

(2000) 02 BOM CK 0080

In the Bombay High Court

Case No : Criminal Writ Petition No. 245 of 1993 With Criminal Application No. 2086 of 1989

Chandrakant Bhalchandra Garware

APPELLANT

Vs

Anil Prabhakar Naik and Others

RESPONDENT

Date of Decision : 09-02-2000

Acts Referred:

Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 40, 41, 42, 43, 44

Citation : (2000) 102 BOMLR 800(1)

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

Bench : Single Bench

Judgement

D.G. Deshpande, J.—This is an ordinary writ petition like thousands of others being filed before this Court every year. But this petition has become extraordinary and most unusual because this Court is being required to find out whether an order of discharge of respondent Anil Prabhakar Naik was at any time passed by Additional Chief Metropolitan Magistrate as alleged by the respondent, and whether the respondent can be entitled for the relief claimed by him in his Application No. 2086 of 1999 which is to be decided along with this writ petition.

2. I heard learned Counsel Mr. Shamrao Samant who was Assisted by senior Advocate Mr. A.S. Bobade along with Mr. Keluskar for respondent No. 1 and learned Counsel Mr. P.L. Berarwalla for the petitioner. Mrs. R.P. Sabarwal. learned A.P.P. for the State/respondent present. Mr. Samant has given in addition the written notes of his document and has tendered certain documents during the course of his argument to substantiate his case that an order of discharge was passed by Additional Chief Metropolitan Magistrate, as contended by respondent Anil Naik. Before considering the rival submissions it is necessary to lay down bare facts giving rise to this controversy.

3. Respondent Anil Naik was working with petitioner Chandrakant Garware, an industrialist in Bombay. Petitioner Chandrakant Garware lodged a complaint to

the police against respondent Anil Naik about criminal breach of trust and misappropriation in respect of funds, shares and securities entrusted by the petitioner to respondent Anil Naik with Worli Police. This F.I.R. was lodged on 30.4.1990 and offence was registered against respondent Anil Naik vide C.R. No. 234/90. The respondent came to be arrested on 1.5.1990 and produced before the learned Magistrate. VII Court, Dadar and prior to that his residential premises were searched and shares and various documents were seized under a panchanama. Later on the respondent was released on bail.

4. It appears that though six charge-sheets were filed against respondent Anil Naik by the Worli Police, the petitioner, being directly involved and concerned with the prosecution against the respondent, filed an application before the Additional Chief Metropolitan Magistrate on 8.10.1992 seeking directions of the Trial Court against all the persons to the effect that all the Companies and Financial Institutions whose shares were the subject-matter of the offence against the respondent should be directed to deposit the amount of dividend warrants, benefits and bonus shares etc, with the Senior Inspector of G.B.C.B.C.I.D., Bombay who in turn deposit such amount in a Nationalized Bank and keep those shares in their custody until further orders from the Court.

5. A reply came to be filed on behalf of the respondent to the aforesaid application on 21.1.1993. The application was obviously opposed on merits as well as on the ground of jurisdiction and claim was made by the respondent that he is a real shareholder of the shares and the Companies are under obligation to pay any dividend and other benefits to him.

6. The Additional Chief Metropolitan Magistrate, however, rejected the petitioner's application and as a result of which the present Writ Petition No. 245 of 1993 came to be filed by the petitioner against the said order. The prayers in the petition were for:

(a) calling for the records in Case Nos. 1133 to 1135/P/1991 pending before the Additional Chief Metropolitan Magistrate, Court No. 37, Esplanade, Bombay, pertaining to the impugned order dated 24th February, 1993 and to quash and cancel the said order Article 227 of the Constitution of India to correct and rectify the errors apparent on the face of the record in respect of the impugned order;

(b) to issue Writ of Mandamus or any other writ etc. restraining respondent No. 1 i.e. Anil Naik and respondent No. 2 i.e. Vasudeo Shringare and their agents from receiving any dividend etc. on the shares and if already received to deposit/pay the same to respondent No. 3 i.e. Senior Inspector, G.B.C.B.C.I.D., Bombay;

(c) to issue Writ of Mandamus or any other writ etc. authorising respondent Nos. 3 and 4 to receive the accrued and future bonus shares, dividends and benefits on the shares of the Companies and keep the same in their custody and to deposit the amount of the dividends received in a Savings Bank Joint Account:

(d) interim and ad interim reliefs in terms of prayers (a), (b) and/or (c).

The aforesaid petition came before Justice Chavan and on 1.3.1993 the following order was passed:-

Heard Counsel.

Issue notice before admission returnable on 9th March, 1993. High on Board. Ad interim relief in terms of prayer (b) till then.

A dispute is raised by the respondent Anil Naik regarding ad interim relief granted and according to him, originally ad interim relief in terms of prayer (a) was granted but it was altered and changed to prayer (b). The respondent, however, is silent when questioned who has done this alteration in the order of the Court ?

