

IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT AURANGABAD Criminal Writ Petition No.25 of 2019

* Dnyaneshwar s/o Kachru Todmal, Age 34 years, occupation : Driver, R/o Newasa (Bk), Taluka Newasa, District Ahmednagar. .. Petitioner. Versus 1) The State of Maharashtra, Through its Secretary, Home Department, Mantralaya, Mumbai – 32. 2) The Superintendent of Police, Ahmednagar. 3) The Sub Divisional Police Officer, Shevgaon, Taluka Shevgaon, District Ahmednagar. 4) Vitthal Uttam Gaikwad, Age 53 years, Occu: Police Constable, Newasa Police Station, Newasa, District Ahmednagar. 5) Pravinchand Lokhande, Age 53 years, Occupation : Service, Kopargaon Police Station, Kopargaon, Dist Ahmednagar. 6) Sunil S. Suryawanshi, Age 56 years, Occupation: Service, S.D.P.O. Office, Ahmednagar Rural, District Ahmednagar.

2 7) Pramod Bhingare, Age 30 years, Occupation : Service, Killa Police Station, Malegaon, District Nashik. 8) Tulshidas Gitte, Age 51 years, Occupation : Service, Newasa Police Station, Newasa, District Ahmednagar. 9) Babu K. Ranavare, Age 54 years, Occupation : Service, Newasa Police Station, Newasa, District Ahmednagar. 10) Sandip G. Divate, Age 29 years, Occupation: Service, Belwandi Police Station, Taluka Newasa, Dist Ahmednagar. 11) Jaiwant Todmal, Age 45 years, Occupation : Service, Newasa Police Station, Newasa, District Ahmednagar. 12) Mohan P. Shinde, Age 49 years, Occupation : Service, Newasa Police Station, Newasa, District Ahmednagar. 13) Mahesh S. Kache, Age 32 years, Occupation : Service, Newasa Police Station, Newasa, District Ahmednagar.

3 14) Subhash J. Hazare, Age 48 years, Occupation : Service, Newasa Police Station, Newasa, District Ahmednagar. 15) Devidas D. Khedkar, Age 35 years, Occupation : Service, Newasa Police Station, Newasa, District Ahmednagar. 16) Savita Undre, Age 27 years, Occupation : Service, Newasa Police Station, Newasa, District Ahmednagar. .. Respondents. ---Shri. V.D. Sapkal, Advocate, for petitioner. Shri. D.R. Kale, Additional Public Prosecutor, for respondent Nos.1 to 16. --- Coram: T.V. NALAWADE & S.M. GAVHANE, JJ. Judgment reserved on : 18 November, 2019 Judgment pronounced on : 29 November, 2019

JUDGMENT (Per T.V. Nalawade, J.):

1) Rule. Rule made returnable forthwith. Heard both the sides by consent for final disposal.

4 2) The present proceeding is filed for declaration that the act of the respondents, police officers, of taking search of the house of the petitioner on the night between 5-5-2018 and 6-5-2018 was illegal and that was interference in the privacy of the petitioner and his family. Relief is claimed of compensation of Rs.10 lakh for infringement of fundamental right,

right of privacy. Direction is also sought to prosecute the police officers involved in the house search for offence of trespass and other offences.

3) The incident in question took place on the night between 5-5-2018 and 6-5-2018 at about 2.00 a.m. The search of the house of the petitioner was taken by Newasa Police, District Ahmednagar. According to the petitioner, police had not obtained search warrant for taking such search and ultimately nothing objectionable was recovered from his house. It is contended that during search, one Constable by name Vitthal Gaikwad had tried to plant a country made pistol in his house but due to alertness of the petitioner he could not plant such arm. It is the contention of the petitioner that while leaving the

5 house threats were given by the police to him that they would implicate him in a false crime. It is contended that this act of the police was infringement into his privacy, violation of his fundamental rights guaranteed under Article 21 of the Constitution of India.

