

(1999) 09 BOM CK 0085

In the Bombay High Court

Case No : Criminal Writ Petition No. 1301 of 1997

Arun B. Vaidya

APPELLANT

Vs

The State of Maharashtra and others

RESPONDENT

Date of Decision : 18-09-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202
Penal Code, 1860 (IPC) — Section 120, 409, 419

Citation : (2000) 2 BomCR 623

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : A.G. Sabnis, Shirish Gupte and Ms. Bharati Mahant, for the Appellant; Pravin Singhal, Assistant Public Prosecutor and Rajan Desai, for the Respondent

Judgement

D.G. Deshpande, J.—Heard Advocates for the petitioner and respondent No. 3 and also A.P.P. for the State of Maharashtra.

2. The petitioner is a Member of the Governing Council of the Indian Education Society and Chairman of the Buildings Committee, a Sub-Committee appointed by the Governing Council. This petition is filed for quashing and setting aside the charge-sheet filed by respondent Nos. 1 and 2 in Case No. CC/10/I & R/91, later numbered as 190/P/97, pending before the Metropolitan Magistrate, 30th Court, Kurla, Mumbai and for other ancillary reliefs. Even though record of the case was bulky, Shri Sabnis, Counsel for the petitioner restricted his arguments only on four points which are subject matter of the charge-sheet and no grievance was made by the Counsel for the respondents regarding those four points.

3. The main allegation against the petitioner in the charge sheet which came to be filed in certain circumstances with which I will deal with later are that the petitioner along with other members of the Governing Council of the Indian Education Society hereinafter called "the Society" committed criminal breach of trust and misappropriation of the property belonging to the society. To be specific

and precise, those allegations are in respect of (1) Rachana Sansad, (2) Dombivali Sports Club (3) Marol Compound Wall and (4) Mulund School Building. Concerned pages of this complaint and paragraph numbers are as under :

- (i) Rachana Sansad page No. 102, paragraph 36.
- (ii) Dombivali Sports Club- Pages 96 and 97, paragraphs 33 and 34.
- (iii) Marol Compound Wall - page 94, paragraph 32
- (iv) Mulund School Building - page 99 paragraph 35.

It is clear from the facts alleged in the writ petition and submissions made by both the Advocates that in the society there was factions and groups as are found in other societies whether educational society or a Co-operative society and this leads to allegation and counter allegations and moves to control and rival to see that they are either put in trouble pressurized or harassed. There is nothing wrong in this attitude so far as it does not lead to rivalry.

4. In the instant case, according to the petitioner, Chairman of the Society one D.K. Kulkarni and Eknath Thakur are leaders of the rival group, whereas petitioner belongs to Lotlikar Group. According to the petitioner, respondent No. 3 belongs to group of Shri Kulkarni and Thakur and both of them are behind respondent No. 3 in filing the complaint after complaint before different authorities against the petitioner and other members of the society.

5. According to the petitioner, respondents started complaining against the petitioner and other members of the Governing Council to the Charity Commissioner making allegations against the Governing Council and also obtained ex parte order of status-quo against them. However, in the complaint, no allegation is made against the petitioner. Shri Lotlikar however, filed reply and after hearing Shri Lotlikar's side, the Charity Commissioner held that no prima facie case is made out against Shri Lotlikar to stop him from managing affairs of the trust or dealing with property of the educational institution of the society.

6. According to the petitioner, the said Kulkarni and others filed appeal before the City Civil Court, Mumbai and obtained ex parte order of stay without notice to Shri Lotlikar, but ultimately, Advocate for Shri Kulkarni conceded before the City Civil Court that the said appeal was not maintainable. However, thereafter, Shri Kulkarni and others instigated respondent No. 3 to file false complaints being Criminal Case No. 210/Misc./91 of 1991, before the Metropolitan Magistrate, Kurla, Mumbai, repeating therein similar allegations made before the Charity Commissioner and making other allegations of criminality and in the false complaint, for the first time, allegations were made against the petitioner and he was joined as accused No. 2 in the said complaint. That complaint was in respect of items referred to above.

7. Respondent No. 3 prayed before the Metropolitan Magistrate that enquiry by C.I.D. be ordered against all the accused and consequently, the Magistrate

ordered enquiry by C.I.D. by his order dated 9th October 1991. Accordingly, Investigating Officer was appointed to make enquiry. He made detailed enquiry, but under the garb of enquiry he started misusing powers (as alleged by the petitioner). Hence, Shri Lotlikar and the present petitioner filed a petition in this Court where Justice Daud did not interfere with investigating but gave certain directions to protect the interest of the petitioners therein. In the meantime petitioner also filed civil writ petition wherein Arbitrator was appointed and members of the Governing Council were made parties. All of them agreed for fresh election and in those elections held in August 1992, Group of Lotlikar and the petitioner won by thumbing majority.