7. Thereafter on 26.4.1993 justice Saldanha heard the counsel. Rule was issued and he directed as under:

Earlier (a) ad interim order to continue. Liberty to respondent No. 1 to apply for modification through an appropriate application setting out valid grounds.

8. After 26.4.1993 the matter came on board for the first time in September, 1999 before Justice Vishnu Sahai when Criminal Application No. 2086 of 1999 ordered to be kept with the writ petition and matter was adjourned for final hearing for weeks. Thereafter one order was passed by Justice Palkar on 20.10.1999 for calling the record and proceedings of the above mentioned criminal cases and reconstructed record if any then the matter was placed before me for hearing. In the mean time the record of all the criminal cases appears to have been sent by the Magistrate. The details of the record as under:-

The record and proceedings of the Lower Court in Criminal Case Nos. 1133/P/91;1134/P/91;2/P/92; 1022/P/93; 277/P/92;1135/P/92;334/P/92; and 133/N/94 is there. It contains eight files viz. One file of Roznama in Case No. 133/N/94 and other applications from page 1 to 68, first roznama is dated 3.3.1994 adjourning the case to 9.3.94 record page 41 is the order passed by Additional Chief Metropolitan Magistrate on 24.12.1993 after hearing Advocate Mr. Shamrao Samant. In that order Advocate Mr. Samant reported to have informed the Court that no amount has been deposited in Court for obtaining certified copies, but informed that the amount would be paid forthwith. The Court has also ordered that certified/Xerox copies of the roznama in Criminal Case No. 1 134/P/1991 be only supplied as prayed by Mr. Samant. It appears from this order that case papers of Criminal Case No. 1133/P/91 were not traceable and file was ordered to be reconstructed. On record page 47 there is an application by Mr. Samant dated 4.9.1997 where there is mention of order of the Additional Chief Metropolitan Magistrate dated 24.12.1993. The order is as under:

Heard Mr. Samant Advocate.

Certified copies of discharge order passed by this Court on the application for discharge and copies of roznama in C.C. No. 1133/P/91 have not been furnished

as the case papers of C.C. No. 1133/P/91 are not traceable and file has been ordered to be reconstructed.

[1] It appears that Mr. Samant is trying to take advantage of this order to fortify his contention that discharge order was passed by the Court.

[2] Out of eight files one file is of Criminal Case No. 133/N/94. Another file is of Criminal Case No. 2/P/92 in that file there is no roznama and file starts from the charge-sheet. It contains 1 58 pages.

[3] Third file is of Criminal Case No. 1022/P/93 which starts from a list of distinctive number of shares and last page is 278. There is no roznama,

[4] Next file is of Criminal Case No, 277/P/92 which starts from charge-sheet. There is no roznama and it runs into 420 pages.

[5] Another file is of Criminal Case No. 1135/P/91 which starts from charge-sheet. There is no roznama and it runs into 129.

[6] Next file is of Criminal Case No. 1133/P/91 which starts from charge-sheet. There is no roznama and it contains 116.

[7] Next file is of Criminal Case No. 1134/P/91 which starts from charge-sheet. No roznama. Total pages 203.

[8] Last file is of Criminal Case No. 334/P/92. Only one page of Roznama of 21.4.1992 showing that charge-sheet filed today. Adjourned to 13.5.1992. Next roznama is 13.5.1992 marking presence of A.P.P. adjourning the case with another Case No. 1133/P/91 to 16.6.1992. Last roznama is 16.6.1992 showing A.P.P. for the State. Adjourned the case to 14.7.92, then charge-sheet starts. Last page is of 253.

9. So far as writ petition is concerned, respondent Anil Naik had filed an affidavit in reply dated 20.4.1993 along with certain Annexure which include copy of the F.I.R. lodged by the petitioner with Worli Police on 30.4.1990 and some orders passed by this Court in the bail application filed by respondent Anil Naik etc.

10. The Criminal Application No. 2086 of 1999 has been filed by respondent Anil Naik and inasmuch as eight reliefs have been asked by respondent Anil Naik in his application. Those reliefs in short are:-

(a) that the seizure of the property of Anil Naik by Worli Police was illegal;

(b) to direct the Police and other Companies to release dividend warrants and bonus shares etc. in favour of Anil Naik;

(c) to declare Anil Naik was unlawfully arrested and thereby he was subjected to undergo mental torture, physical discomfort etc.;

(d) to prosecute Chandrakant Garware for the false arrest and illegal prosecution which he initiated and caused to be initiated against Anil Naik;

(e) to order an enquiry as to how the discharge order passed by Additional Chief Metropolitan Magistrate and the important case papers got destroyed and are not available ;

(f) to hold Chandrakant Garware responsible for the loss caused to Anil Naik by reason of false case; and

(g) to order Chandrakant Garware to pay Rs. 60/- lakhs as compensation which, according to Anil Naik, had agreed to pay to him in settlement out of Court and further direct to withdraw the case because of the compromise which are accepted by applicant Anil Naik.

