliance was placed by the present petitioner on a case reported as State of Bihar v. Rajmangal Ram [2014 DGLS (Soft) 203] and it was submitted that at the stage of making order under section 156(3) of the Code of Criminal Procedure it is not necessary to insist for production of sanction order made under section 19 of the Prevention of Corruption Act, 1988. He submitted that in the case of Rajmangal the Apex Court has laid down that competency of the authority to give sanction or the question whether there was application of mind by the authority need not be decided at initial stage and such consideration is possible only when entire evidence has been given on such issue. There is no dispute over the proposition but in the present matter in view of the case of Anil Kumar (cited supra) different point is involved and there is no sanction at all in the present matter when the party-in-person is asking the Court to make order under section 156(3) of the Code of Criminal Procedure. He placed reliance on some cases decided by this Court. But there are cases of the Supreme Court on this point and so this Court is considering only the law laid down by the Supreme Court. Some cases are on the point of consideration of point of sanction at appellate stage but that point is also different.

9. The contentions made in the complaints if they are accepted as they are, it can be said that the complainant wants to prove that the public servants created false record and they misappropriated public money. Thus apparently the allegations constitute offences punishable under sections 468, 471 and 409 of the Indian Penal Code and not the offences punishable under the provisions of the Prevention of Corruption Act, 1988 mentioned in the complaint. It needs to be kept in mind that the provisions of the Prevention of Corruption Act prevail over the provisions of the Code of Criminal Procedure even for procedural purpose and so as observed by the Hon'ble Apex Court there needs to be compliance of provision of section 19 of the special enactment. In view of the observations made by the Apex Court in the case reported as (1997) 5 SCC 326 (Shamboo Nath Mishra v. State of U.P.) the act of misappropriation of public funds and fabrication of record cannot be called as act done in furtherance of or in discharge of public duty and in such cases Court cannot insist for sanction at any stage of the matter including for passing order under section 156(3) of the Code of Criminal Procedure. Thus the complainant/petitioner of the present matter under some misconception filed the complaints before the Special Court and asked the Special Court to take cognizance of the matter or to make order under section 156(3) of the Code of Criminal Procedure when no sanction order was obtained under section 19 of the Prevention of Corruption Act, 1988. The

order made by the learned Special Judge in view of the ratio of Anil Kumar case (cited supra) cannot be interfered with but it needs to be observed that the complainant can still approach Criminal Court like Judicial Magistrate, First Class either for taking cognizance of the matter or for making order under section 156(3) of the Code of Criminal Procedure for investigation on the allegations made by him in the complaint. The amendment made to section 156(3) of the Code of Criminal Procedure by which the proviso is added to give power to the Court to make any order even for investigation of the offences mentioned in Prevention of Corruption Act 1988 can be used provided that the procedure given in the said proviso is followed. The said proviso runs as under :

"Provided that, no Magistrate shall order an investigation under this section against a person who is or was a public servant as defined under any other law for the time being in force, in respect of the act done by such public servant while acting or purporting to act in the discharge of his official duties, except with the previous sanction under section 197 of the Code of Criminal Procedure, 1973 or under any law for the time being in force:

Provided further that, the sanctioning authority shall take a decision within a period of ninety days from the date of the receipt of the proposal for sanction and in case the sanctioning authority fails to take the decision within the said stipulated period of ninety days, the sanction shall be deemed to have been accorded by the sanctioning authority."

10. In view of the aforesaid discussion, this Court holds that there are two options open to the present petitioner, original complainant as stated above. However it is not possible to interfere in the order made by the learned Judge of the Special Court. Thus both the proceedings need to be dismissed. This Court appreciates the efforts put in by learned counsel Shri. Pawan B. Pawar for assisting this Court. This Court is directing to pay amount of Rs. 3000/- to the learned counsel through High Court Legal Services Sub Committee Aurangabad as he has incurred expenses for taking photo copies of the reported cases. In the result, both the proceedings are dismissed. The amount of Rs.3000/- is to be paid to the learned counsel through the High Court Legal Services Sub Committee Aurangabad.