8. The Investigating Officer Shri Tambaku did not submit his report and, therefore respondent No. 3 approached the Up-Lokyukta who in turn directed the Commissioner of Police, Gr. Bombay, to make investigation against the said Shri Tambaku and appointed Shri Takle as Second Investigating Officer.

9. Shri Takle carried out investigation at length and filed his report to the Metropolitan Magistrate, that no offence was disclosed. At the highest there were procedural lapses. This report is filed at Ex. F to this petition dated 6th October 1995.

10. Not satisfied with this report respondent again approached Up-Lokyukta, who wrote to the Commissioner of Police, to appoint 3rd Investigating Officer. Thereafter, respondent No. 2, Shri Shyama Parulekar was appointed Investigating Officer and it is he who filed charge sheet against the present petitioner and others before the Metropolitan Magistrate for different offences all of which are in respect of misappropriation and criminal breach of trust etc. This petition is, therefore, filed challenging the said charge sheet.

11. It was firstly contended in this background that initial complaint that was filed by respondent No. 3 and charge sheet consequently came to be filed are all outcome of the group rivalry and petty jealousies over controlling power vis-a-vis the society and it is also pointed out that though original complaint filed was by respondent No. 3, Shri Kulkarni and group were behind the same and it was filed after Shri Kulkarni lost before the Charity Commissioner. Shri Sabnis pointed out that charge sheet filed by respondent No. 2 was defective and not maintainable because earlier Investigating Officer appointed by the Commissioner of Police had submitted his report wherein he has exonerated the petitioner and other accused from all the allegations. First Investigating Officer arrived at conclusion that no charges could be substantiated against the petitioner, directing other Investigating Officer to re-enquire in the matter would ultimately result in pressurising tactics to any how implicate the petitioner.

12. As against this, it was contended by Counsel for respondent No. 3 that there was nothing illegal on the part of the Police Commissioner to direct fresh investigation even though first investigation carried out by Shri Takle was unfavourable to respondent No. 3 or favourable to the petitioner. Counsel for

respondent No. 3 also pointed out that investigation carried out by the first Investigating Officer Shri Takle was not proper and, therefore, there was nothing wrong in ordering fresh investigation.

13. I do not find any substance in this submission made by Counsel for respondent No. 3. Nothing was pointed out by him as to how, investigation carried out by Shri Takle was in any way defective or procedural incorrect. He also did not point out whether investigation carried out by Shri Takle was motivated or prejudiced either in favour of the petitioner against respondent No. 3 or in favour of respondent No. 3 or against petitioner.

14. It is true that the Magistrate if not satisfied with the investigation, can direct fresh investigation to be carried out on the facts narrated before him. It is clear that the Magistrate after passing order regarding investigation by the C.I.D., never came into picture and it was the Up-Lokyukta through the Commissioner of Police, who ordered subsequent, second and third investigation. No legal provision was cited by the Counsel for the respondents as to how any outside agency who interfered when the matter i.e. complaint of respondent No. 3 was subjudiced before the Magistrate, Kurla.

15. In this background and for the aforesaid reasons, the third investigation carried out by respondent No. 2 on the basis of which charge-sheet came to be filed appears to be totally without legal force and sanction and it was without orders of the Magistrate concerned and since respondent No. 3 failed to point out why investigation carried out by Shri Takle was not liable to be accepted, the submission of the Counsel for respondent No. 3 cannot be accepted. At the same time, contention of Shri Sabnis that respondent No. 2 filed charge sheet under pressure is required to be accepted though not in strict sense of word "pressure" and since on consideration of fact that Shri Takle has given report, after investigation fresh enquiry order for investigation is presumably and impliedly meant that investigation has to be in positive and affirmative in favour of respondent No. 3 and against the petitioner. It may also be pointed out here that no material was placed before me by Counsel for the respondent as to why respondent No. 3 was not satisfied about the investigation carried out by Shri Takle and the report given by him. No allegations were made that Shri Takle was biased or was favouring the petitioner. It appears from the contentions of the respondent that they wanted investigation by C.I.D. in the whole affair, not only for the purpose of finding out truth, but with a view to set score with the petitioner and the manner in which criminal case came to be filed at the instance of respondent No. 3, there is no doubt that the object of respondent No. 3 in seeking investigation by C.I.D. was to book the petitioner any how in the allegations which respondent No. 3 thought to be well founded.

16. So far as merits of the matters are concerned, it is required to be seen whether respondents succeed in making out prima facie case against the petitioner with reference to four items stated above viz. (1) Rachana Sansad (2) Dombivali Sport Club (3) Marol compound wall and (4) Mulund school building.