11. Petitioners Chandrakant Garware had filed an affidavit in reply to this criminal application and the same is dated 9.8.1999. There is a counter reply by Anil Naik to this affidavit of Chandrakant Garware and this counter affidavit is dated 10.9.1999. Since the petition and criminal application were tagged together for hearing I heard both the counsel i.e. Mr. Samant for Anil Naik and Mr. Berarwalla for Chandrakant Garware on the petition as well as on the criminal application.

12. Mr. Berarwalla however raised strong preliminary objection to the maintainability of the criminal application on the ground that the reliefs claimed in the criminal application are totally different and not connected with the reliefs in the petition, that the reliefs claimed in the criminal application are beyond the scope of powers of this Court inasmuch as different declaration sought for by respondent Anil Naik cannot be granted, nor he can be granted any compensation, and that all these reliefs can be granted by only Civil Court of competent jurisdiction wherein respondent Anil Naik will have to prove that he was falsely arrested or was maliciously prosecuted. Mr. Berarwalla, therefore, contended that the criminal application was liable to be summarily rejected with heavy costs for making false, frivolous and reckless allegations not only against Mr. Chandrakant Garware but also about proceedings before the Additional Chief Metropolitan Magistrate and also for raising false plea that respondent Anil Naik, the accused before the Metropolitan Magistrate, had made an application for discharge and that the Magistrate had allowed his application and has discharged him from all the criminal cases filed against him at the instance of Worli Police wherein Chandrakant Garware was the first informant or complainant.

So far as this preliminary objection is concerned, Mr. Samant vehemently contended that none of the preliminary objections raised by Chandrakant Garware have any force and they are outright to be rejected and the reliefs claimed by Anil Naik in the criminal application granted to him.

13. Since decision of the writ petition as well as the criminal application is likely to be affected by the order of discharge in favour of Anil Naik as claimed by him, it is necessary to find out and see, whether the Additional Chief Metropolitan Magistrate ever passed any order of discharge.

14. Admittedly, the copy of the discharge order is not on record. The same has not been filed by Anil Naik. He also did not file a copy of the application filed by him for discharge before Additional Chief Metropolitan Magistrate, even though repeatedly he was asked to produce both the copies viz. copy of his application for discharge and copy of the order of discharge. According to Mr. Samant, Advocate for Anil Naik, such an order was passed by Additional Chief Metropolitan Magistrate and in support thereof Mr. Samant has produced written notes of arguments tendered by him before Additional Chief Metropolitan Magistrate in support of his application for discharge of Anil Naik, xerox copy of the roznama of the Additional Chief Metropolitan Magistrate (marked as HC 1) and a receipt issued by the Court of Additional Chief Metropolitan Magistrate accepting Rs. 51/- on 12.4.1993 for the certified copy of the discharge order. Mr. Samant also placed reliance on an order passed by Additional Chief Metropolitan Magistrate, 37th Court, Esplanade on 24.12.1993. to the effect that:

Heard Mr. Samant Advocate. The certified copies of the discharge order passed by this Court on application for discharge and copies of Roznama in C.C. No. 1133/P/91 have not been furnished as the case papers in C.C. No. 1133/P/91 are not traceable and the file has been ordered to be reconstructed.

Xerox copy of this order is found on record and proceedings of C.C. No. 133/N/94 on the file of Additional Chief Metropolitan Magistrate, 37th Court. Esplanade, Bombay, in support of his contention that an order of discharge was passed by Additional Chief Metropolitan Magistrate.

15. According to Mr. Berarwalla, the entire case of Anil Naik in this regard is false and concocted. Mr. Berarwalla strenuously urged and contended that Anil Naik never filed an application for discharge and at no point of time the Additional Chief Metropolitan Magistrate allowed that application in favour of Anil Naik i.e. discharging Anil Naik from all the criminal cases. Mr. Berarwalla also contended that there is no iota of evidence with Anil Naik to substantiate his contention, and therefore, not only this contention was liable to be rejected, but Anil Naik was also liable for being prosecuted for perjury for making deliberate, false and malicious contentions on oath or in the alternative heavy costs were required to be saddled upon him.

16. After the arguments of both the Advocates were concluded it was clarified by me to both of them that I would be passing order in this case strictly and only on the basis of record available on record and will not at all take into consideration the statements made by the Advocate before this Court viz. that he has filed discharge application; that he has personally argued or that no such application was filed, nor any arguments in reply were ever advanced etc. This clarification was necessary because the Court has to pass an order in such a case without being affected by the statements across the Bar made by the respective and respected Advocates.

17. When the arguments of Mr. Samant for respondent Anil Naik and Mr.

Berarwalla for petitioner Chandrakant Garware were concluded I made query from senior Advocate Mr. Bobade who was assisting Mr. Samant and the query was, whether existence of a judicial order has to be proved by a party by preponderance of probability or beyond reasonable doubt or as conclusive proof. Mr. Bobade replied that a fact has to be proved by preponderance of probability for which the Court can take into consideration circumstantial evidence.

