

(2023) 02 BOM CK 0089

In the Bombay High Court

Case No : Criminal Application No. 3312 Of 2019

Amer Khan S/O Anwar Khan

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 22-02-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 349, 350, 351, 353, 504, 506

Citation : (2023) 02 BOM CK 0089

Hon'ble Judges : Anuja Prabhudessai, J; R. M. Joshi, J

Bench : Division Bench

Advocate : Ashutosh S. Kulkarni, A. R. Kale, A. R. Vaidya

Final Decision : Allowed

Judgement

R. M. Joshi, J

1. By this application the applicant is seeking quashment of FIR bearing No. I-252 of 2019 registered with City Chowk Police station, Tq. and Dist. Aurangabad for the offences punishable under Sections 353, 504, 506 read with Section 34 of the Indian Penal Code (for short 'IPC') and consequent criminal proceeding bearing R.C.C. No. 2207 of 2019 pending before Judicial Magistrate First Class, Aurangabad.

2. It is the case of the applicant that he is the owner of property bearing CTS No. 11583. On 16th July, 2019, when the respondent No. 2 came to the spot to remove the alleged encroachment, the applicant informed him that he is the lawful owner of the property and also showed the property card indicating name as an occupier. The applicant claims that the respondent No. 2 lodged a false complaint against him.

3. Report lodged by the respondent No. 2 indicates that pursuant to the Suo Moto Public Interest Litigation bearing No. 3 of 2019 in respect of encroachment on Salim Ali lake, direction was received from authorities of the Corporation for removal of encroachment and accordingly meeting was held wherein action of

demolition was directed to be taken. Police protection was also sought for the said drive to be held on 16th July, 2019. According to the informant at about 1.30 pm on 16th July, 2019 he along with the Officers of Corporation and other staff was present in the area of Dr. Salim Ali lake. It is alleged that Namdev Sahane has encroached on the jogging track to the extent of 30 x 50 sq.ft. shed wherein he does furniture business. It is also stated that prior to the actual removal of encroachment respondent NO. 2 had been to the spot 2-3 hours and made request for the removal of the same. However, applicant and his relative Navid Shaikh abused, threatened him and rushed on his person. Respondent No. 2 informed them that the action of removal of encroachment is being undertaken pursuant to the directions of the High Court. It is alleged that the applicant and his relative created ruckus at the spot and caused obstruction to the lawful discharge of duties of respondent No. 2.

4. Learned counsel for the applicant submitted that under the false pretext of order passed by the High Court the action of demolition has been taken and which is in contravention with the order of injunction granted by the Civil Court in respect of the concerned structure against Corporation. He drew attention of the Court to the various orders passed in relation to the subject property. It is also submitted that High Court did not issue any direction on or before 16th July, 2019 to remove any construction and therefore, the respondent No. 2 was not discharging his lawful duty when he demolished the structure and hence question of attracting provision of Section 353 of the IPC does not arise. He also argued that even otherwise if the entire material placed on record is accepted as it is but still no offence is made out for assault or use of criminal force to deter public servant i.e. respondent No. 2 from discharge of his duty.

5. Learned counsel for the respondent No.2 submitted that a suo moto petition was taken up by the High Court in respect of the encroachment carried on or around Dr. Salim Ali lake. According to him, pursuant to the proceedings held before the High Court, it was expected from the Corporation to take action against the unauthorized structures standing around the concern place and hence the action of demolition was undertaken and respondent No. 2 was discharging his official duty, when he was obstructed by applicant.

6. Learned APP vehemently opposed the application by submitting that as per the record the action of demolition was undertaken pursuant to the directions passed by the High Court in suo moto petition. He, however, was unable to show any such order being passed on or before 16th July, 2019. It is also submitted that applicant has no concern with the subject property, but he obstructed respondent No. 2 from discharging his duty. He further argued that the act of applicant of threatening respondent No.2 to break his hands and legs coupled with his act of rushing on the person of respondent No.2 amounts to "assault" within the meaning of Section 351 of IPC and therefore, there is prima facie material on record to indicate commission of offence by applicant and hence it is not a fit case for quashing the FIR and consequential criminal proceeding.

7. In order to appreciate the facts on record it needs to be seen as to what constitutes an offence under Section 353 of IPC which reads thus;

"353. Assault or criminal force to deter public servant from discharge of his duty – Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both."

8. A plain reading of this provision indicates that first and foremost requirement for attracting rigour of this provision is that the public servant must be discharging his duty. Needless to say that such duty must be 'lawful'. Unlike in some other provisions, the "purported discharge of duty" by public servant, is not contemplated herein. Hence for making this provision applicable, the discharge of lawful duty is a condition precedent.

9. Further, in order to attract the said provision there must exist assault or use of criminal force against public servant to prevent or deter that person from discharging his lawful duty.

. Section 349 of the IPC defines criminal force as;

"349. Force – A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling:

Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described:

First.- By his own bodily power.

Secondly.- By disposing any substance in such a manner that the motion or change or cessation of motion take place without any further act on his part, or on the part of any other person.

Thirdly.- By inducing any animal to move, to change its motion, or to cease to move."