4) It is the contention of the petitioner that on 7-5-2018 he gave complaint to the concerned Tahsildar about the aforesaid illegal act of police but no action was taken. It is contended that he gave complaint to the District Superintendent of Police on 10-5-2018 and copy of the complaint was sent to State Human Rights Commission but no action is taken against the respondents. He had approached this Court by filing Writ Petition No. 841 of 2018. In that proceeding a letter of the District Superintendent of Police Ahmednagar was shown to the Court and it was to the effect that the Sub Divisional Police Officer was appointed to make inquiry. In view of the steps taken by the superior police officers, Writ Petition No.841of 2018 was disposed of by this Court.

6 5) It is the contention of the petitioner that in the aforesaid inquiry it revealed that the search of the house of the petitioner was taken but there was no search warrant. It is his contention that though illegality was noticed, the Sub Divisional Police Officer did not propose action against the police officers involved in the illegal search. It is his contention that the police officers involved in the house search could not have come together as they were posted at different places for discharge of their routine duties and everything in the action was illegal. It is the contention of the petitioner that there is nothing with the respondents to show that they had received any information against the petitioner on that night or prior to that night and the action taken had no basis. A copy of the report prepared by the Superintendent of Police is produced on the record and other documents like copy of representation are also produced and the aforesaid reliefs are claimed.

6) The Superintendent of Police Ahmednagar has filed reply affidavit. He has contended that from the year 2014 onwards as many as 16 crimes were registered

7 against other persons of that area as they were found in possession of fire arms. He has contended that due to such circumstance there was a probability that

persons of that local area were having fre arms and they were involved in illegal activities and so action was taken by police which was on the basis of secret information.

7) It is the contention of District Superintendent of Police that, present petitioner is driver by occupation and against him some crimes were registered prior to the date of action though under sections 304-A and 279 of the Indian Penal Code between years 2011 and 2015. It is contended that it cannot be said that the petitioner had no criminal background. It is contended that the action was taken in good faith by police. Along with reply, a list of 30 crimes registered from years 2011 to 2018 under Arms Act against many persons is given and list of separate 16 crimes is given to show that accused from these cases were involved frst time in such crimes.

8) Respondent No.5 – Police Inspector who was involved in the search and who was senior most police

8 officer of the team has fled reply affidavit. He has contended that there was secret information against the petitioner so search was taken. Other contentions made by the Police Inspector are similar to the contentions made by the District Superintendent of Police. The Police Sub Inspector who was involved in the search has also fled similar reply. One Head Constable, respondent No.4, has also fled similar reply.

9) With the inquiry report prepared by the Sub Divisional Police Officer there are statements of police officers who were involved in the search. There are statements of the panch witnesses also. The record and the report are to the efect that after the search the petitioner had given threats that he would approach higher authority and also the court for taking such search and he had said that he would also approach the political leader Shri. Prashant Gadakh. It appears that the petitioner is a follower of the aforesaid leader.

10) More record came to be produced by the respondents during pendency of the present proceeding.

9 Copy of complaint dated 10-10-2019 given by one Baba @ Bhusaheb Maruti Kangune is produced. He has made allegation against the petitioner that the petitioner had supplied false information against him that he had illegally stored liquor in his feld. In the complaint he has contended that the petitioner is a follower of a big political leader and so police are not taking action against him. Copy of the complaint given by one Mohan Todmal dated 2-4-2019 is produced by the respondents. The petitioner is cousin bother of Mohan Todmal. Mohan Todmal has made allegation that on 31-3-2019 he had given complaint to the concerned police station that the petitioner had given threats to him by showing revolver but no action was taken against the petitioner by police. He has also contended that the petitioner has support of political leader Shri. Prashant Gadakh. Allegations are made that the petitioner is doing money lending business illegally.

11) In view of nature of the allegations and the aforesaid circumstances the record of year 2019 which is produced by the respondents cannot be considered. It is

10 not the case of the respondents that further action was taken against the petitioner on the basis of the aforesaid two complaints. It is unfortunate that such complaints are collected subsequent to the date of filing of the present proceeding and they are produced to show that against the petitioner there are some complaints.

12) The learned counsel for the petitioner has placed reliance on a decision given by this Court in Criminal Writ Petition No.823/2018 (Pushpa Santosh @ Ishwar Pimple v. The State of Maharashtra & Others). Direction was given by this Court in that writ petition on 10-6-2019 to register crime against the police of Newasa Police Station, the police station to which some of the present respondents were attached at the relevant time. Direction was given in respect of death which had taken place in the custody of police on 23-8-2017. This circumstance cannot be considered and this circumstance cannot lead to presumption that police of this police station always indulged in such activities and there was excessive use of power by them in general.