18. At the out set, I must state that I am in disagreement with Mr. Bobade in this regard. Let us find out a truth with the help of Evidence Act. The question involved in this case is, whether the Additional Chief Metropolitan Magistrate passed an order of discharge in favour of Anil Naik.

18A. The ancillary questions which arise in this connection are as under:-

- (i) Whether Anil Naik applied for discharge ?
- (ii) When did he apply for discharge ?
- (iii) Where is the copy of his application for discharge ?
- (iv) Whether the copy of the application for discharge was given to the Assistant Public Prosecutor ?
- (v) When the copy of discharge application was given ?
- (vi) Whether Anil Naik had acknowledgment in that regard ?
- (vii) Whether the Public Prosecutor has given written reply to the said application for discharge ?
- (viii) If yes, where is the copy of said reply which was given to Anil Naik or his Advocate ?
- (ix) On which date this application for discharge was heard?
- (x) Who was the Judicial Officer who heard the application for discharge?
- (xi) Who was the Judicial Officer who allowed the application for discharge and by which order ?
- (xii) Where is the Judgment or order on the discharge application ?

19. Before answering the aforesaid issues it is necessary to find out the provisions of law in that regard, particularly with reference to the Evidence Act.

Section 40 lays down that the existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or hold such trial.

Section 41 lays down that a final judgment, order or decree of a Competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person, any legal

character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

As per Section 42, judgments, orders or decrees other than those mentioned in Section 41, are relevant if they relate to matters of a public nature relevant to the inquiry.

Section 43 lays down that judgments, orders or decrees, other than those mentioned in Sections 40, 41 and 42 are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.

Section 44 empowers a party to a suit or other proceedings to prove that a Court which delivered a judgment or order was not competent to deliver it or it was obtained by fraud or collusion.

20. Apart from the aforesaid five sections there is no other section in the Evidence Act which directly deals with the judgment.

21. Since the issue involved is, whether an order of discharge was passed by the Additional Chief Metropolitan Magistrate and since the issue is raised by respondent Anil Naik, burden lies upon him to prove that such an order was passed in his favour. He has to prove the discharge order. Admittedly it will be in the form of a document. Therefore, the provisions of Chapter V of the Evidence Act will apply and as per Section 61 of the said Chapter the contents of the document may be proved either by primary or by secondary evidence. As per Section 62, "primary evidence means the document itself produced for the inspection of the Court". Admittedly, as prayed by and as per the grievances made out by the counsel for the petitioner, this Court has called record and proceedings of Case No. 1133/P/91 and other proceedings in order to ascertain and verify, whether any discharge order was passed. The record and proceedings that is sent does not show that any such order of discharge was passed by Additional Chief Metropolitan Magistrate as alleged by respondent Anil Naik. The roznama of Criminal Case No. 1133/P/91 or roznama of Criminal Case No. 133/N/94 nowhere suggests or shows that any such discharge order was passed.

22. The result therefore, is that respondent Anil Naik is not able to prove the existence of a discharge order on the basis of primary evidence viz. the original order itself.

23. However, respondent Anil Naik has been contending not only before this Court but also before the Additional Chief Metropolitan Magistrate that original record is lost, destroyed, misplaced, stolen or tampered with. The record and report submitted shows that the record of C.C. No. 1133/P/91 or/and roznama of all the cases is not traceable nor available. If this is so, it will have to be seen, where respondent Anil Naik succeeds in showing on the basis of secondary

evidence as laid down in Section 63 in proving that an order of discharge was passed by Additional Chief Metropolitan Magistrate in his favour.

Section 63 lays down that secondary evidence means and includes ?

- (1) certified copies given under the provisions;
- (2) copies made from the original by mechanical process;
- (3) copies made from or compared with the original;
- (4) counterparts of documents as against the parties who did not execute them; and
- (5) oral accounts of the contents of a document given by some person who has himself seen it.

Section 64 lays down that the documents must be proved by primary evidence except in the cases hereinafter mentioned.

Section 65 lays down as:

Secondary evidence may be given of the existence, condition or contents of a document in the following cases;

- (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
- (e) when the original is a public document within the meaning of Section 74:
- (f) when the original is a document of which a certified copy permitted by this Act, or by any other law in force in, to be given in evidence:

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In cases (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

24. The aforesaid provision of Section 65(e) will show that when the original is a public document within the meaning of Section 74, secondary evidence thereof could be adduced and in case (e) or (f) as shown in Section 65, a certified copy of the document, but no other kind of secondary evidence, is admissible.

25. An order of discharge passed by Additional Chief Metropolitan Magistrate is a public document within the meaning of Section 74 because it is a document forming the acts or records of the acts of Public Officer as laid by Section 74(1) and (iii).