10. The above definition clearly shows that there can be said force, to use of only when one makes another to cause motion, change of motion or cessation of motion in one of the three ways expressly provided therein i.e. by his own bodily power or by disposing any substance in such a manner that the motion or change or cessation of motion takes place and inducing any animal to move to

change its motion or to cease to move. In absence of adoption of any one of three ways or in absence of causing of motion, change or cessation thereof, above definition would not attract.

11. Criminal force as defined in Section 350 indicates that whoever intentionally uses force to any person, without that person's consent, in order to commit any offence or intending by the use of such force to cause or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

12. Perusal of first information report shows that the applicant abused and threatened respondent No.2 and rushed on his person. There is no allegation against present applicant that he has caused respondent No.2 any motion, change of motion or cessation of motion with the use of bodily power. Thus, on the face of it, this is not a case wherein any force has been used by the applicant and consequently application of criminal force does not arise.

13. Learned APP laid stressed upon definition of "assault" under Section 351 of the IPC in order to submit that the act of the applicant of rushing on the person of respondent No.2 with abuses and threatening amounts to assault. Section 351 of the IPC defines assault as under:

"351. Assault- Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation.- Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.

Illustration

(a) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(b) A begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

(c) A take up a stick, saying to Z, "I will give you a beating". Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault."

14. The above definition indicates that whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause person to apprehend that he is about to use of criminal force to that person is said to to commit an assault. According to explanation thereto mere

words do not amount to an assault, but the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures amount to an assault. For instant case illustrations (a) and (c) would be relevant to take into consideration. These illustrations show that what sort of gestures are contemplated in order to constitute that to be an assault and they indicate that there has to be a clear intention appearing from the gesture that the person is intending to cause to believe that he is about to strike other.

15. Herein this case it is alleged that applicant abused and threatened respondent No.2 by rushing on his person. Except for the words spoken there is complete absence of any gesture as contemplated as Section 351 to constitute it to be an assault. It is pertinent to note that even from report no apprehension is indicated to have been caused in the mind of respondent No.2 from the said act of applicant on rushing on his person because in response thereto respondent No.2 simply informs him that the action in question is being undertaken as per the directions of High Court. The contents of first information report thus clearly show absence of any apprehension by the gestures caused to respondent No. 2.

16. It further needs to be recorded that as per first information report of respondent No.2, the said incident has not occurred at the time of actual demolition but prior to 2-3 hours thereof, when respondent No.2 claims to have been to the spot. Thus, there is apparently no discharge of duty in any manner whatsoever sought to be done by the respondent No.2 and hence even otherwise he has neither been obstructed nor been deterred to desist from discharge of duty. Considering the aforesaid facts even if the first informant report is accepted in his entirety as true, still no offence punishable under Section 353 is made out against the applicant.

17. Apart from this, it would be also relevant to take note of certain facts which leads to the inevitable inference that first information report is an outcome of malafide and malicious complaint against the informant to cover up the action of the respondent No. 2 which was wholly illegal, in total disregard of law and contemptuous being in utter flouting of injunction granted in respect of the subject property by Civil Court.

18. Perusal of the photo copy of judgment in R.C.S. No. 112 of 2010 indicates that in respect of CTS No. 11583 & 11595 injunction was granted by the Civil Court against Corporation from demolishing the suit structure, which is subject property in this case. The applicant has placed on record property card showing him to be occupier of the subject property. Order passed in R.C.S. No. 377 of 2009 indicates that Namdev Pundlik Sahane is tenant in respect of the said property and he had sought reliefs against erstwhile owner. Thus, there is material evidence in the form of judicial orders on record to indicate that applicant was very well concern with the subject property. The factum of issuance of notice to applicant by Corporation itself is sufficient to falsify arguments of learned APP that applicant had been to spot without any concern with the property in question. Not only that action of demolition of subject

property was in utter disregard of the law but it was based or initiated on totally false claim that there was direction of the High Court in Suo Moto Petition for demolition of the structure around Dr. Salim Ali lake. Though, it is so claimed by the learned counsel for respondent No.2 and learned APP, however, the documents on record show otherwise. This is thus a clear cut case of abuse of process of law by respondent No.2 and in order to cover up the same apparently malicious complaint has been lodged against the applicant.

19. The provision of Section 353 of IPC has been enacted to make sure that public servant is not being obstructed or deterred from performing his lawful duties and by no stretch of imagination same can be allowed to become a tool in hand, of unscrupulous persons to cover up outright illegality as done in the present case. In order to attract offence under this provision there must exist element of lawful discharge of duties by public servant, which is absent herein. In the facts of the case where no cognizable offence is made out against applicant, to continue criminal prosecution on the basis of apparently frivolous and malicious complaint will be an abuse of process of Court. The present case, therefore, squarely falls in illustration 1, 3 and 7 given by the Hon'ble Apex Court in case of State of Haryana And Ors Vs. Ch. Bhajan Lal And Ors., 1992 AIR 604.

20. In view of the above discussion, application stands allowed in terms of prayer clauses (B) and (C). Consequently, FIR No. I-252 of 2019 registered with City Chowk Police Station, Tq. and Dist. Aurangabad and R.C.C. No. 2207 of 2019 pending before JMFC, Aurangabad stand quashed qua applicant.