11 13) The learned counsel for the petitioner mainly submitted that police ought to have obtained search warrant first for taking search of the house of the petitioner and as such warrant was not obtained, the house search was illegal. He took this Court through the provisions of Chapter VIII and some provisions of Chapter V of the Code of Criminal Procedure. Those provisions are altogether different and the purpose behind those provisions is different. The specific purposes for which the search can be taken under search warrant are given in provisions of sections 93 to 95 of the Cr.P.C. In the present matter it is specific case of the respondents that, on the basis of some secret information that the petitioner was in possession of firearm illegally, the search was taken. There are not only the aforesaid provisions enabling the police officer to take search of the house but there are other provisions like provisions of sections 165 and 166 of the Cr.P.C. Provision of section 165 of the Cr.P.C. runs as under.

“165. Search by police officer.-- (1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for

12 believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing, the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station. (2) A police officer proceeding under sub-section (1), shall, if practicable, conduct the search in person. (3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require

any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place. (4) The provisions of this Code as to search-warrants and the general provisions as to searches contained in section 100 shall, so far as may be, apply to a search made under this section. (5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate.”

14) The provision of section 166 of the Cr.P.C. shows that police officer in charge of a police station may require another to issue search-warrant when a place to be searched is situated within local jurisdiction of the

13 other police station. This Court holds that provisions of sections 165 and 166 of the Cr.P.C. are applicable in a case like present one. Provision of section 165 of the Cr.P.C. has following four ingredients :-

(i) The police officer must have reasonable ground for believing that anything necessary for the purpose of an investigation of an offence cannot, in his opinion, be obtained otherwise than by making a search, without undue delay; (ii) he should record in writing the grounds of his belief and specify in such writing as far as possible the things for which search is to be made; (iii) he must conduct the search, if practicable, in person; and (iv) if it is not practicable to make the search himself, he must record in writing the reasons for not himself making the search and shall authorise a subordinate officer to make the search after specifying in writing the place to be searched, and, so far as possible, the thing for which search is to be made.”

15) In the case reported as State v. Rehman (AIR 1960 SC 210) it is laid down by the Apex Court that a search is a process exceedingly arbitrary in character, stringent statutory conditions are imposed on the exercise of the power. The provision of section 165 of the Cr.P.C. is enacted to enable police to take search when there is

14 urgency and when it is not permissible to follow lengthy process, securing search warrant from Magistrate. In the case of Rehman (cited supra) the Apex Court has laid down that as the provision of section 165(1) of the Cr.P.C. is mandatory in nature, it should be strictly followed. Thus, before entering a house, investigating officer has to specify in writing the things for which search is to be made and also the ground of his belief that such things would be found in the house which is to be searched. In view of the wording of the provision it can be said that the provision is not restricted to search of what is stolen or believed to be stolen and it permits the police officer to make search for anything necessary for the purposes of investigation into any offence. Thus, on one hand the

provision enables police to take search of the house for investigation of any crime, on the other, it becomes mandatory for police to record reasons as the first step before entering the house.

16) Sub section (2) of section 165 of the Cr.P.C. shows that police officer taking action should be either police officer in charge of the police station or the

15 investigating officer. It can be said that in cases of urgency, the investigating officer may depute his subordinate but in view of the provision of section 165(1) of the Cr.P.C. such deputation must be in writing. That is also made clear in section 165(3) of the Cr.P.C.

17) The provision of section 165 of the Cr.P.C. shows that it applies to searches when offence is committed under general Act like Indian Penal Code, or special Acts or also local Acts provided that the conditions given in section 165 of the Cr.P.C. are satisfied. This Court has gone through the provisions of the Arms Act 1959 as the respondents have come with the defence that there was specific secret information against the petitioner that he was in possession of firearm illegally. There is nothing in the Arms Act and the Rules framed under that Act to enable police to take such search by ignoring the provision of section 165 of the Cr.P.C. This Court has also gone through the provisions of the Maharashtra Police Act to ascertain the powers of police officer and this Act also does not show that police can bypass the provision of section 165 of the Cr.P.C.