26. The aforesaid provisions of Evidence Act and particularly Section 65(e) and Explanation given thereto will show that if respondent Anil Naik contends that an order of discharge was passed by Additional Chief Metropolitan Magistrate in his

favour then he must, either succeeds in producing original order from the concerned Court, or since the said order is a public document, he must give the certified copy of the document.

27. Section 65(o), however, at the same time lays down that when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time, then any secondary evidence of the contents of the document is admissible. Any secondary evidence means and includes, as it lays down in Section 63, copies made from the original by mechanical process; copies made from or compared with the original; counterparts of documents; oral accounts of the contents of a document given by some person....

28. Since the original record is destroyed, or lost, then respondent Anil Naik can be permitted to prove the discharge order by secondary evidence and to be precise by any kind of secondary evidence as contemplated by u/s 63 of the Evidence Act, which includes certified copies, copies made from original, copies made from or compared with original, counterparts of documents. However, respondent No. 4 has not in his possession any of these four types of secondary evidence i.e. he does not have certified copy of the discharge order; does not have copy of the discharge order: by mechanical process neither copy made from or compared with the original nor the counterparts of the documents and so far as Sub-section (5) of Section 63 is concerned, which permits oral accounts of the contents of a document given by some person who has himself seen it. Respondent Anil Naik has nowhere in his affidavit stated that he has personally seen/read the discharge order and such and such were the contents of the discharge order. It will be, therefore, clear that if the fact of existence of discharge order has to be proved by respondent Anil Naik he has neither original nor certified copy and even if destruction of or lost of original record is proved, or can be held to have been proved, he has no secondary evidence of any of the types contemplated u/s 63 of the Evidence Act. In law, therefore, respondent Anil Naik has no evidence whatsoever as legally permitted by the Evidence Act to support his contention that the Metropolitan Magistrate had passed discharge order in his favour and his contention can be rejected completely at this stage.

29. However, since admittedly, the arguments were advanced with aspersion on other side and may be against Lower Court also for destruction of record it is necessary to find out whether from the circumstances brought on record by respondent Anil Naik. It can be held that discharge order was passed by Court as alleged by him. Mr. Samant pointed out following circumstances in that regard:

(a) Submission of written notes of arguments by him before the Metropolitan Magistrate in support of his oral arguments about discharge application;

(b) A xerox copy of roznama;

(c) A receipt for Rs. 51/- deposited by respondent Anil Naik on 12.4.1993 for certified copy of the discharge application;

(d) An order passed by Additional Chief Metropolitan Magistrate Shri Motwanl on 24.12.93 at record page 41 of C.C. No. 133/N/94 which runs as under:-

Heard Mr. Samant Advocate.

The certified copies of the discharge order passed by this Court on the application for discharge and copies of Roznama in C.C. No. 1133/P/91 have not been furnished as the case papers of C.C. No. 1133/P/91 are not traceable and file has been ordered to be reconstructed.

It is now necessary to consider the submissions of Mr. Samant made in this regard and the aforesaid circumstances put forth by him in support of his contention with reference to the conditions laid down in para ISA. If the submissions and aforesaid circumstances pointed out by Mr. Samant are considered, then it is clear that respondent Anil Naik does not have a copy of discharge application. He has not been able to give any particulars as to who was the Public Prosecutor to whom the copy of the application was served? when it was served? whether any written reply was given by the Public Prosecutor to the said application? where is that reply? when the arguments were advanced by his Advocate? and when reply to the same was given by Public Prosecutor? whether any Advocate for Chandrakant Garware was watching the proceedings at that time ?-whether the copy of discharge application was given to that Advocate? whether the arguments were advanced by that Advocate and when? No particulars of any kind are forthcoming from respondent Anil Naik, either in his affidavit or written notes submitted about the above aspects.

30. In his affidavit respondent Anil Naik in para 10 has stated that on 13.5.1992 he made an application in the Court of the learned Additional Chief Metropolitan Magistrate and as per this affidavit the said application dated 13.5.1992 was pending and not decided on the date of affidavit dated 20.4.1993. He also stated that a copy of application was served by him on the Public Prosecutor in the Court. However in para 11 he has stated as:

instead of preparing to go for hearing of that application, which should have been done by the prosecution, the petitioner, on his own, without the learned prosecutor moving the Court for it. made his own personal application to the Court on 8th October, 1992, out of which the above criminal writ petition has arisen.

So far as the question as to whether when the arguments were advanced, Mr. Samant relied upon a xerox copy of roznama wherein his presence was shown as, 16.6.92, 14.7.92, 11.8.92, 27.8.92, 8.10.92, 29.10.92, 24.11.92, 26.11.92. The Roznama dated 27.8.92 mentions-"Argument on discharge of accused. I.O. present." The Roznama dated 26.11.1992 mentions - "Heard Advocate Shamrao Samant partly."

31. So far as date of discharge application is concerned, Its date is given by Anil Naik in the points of arguments submitted by Advocate Mr. Samant on 31.1.2000

as 25th June, 1993.