17. Copy of complaint of respondent No. 3 filed before the Metropolitan Magistrate, Kurla, is filed in this petition at Ex. C. The allegations are under sections 120, 409, 419 of the Indian Penal Code. So far as Rachana Sansad is concerned, the allegations are to be found in para 36 and it is alleged by the complainant that accused No. 1 directed the suppliers of the society to supply steel and cement worth Rs. 4,80,323/-. This material was earmarked for the purpose of society and as such, it could not be used for Rachana Sansad. By allowing wrongful use of the said material the accused caused loss of Rs. 4,80,323/- to the society. According to the petitioner, however, there was nothing illegal whatsoever in directing supply of steel and cement worth Rs. 4,80,323/- to the Rachana Sansad because necessary resolution in that regard was passed on 23rd March 1991 and Shri Kulkarni who is behind all this litigation was one of the signatories to this resolution. Further, according to Shri Sabnis, Rachana Sansad paid Rs. 4,80,323/- to the Indian Education Society and this falsifies the case of respondent No. 3 in that regard.

18. The Resolution dated 23rd March 1991 is at page 48 of the additional compilation. The concerned resolution is at Item No. 4 and caption of Item 4 is as under :

"To consider a proposal to take over the activities assets and liabilities of a trust named "Rachana Sansad" having its registered office at Shankar Ghanekar Marg, Prabhadevi, Bombay 400 025."

It was decided that since the proposal was already accepted by both the trusts in principle in good faith, the Indian Education Society should extend every possible co-operation to the Rachana Sansad to restart the construction work of the Academy which has come to a complete halt for last about a year.

19. According to Shri Sabnis this resolution gave full authority to Shri Lotlikar and Shri Thakur to supply building material to Rachana Sansad because co-operation was to be given for restarting construction work of the said Sansad. Obviously, it meant giving financial support by supply of material. I find considerable force in this contention of Shri Sabnis in this regard, because, admittedly, petitioner society was not a society carrying out construction work. It was an educational society doing activities for the purpose of spreading education. Therefore, if petitioner was giving co-operation to Rachana Sansad, then co-operation could only be in the form and nature of financial assistance and assistance by way of construction material. Apart from this, none else material is supplied by the society and, therefore, there is no force in the allegation of respondent No. 3 or in the allegations contained in the charge sheet in this regard. It is to be held that there is no case for proceeding against the petitioner regarding Rachana Sansad.

20. The 2nd item is regarding Dombivali Sports Club. This point is found at paragraphs 33 and 34 of the complaint. It is stated that 2.5 acres of land at Dombivali was acquired by the Society and possession was taken over on

4-6-1989 for the purpose of starting school at Dombivali (East). However, apart from this plot, Chandrakant Patkar Trust had one more plot of 5 acres reserved for sport complex. The Society negotiated with Patkar Trust for the said plot, but negotiations could not be materialised. Even so, according to the complainant, the present petitioner along with other accused put steel fencing around the plot by spending Rs. 5.5 lacs from the funds of the society and this was illegal construction and expenditure also was illegal. This work was entrusted to M/s. Harshad Engineering Works without any bid from them. This amount was not spent for the purpose and object of the society and, therefore, there is misutilisation of funds by the petitioner to the tune of Rs. 5.5 lacs. As against this, it was contended by Shri Sabnis that firstly, allegations about spending Rs. 5.5 lacs for putting steel fencing are wrong because amount spent for that purpose is only Rs. 1.95 lacs. Counsel for respondent No. 3 could not contradict Shri Sabnis in this regard and secondly, it was pointed out by Shri Sabnis from page 19 onwards that decision to acquire additional plot and original plot was taken by the society with deliberations with an object to start school from June, 1989 and it was agreed to have construction over the entire area. Record pages 19, 20 and 21 are supporting documents. Considering these particulars, case and contention of respondent No. 3 that accused spent Rs. 5.5 lacs for construction of compound wall is contradicted by these documents because construction cost is only Rs. 1.95 lacs and odd.

21. Secondly, there is also one more important circumstance which is required to be considered vis-a-vis allegations of respondent No. 3. Admittedly, the object and purpose of Indian Education Society is to support in furtherance of educational activities. Plot from Patkar Trust was acquired for the purpose of starting school not only for Marathi students, but also students from other linguistic groups. It is revealed from the letter dated 8-6-1988 (Page 21) that the society had decided to acquire this entire plot For 99 years on lease, on nominal rent of Rs. 1/-. It is also revealed from the said letter that as soon as land was handed over to the society, the society will construct compound wall so as to protect possession and also to prevent encroachment in the said land. Name of Architect Vaidya is also mentioned in the said letter. All these things show that construction of compound wall over the plot was in pursuance of the agreement with Patkar Trust for which society had shown willingness and, therefore, it cannot be said that erection of iron fencing on the plot where school was to be started and is started (as pointed out Shri Sabnis), was illegal act or activity beyond the scope and object of the Society.