16 18) Learned counsel for the petitioner submitted that taking house search illegally itself amounts to infringement of privacy and such act is in breach of the fundamental rights given under Article 21 of the Constitution of India. In view of the aforesaid provision, and as police officers entered the house that too in night time when he was sleeping with his family which included two ladies and the issues, this Court holds that it was intrusion into privacy. If such act is done illegally without following the procedure which is contemplated in Article 21 of the Constitution of India, the consequences follow. In such a case, there cannot be defence that it was a mistake on the part of the police officers. On this point, learned counsel for the petitioner has placed reliance on the case reported as AIR 2017 SC 4161 (Justice K.S. Puttaswamy v. Union of India). Facts and circumstances of each and every case are always different. It needs to be ascertained in every case as to whether the action of the officers was in breach of the fundamental rights given by provision like Article 21 of the Constitution of India. If the Court comes to conclusion that the action was not in accordance with law, it was illegal the court is bound to give compensation.

17 19) In the present matter this Court had given opportunity to the respondents to show that there was secret information received by police on that night. Though from the information, the informant's name need not be disclosed, it is necessary for police to create a record of the information received. Entry of such information which involves

commission of cognizable offence needs to be made in station diary. When police officers leave for action, they need to make an entry about their movements in station diary. In the present matter the record produced by the petitioner shows that most of the respondents were assigned different duties at different places on that night. All of them came together on that night for this action but no writing is there in respect of secret information and also about the compliance of provision of section 165 of the Cr.P.C. It appears that subsequent to taking the search some entry was made in the station diary but such entry cannot be used to show that there was compliance of provision of section 165 of the Cr.P.C. This Court holds that the action of the police officers was illegal. This Court has no hesitation to hold that the State is liable to pay compensation to the

18 petitioner for such illegal action. That action of police was not only the infringement into privacy but that action defamed the entire family. If in the past some crimes were registered against the petitioner for offence of accidents that cannot be considered to say that the petitioner had criminal background when his occupation was driver. Many times a driver faces such prosecution. So, the defence of such nature taken by the respondents cannot help them to show that they had reasonable ground to take action against the petitioner. There is other probability like involvement of the rivals of the aforesaid political leader. Thus there is possibility of mala fides also in the present matter. Considering the status of the petitioner this Court holds that the respondents need to pay at least Rs.25,000/- as compensation to the petitioner. Initially that amount needs to be paid by the State and it will be open to the State to recover the amount from the concerned police officers after fixing responsibility on them.

20) Granting of other reliefs like prosecuting the police officers is not possible in the matter like present one. Learned counsel for the petitioner drew attention of

19 this Court to the provision of section 147 of the Maharashtra Police Act 1951 which is as under.

“147. Vexatious entry, search, arrest etc., by Police Officer. Any Police Officer who – (a) without lawful authority or reasonable cause enters or searches, or causes to be entered or searched, any building, vessel, tent or place; (b) vexatiously and unnecessarily seizes the property of any person; (c) vexatiously and unnecessarily detains, searches or arrests any person; (d) offers any unnecessary personal violence to any person in his custody, or (e) holds out any threat or promise not warranted by law, shall for every such offence, on conviction, be punished with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, or with both.”

In the present matter, the incident took place on the night between 5-5-2018 and 6-5-2018. In view of the provision of section 161 of the Maharashtra Police Act, action under the aforesaid provision ought to have been taken within six months. If the action is not taken within six months in view of section 161 of Maharashtra Police Act, the provision of section 197 of the Cr.P.C comes in play.