32. According to respondent Anil Naik, the order of discharge came to be passed on 25.6.1993 and next two days being Saturday and Sunday he applied for certified copy of the order on 28.6.1993. Thereafter he went on contacting the judicial clerk to get his certified copy, but the judicial clerk told him that the papers were not available. Therefore, the applicant approached his counsel who filed an application for certified copy of the judgment on 24.12.1993. These particulars have been given by respondent Anil Naik in his application in para 35 and in para 38 it is set out that on a perusal of the application dated 24.12.1993 it would be found that the applicant had alleged that he had filed two applications earlier for certified copy of the judgment and the learned Magistrate i.e. Additional Chief Metropolitan Magistrate Shri Shri Motwani made the following order:-

Heard Mr. Samant Advocate. The certified copies of the discharge order passed by this Court on application for discharge and copies of Roznama in C.C. No. 1133/P/91 have not been furnished as the case papers in C.C. No 1133/P/91 are not traceable and the file has been ordered to be reconstructed.

At this juncture it has to be noted that:

- (a) Respondent Anil Naik does not have anything with him to show that he applied for certified copy of the judgment on 28.6.1993;
- (b) Respondent Anil Naik has also not with him anything to show that he applied for certified copy on 24.9.1993 as alleged by him;
- (c) It is clear from the noting made by Additional Chief Metropolitan Magistrate Shri Shri Motwani on 24.12.1993 in his order that till 24.12.1993 respondent has not paid the charges for certified copy which means even if according to respondent Anil Naik he applied on 28.6.1993 and 24.9.1993 he had not deposited the necessary charges for certified copy;
- (d) Respondent again applied for certified copy on 3.3.94 as per Exhibit J of the Criminal Application, but at that time also he had not deposited the amount for certified copy;
- (e) Ultimately and for the first time he deposited the necessary charges for certified copy on 12.4.1994.

The original record of C.C. No. 133/N/94 which was sent by Additional Chief Metropolitan Magistrate shows that when Advocate Mr. Samant applied to the Additional Chief Metropolitan Magistrate on 24.12.1993. Additional Chief Metropolitan Magistrate Shri Shri Motwani called for the report and it was submitted by judicial clerk. I see record page 11 and 12 of C.C. No. 133/N/94. The judicial clerk submitted his report to the applications dated 28.6.1993 and 24.9.1993. So far as application dated 24.9.1993 is concerned, he has categorically stated that such an application was not on record and that

application dated 24.9.1993 for furnishing copy of Roznama was not put up before him. So far as application dated 28.6.1993 is concerned, he has stated "Application dated 28.6.1993 is in the file lying with typist for supplying copy of order is pending.

33. It is after this explanation by the judicial clerk, that Additional Chief Metropolitan Magistrate Shri Shri Motwani passed order quoted above and at that time Advocate Mr. Samant stated that he has not paid any amount for certified copy so far.

34. At this juncture it is necessary to go to para 39 of the criminal application. In this para respondent Anil Naik has stated that on 12.4.1994 the applicant paid the requisite charges to cover the certified copy of the discharge order. What is most significant thing is that at the time when the clerk concerned was approached with money, he collected Rs. 51/- which was calculated according to the rules of the Court at Rs. 1.50 per page and for 34 pages of the discharge order that worked out to Rs. 51/-.

35. Exhibit J to the criminal application, is an application of Advocate for respondent Anil Naik dated 3.3.1994 and on internal page 4 thereof an explanation of judicial clerk of Additional Chief Metropolitan Magistrate Court is recorded. From it, it is clear that for the first time in October, 1993 loss of the case papers reported and permission to reconstruct the case was obtained which was sought and it was granted by Chief Metropolitan Magistrate on 3.11.1993. It will be clear from internal page 4 of Exhibit J that when respondent Anil Naik deposited Rs. 51/- the original discharge order was not before the clerk who accepted Rs. 51/-. And from para 35 of the criminal application it is clear that even on 28.6.1993 itself the judicial clerk had informed the applicant that case papers were not available.

36. So far as xerox copy of the roznama tendered by Advocate Mr. Samant is concerned, it is taken on record and marked "HC 1" for identification. From that xerox copy Advocate for respondent Anil Naik wants to contend that arguments on his application for discharge took place on 16.6.92, 14.7.92, 11.8.92, 27.8.92, 8.10.92, 29.10.92, 24.11.92, 26.11.92.

37. The question is, when respondent Anil Naik applied for xerox copy of this roznama. To whom he applied and who has granted him the said xerox copy. In this regard respondent Anil Naik has relied through his Advocate on para 15 of the written notes submitted on 21.1.2000 wherein it is stated:

Thereafter on 24.12.1993 the learned Magistrate, 37th Court, Esplanade, in his order directed as under:-

The certified copies of the Roznama in C.C. No. 1134/P/91 according to Mr. Samant, Advocate be only supplied and not of all other cases. As such xerox copies of the entire Roznama in C.C. No 1134/P/91 be supplied forthwith.