22. The 3rd item is about Marol Fencing. Allegations in this regard are to be found at para 32 of the complaint. So far as these allegations are concerned, steel fencing was done to the plot admeasuring 4213 sq. metres. According to the complainant, fencing over 2000 metres area was permissible as authorised by Governing Council of the Society. However, fencing on area over and above 2000 sq. metres. was illegal and amount of Rs. 2 lacs spent for that purpose was a waste of funds of the Society. In this regard it was contended by Shri Sabnis

that at no point of time an amount of Rs. 5.5 lacs was spent by the society for construction of the compound wall. The total expenditure was only Rs. 1.95 lacs. Even this amount was spent after passing resolutions, copies of which are at pages 35 and 56 of additional compilation. Perusal of these pages shows that Resolution Item No. 20 was passed to appoint M/s. V.S. Vaidya & Co., Dadar, Bombay, Architect for the proposed school buildings at Dadar and Mulund (E) and M/s. Vaidya & Co. was to be paid fees at 2% of the total cost of construction. To this resolution, Shri Kulkarni was a signatory. Minutes of the Building Committee meeting held on 15th July, 1989 are at record page 33 of the additional compilation. Resolution No. 10 is in respect of proposed school building at Dombivali (E) which shows as follows:

The compound walls, fencing N.V.V. road etc. at this site have been complete as already mentioned in the minutes of the meeting dated 25th March, 1989. Our Architect M/s. V.S. Vaidya & Co. are processing the approval of plan for the school building as follows.

It is also mentioned that regular school was to be commenced from June, 1990.

23. Apart from these two resolutions, most important factor of the case against the petitioner is that according to complaint, construction of compound wall over 2000 sq. metres. on the plot is legal but construction of compound wall in excess of 2000 sq. metres. is illegal. Perusal of the complaint shows that the complainant nowhere gives how much cost was incurred for construction of compound wall over 2000 Sq.mtrs. and how much amount was incurred for construction of compound wall on the entire plot of 4230 sq. metres. No particulars have been given by the complainant as to how much amount in excess was spent by the accused in excess in violation of the provisions of the resolution, by-laws or law. Admittedly, allegations of the complainant are relating to certain offences under Indian Penal Code, when allegations of criminal breach of trust was to be fortified by necessary particulars. It is not that respondent No. 3 was ignorant about the expenditure made for entire construction of the compound wall or construction of compound wall over 2000 sq.metres of plot, but he has not given any particulars as to how much amount was illegally spent and, therefore, considering these two resolutions and absence of these particulars it has to be held that no prima facie case is made out against the petitioner in this regard also.

24. Similar is the case with last item of Mulund Building. Allegations are to be found at para 35 of the complaint. Respondent No. 3 stated therein that accused Nos. 1 and 2 applied to the Bombay Municipal Corporation for permission to construct a temporary school on the plot reserved by the Corporation admeasuring 2544 sq. metres. The Corporation approved the proposal of the accused on their giving undertaking that they will return the plot to the Bombay Municipal Corporation along with structure standing thereon without any compensation as and when demanded by the Corporation. Respondent No. 3 has contended that accused spent Rs. 35 lacs for construction of school and this

expenditure, according to respondent No. 3 is detrimental to the society because the society never authorised the accused to give any such undertaking.

25. As against this contention, it was contended by Shri Sabnis that as per record page 39 to 47 cost of construction of the school building was Rs. 37 lacs and not Rs. 57 lacs as alleged by respondent No. 3. Further, according to the petitioner, the Governing Council passed a resolution authorising construction of Mulund building and the same is to be found at page 56 of the additional Compilation.

26. As against this contention and documents tendered by Shri Sabnis, it was contended by Counsel for respondent No. 3 that the Auditors have in their different reports repeatedly observed that all these expenditure made by the Society under four Heads viz. Rachana Sansad, Dombivali Sports Complex, Marol Fencing and Mulund Building were without any authority and according to the Counsel for respondents, these observations of the auditor are required to be taken into consideration while deciding this petition.

27. I have gone through those auditors reports but question is whether decision taken by the accused in spending amounts in the aforesaid items has any criminality in them or whether merely procedural irregularity. For the aforesaid reasons, it is to be held that no criminality is involved in this matter and respondent No. 3 has failed to make out any prima facie case against the petitioner.

28. For all these reasons the petitioner is entitled to relief claimed. Hence order.

ORDER

29. Petition is allowed and rule is made absolute. Charge sheet filed by respondents Nos. 1 and 2 at the instance of respondent No. 3 as prayed for in prayer (b) of the petition is quashed and proceedings against the petitioner are quashed and set aside. However, considering the circumstances, there will be no order as to costs.

30. Petition allowed.