1951 reads as under :

“161. Suits or prosecutions in respect of acts done under colour of duty as aforesaid not to be entertained, or to be dismissed if not instituted within the prescribed period. (1) In any case of alleged offence by the Revenue Commissioner, the Commissioner, a Magistrate, Police Officer or other person, or of a wrong alleged to have been done by such Revenue Commissioner, Commissioner, Magistrate, Police Officer or other person, by any act done under colour or in excess of any such duty or authority as aforesaid, or wherein it shall appear to the Court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained, or shall be dismissed, if instituted, more than six months after the date of the act complained of: Provided that, any such prosecution against a Police officer may be entertained by the Court, if instituted with the previous sanction of the State Government within two years from the date of the offence. In suits as aforesaid one month's notice of suit to be given with sufficient description of wrong complained of. (2) In the case of an intended suit on account of such a wrong as aforesaid, the person intending to sue shall be bound to give to the alleged wrong-doer one month's notice at least of the intended suit with sufficient description of the wrong complained of, failing which such suit shall be dismissed. Plaint to set forth service of notice and tender of amends. (3) The plaint shall set forth that a notice as aforesaid has been served on the defendant and the date of such service, and shall state whether any, and if any, what tender of amends has been made by the defendant. A

copy of the said notice shall be annexed to the plaint endorsed or accompanied with a declaration by the plaintiff of the time and manner of service thereof.”

21) On the point of necessity of sanction under section 197 of the Cr.P.C., learned counsel for the petitioner has placed reliance on observations made in the cases reported as (1) AIR 1973 SC 2591 (Pukhraj v. State of Rajasthan); and, (2) 1970 Cri.L.J. 1401 (Bhagwan Prasad Srivastava v. N.P. Mishra). The facts of these two reported cases are different. In view of the facts of those cases it was held that the acts were not done in purported exercise of the duty. In the case of Bhagwan Prasad Srivastava (cited supra), the Apex Court has made it clear that there must be reasonable connection between the “act” and the discharge of official “duty”. The act must fall within the scope and range of official duty of the public servant concerned. It is observed that it is not “duty” which requires examination as much as “act” because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. There cannot be dispute over the propositions made in the two cases. In the present matter this Court has referred to provisions of sections 165 and 166 of the Cr.P.C. The house of the petitioner is situated within local jurisdiction of the police station of the respondents and it is their contention that there was specific information about illegal possession of firearm against the petitioner and so search was taken. In view of the provisions of the Cr.P.C. quoted, it can be said that search of the house premises was a part of official duty. In the matter like present one there is no need to go into other requirements of provision of section 165 of the Cr.P.C. to ascertain as to whether the search was being taken by Police Station Officer or the investigating officer.

22) As the act was done while discharging of duty the observations made by the Apex Court in the aforesaid two cases cited by the learned counsel for the petitioner cannot be used in the present matter.

23) On the other hand, learned Additional Public Prosecutor has placed reliance on the observations made by the Apex Court in the cases reported as (1) AIR 2006 SC 820 (Rakesh Kumar Mishra v. State of Bihar); and, (2) AIR 2008 SC 1992 (Anjani Kumar v. State of Bihar). In

the first matter there was similar allegation like the search of the house of the respondent of that matter. Allegations were made that search was motivated and it was for the purpose of humiliating and harassing him. There was also contention that there was no search warrant. Though search was without warrant the Apex Court held that sanction for prosecution of such police officer needs to be obtained under section 197 of the Cr.P.C. In the second matter of Anjani Kumar similar observations are made and it is observed that if there is reasonable connection between the act and the discharge of duty by public servant, the act would be 'official' to which section 197 of the Cr.P.C. would be applicable. On that count the proceeding filed against the public servant was quashed. In view of this position of law, this Court holds that for the prosecution there is necessity of sanction under section 197 of the Cr.P.C. In view of the facts of the present matter this Court holds that no further action like direction for prosecution of the police officers is warranted and giving of the compensation to the petitioner would be sufficient. In the result, following order :

24) The petition is partly allowed. It is hereby declared that the search was illegal. The respondents are directed to pay compensation of Rs.25,000/- (Rupees Twenty Five Thousand Only) to the petitioner. The amount is to be deposited initially by the Government within 45 days of this decision. If the amount is not deposited within 45 days the amount shall carry interest at the rate of 8% per annum. After deposit of the amount, the amount is to be given to the petitioner. It will be open to the State to make inquiry and fasten liability on the concerned for recovery of the amount from the concerned officers. It is open to the petitioner to take appropriate steps permitted by law for prosecution. Rule is made absolute in those terms.

Sd/-

Sd/(S.M. GAVHANE, J.)

(T.V. NALAWADE, J.)