According to respondent Anil Naik, the xerox of Roznama "HC 1" was given to by

the Magistrate pursuant to this order dated 24.12.1993. Copy of application dated 24.12.1993 filed before the Additional Chief Metropolitan Magistrate is at Exhibit H, record page 64 and Exhibit I record page 66 of the criminal application. In fact the original record shows that it is only one application. But the criminal Application shows that there are two applications of the same date perhaps it is done to include the order of the Metropolitan Magistrate and say of the judicial clerk separately. Original application dated 24.12.1993 is on record pages 11 and 12 and reverse of that application say of judicial clerk and order of Additional Chief Judicial Magistrate Shri Shri Motwani are written in hand.

38. On the basis of the aforesaid application dated 24.12.1993 and order passed therein by Additional Chief Judicial Magistrate Shri Shri Motwani on the same date, respondent Anil Naik wants to contend that he got xerox: copy of "HC 1" from the Court pursuant to this order.

39. The aforesaid contention is required to be dealt with here only, be cause what is tried to be represented by respondent Anil Naik is that on 24.12.1993 also when Additional Chief Metropolitan Magistrate Shri Shri Motwani passed order, the original record i.e. the Roznama of C.C. No. 1134/P/91 was available and was there with the Additional Chief Metropolitan Magistrate. However, this stand taken by respondent Anil Naik is not supported by the explanation given by judicial clerk on the application of respondent Anil Naik dated 3.3.1994 Exhibit "J" wherein he has stated that loss of the record was not traceable. On 11.8.1993 explanation sought was submitted to the Additional Chief Metropolitan Magistrate. The matter was reported to Chief Metropolitan Magistrate on 30.10.93 and permission to reconstruct the record was granted on 3.11.93.

40. Another vital important question that arises is, if the roznama in C.C. No. 1 133/P/91 for which Exhibit "HC 1" the roznama was available and was intact, then what prevented respondent Anil Naik from obtaining xerox copy of the entire roznama to substantiate his contention that he filed an application for discharge on 13.5.1992, that the copy was given to the Public Prosecutor; that Public Prosecutor filed his say; that matters were heard: and most importantly that on 25.6.1993 an order of discharge came to be passed and files were closed by the Metropolitan Magistrate,

41. From these facts it will be clear that when the original roznama was not available as back as in August, 93 then question remains that from where respondent Anil Naik got xerox copy of the roznama "HC 1". It is tried to be represented by respondent Anil Naik that he got HC 1 after 24.12.1993. If this is so, it would mean that original roznama in C.C. No. 1133/P/91 was available and intact on 24.12.1993 and then question is what prevented respondent Anil Naik from obtaining xerox copy of the entire roznama right from the day first to substantiate his contention that he filed an application for discharge on 13.5.1992, that the copy was given to Public Prosecutor, that the Public Prosecutor filed his say of reply, that the matters were heard and that on 25.6.1993 discharge order was passed. Admittedly respondent Anil Naik has no

answers to these questions, and therefore "HC 1" can not be of any help to respondent Anil Naik. Nowhere in his affidavit respondent Anil Naik has explained that, when he applied for the xerox copy of roznama "HC 1", why he did only apply for a particular page of the entire roznama, how much charges were paid by him for the said xerox and when he got xerox copy and from whom. In the absence of this explanation "HC 1" cannot be taken on record in proof of the submissions made by respondent Anil Naik regarding filing of his discharge application and same being allowed in his favour. I have held that respondent Anil Naik has not been able to produce original discharge order, nor he has got certified copy thereof. He also does not have any other secondary evidence of the said order as is contemplated in Section 63 of the Evidence Act reproduced above. Therefore, his contention that he has applied for discharge and that it was ordered by the Court in his favour has to be rejected.

42. Apart from this, even if the circumstances pointed out by Mr. Samant are taken into consideration it cannot lead this Court to the conclusion that respondent Anil Naik has applied for discharge order and that the Court has passed discharge order on 25.6.1993. Existence of a judicial order has to be proved by conclusive proof and not by preponderance of probability as contended by Mr. Bobade.

43. Payment of Rs. 51/- vide receipt dated 12.4.1993 is also of no help to respondent Anil Naik because it will not prove that a discharge order was passed. The fact that from 25.6.1993 to 12.4.1993 Anil Naik did not pay necessary charges for the certified copy goes long way against him and his conduct in that regard was most unnatural.

44. The order passed by Shri Motwani on 24.12.1993 also does not prove that any discharge order was passed and that order only reproduces submissions made by Mr. Samant regarding his oral application for certified copies.

45. So far as notes of written arguments relied upon by Mr. Samant are concerned, those notes were shown to me during arguments by him. Those notes were his copy of written notes. There was no endorsement of any Public Prosecutor in token of having received the same. It was not certified copy of the notes tendered in the Court. When the matter reserved for judgment and the papers were seen it was found that those notes and "11C 1" were not on record. Therefore, another xerox copy of the roznama was obtained from Mr. Samant by Mr. Kharat, the then Sheristedar which is formed "HC 1". But written notes of arguments are not on record. When the fact of filing discharge application is not proved by respondent Anil Naik, the written notes of arguments tendered by Mr. Samant cannot lead this Court to the inference that such an application was filed, it was heard and discharge order was passed.

46. For all these reasons it has to be held that respondent Anil Naik has miserably failed to prove that a discharge order was passed in his favour by Additional Chief Metropolitan Magistrate on 25.6.1993.

47. The most Important aspect of the matter is that if the discharge order was passed by Additional Chief Metropolitan Magistrate and respondent Anil Naik was discharged then the Magistrate would have also required to pass order regarding shares and securities which were in the custody of the police because directions would have required to be given as to the disposal of the property. It is held that respondent Anil Naik is totally silent in this regard and he has nothing with him to show that whether any such order was passed regarding shares and securities which were taken charge from him during the raid of his house.

48. Third thing that goes against respondent Anil Naik is his conduct in not intimating the fact of his discharge to this Court which was seized of the matter from the date of filing of writ petition and particularly from 1.3.1993 when Justice Chavan passed ad interim relief in terms of prayer (a). If respondent Anil Naik was discharged, he would have been the first person to rush to the Court to intimate the fact of his discharge the purpose of which for vacating ad interim relief granted by Justice Chavan.

49. It was contended by Mr. Samant that Justice Chavan had initially granted relief in terms of prayer (b). But that was subsequently changed to prayer (a). I do not find any substance or force in this submission because I have reproduced the prayers above and there was nothing in prayer (b) which could be granted as interim relief.

50. If at all calling for record as per prayer (a) was ad interim relief then there was no need to continue that relief as has been done by Justice Saldanha and if the record was called for and not received, a reminder would have been sent to the Magistrate in ordinary course for that purpose. Prayer (b) to the contrary, is to restrain respondent Nos. 1 and 2 from receiving any dividend accrued or which may accrue and any bonus shares accrued or may accrue in respect of the shares of various Companies about which the parties were on dispute. The contention of Mr. Samant about change of relief prayer (a) to prayer (b) cannot also be accepted because he did not contend that this Court after passing of the order or any official of this Court had changed relief or made any alteration in the order regarding ad interim relief and altered from prayer (a) to prayer (b). The purpose of writ petition was to not only challenge the Magistrate's order but also to seek stay order against respondent Nos. 1 and 2 of the petition, and therefore, it has to be held that this Court has granted ad interim order in terms of prayer (b) and not prayer (a).

51. Having come to the conclusion that respondent Anil Naik has failed to prove that he was discharged from the criminal case, what remains to be seen is, whether his Criminal Application No. 2086 of 1999 can be entertained in view of the strong preliminary objection raised by Mr. Berarwalla. I have already quoted relief claimed by respondent Anil Naik in his criminal application and also quoted relief in the main petition. Obviously and on the face of it criminal application is beyond the scope of writ petition. Respondent Anil Naik wants from this Court to decide that he was falsely and maliciously arrested by at the instance of

Chandrakant Garware and for that he is claiming compensation of Rs. 60 lakhs. That too in pursuance of some oral understanding between himself and Chandrakant Garware. There is also absolutely nothing with Anil Naik to show that any compromise was arrived at between him and Chandrakant Garware and Chandrakant Garware had agreed to pay Rs. 60 lakhs to him. Further whether the alleged arrest and prosecution was false and malicious, is a question of fact which cannot be decided by this Court and it has to be left to the Civil Judge before whom Anil Naik must take appropriate steps.

51. Mr. Samant relied upon a judgment of the Supreme Court in Mary Angel and Others Vs. State of Tamil Nadu, wherein a letter addressed to the Supreme Court was treated as writ petition for granting explanation against violation of fundamental rights. This ruling has absolutely no application because no question of violation of fundamental rights is involved and secondly whether arrest of respondent Anil Naik was false or whether his prosecution was malicious are the questions and facts for which Civil Court is competent to decide. The objection of Berarwalla to the Criminal Application, being fully decided, has got to be upheld and as rightly contended by Mr. Berarwalla that respondent Anil Naik in his criminal application made frivolous allegations not only against Chandrakant Garware but also about his filing of discharge application and obtaining order from the Additional Chief Metropolitan Magistrate thereon. Therefore, costs are required to be saddled upon him.

In the result I pass following order

ORDER

Writ Petition is allowed in terms of prayer Clauses (a), (b) and (c).

Rule made absolute.

Criminal Application No. 2086 of 1999 is dismissed with costs of Rs. 10000/- (Rupees ten thousand). Costs to be paid within four weeks of this order.

Certified copy expedited.