

(2012) 03 AP CK 0005

In the Andhra Pradesh High Court

Case No : Criminal Petition No's. 3257 and 5111

Dr. A.V.V. Surya Prasad and others

APPELLANT

Vs

Mohammad Farookh and another

RESPONDENT

Date of Decision : 05-03-2012

Acts Referred:

Andhra Pradesh Co-operative Societies Act, 1964 — Section 128, 51, 52, 60(1)
Constitution of India, 1950 — Article 356
Criminal Procedure Code, 1973 (CrPC) — Section 195(1), 197, 452, 482
Penal Code, 1860 (IPC) — Section 107, 120A, 167, 176, 177

Citation : (2013) 1 ALT(Cri) 42

Hon'ble Judges : B. Seshasayana Reddy, J

Bench : Single Bench

Advocate : Narasimha Rao, for the Appellant; Shafath Ahmed Khan, Advocate for the Respondent No. 1, Public Prosecutor on behalf of the Respondent Nos. 2, for the Respondent

Final Decision : Allowed

Judgement

B. Seshasayana Reddy, J.—These two criminal petitions have been taken out u/s 482 Cr.P.C. by the accused in Daily Document Register No. 2528 of 2009 on the file of III Additional Chief Metropolitan Magistrate, Visakhapatnam at Gajuwaka to quash the proceeding therein.

Background facts, in a nutshell, are:-

The complainant-Mr. Mohammad Farookh was President of Eastern Naval Command Co-operative House Building Society Limited, Regd. No. B-1793, Visakhapatnam (hereinafter referred to as "the society") during the period 1990-94. He made a complaint to the Deputy Registrar of Co-operative Societies, Visakhapatnam against the past committee members. Likewise, the past committee members filed complaint against the complainant. The District Co-operative Officer issued Order Rc. No. 69Q8/91E (Co-operative) dt. 16-5-1992 appointing D. Panduranga Rao/A-1 as Inspecting Officer u/s 52 of A.P. co-

operative Societies Act, 1964 ("the Act", in short). A-1 conducted enquiry and submitted his report dated 11-9-1992. However, he conducted further enquiry and submitted 2nd report on 12-2-1993. Basing on the 2nd enquiry report, A-2-D. Jagannaikulu-Divisional Co-operative officer Visakhapatnam recommended for issuance of surcharge proceedings against the complainant and others. Accordingly, A-3 - A.V.V.S. Prasad-District Co-operative Officer/Deputy Registrar, Visakhapatnam issued Surcharge order, vide Rc.No. 1/1689/ 91-C, dated 28-6-1994 against the complaint for recovery of ` 1,71,641/-. The complainant came to be terminated from the post of the President of the society on the basis of the surcharge proceedings, vide order Rc.No. 1689/91-C, dated 19-7-1994. Criminal Proceedings also came to be initiated against the complainant for misappropriation of the society funds, vide Cr. No. 69 of 96 of Malkapuram Law and Order P.S. registered for the offences under Sections 406, 420 and 477 IPC. The complainant questioned the proceedings issued by A-3 by filing an appeal being O.A. 88 of 1994 in the A.P. Co-operative Tribunal, Vijayawada. His appeal came to be allowed on 12-1-2000 remanding the matter back to the District Registrar of Cooperative Societies for conducting fresh Surcharge enquiry. Pursuant to the judgment in O.A.No. 88 of 1994, fresh surcharge notice came to be issued to the complainant by the Deputy Co-operative Registrar of Cooperative Societies, Visakhapatnam on 22-10-2001, vide Rc.No. 1926/2001C. The Deputy Registrar directed the Co-operative Sub-Registrars namely, Sri G. Govinda Rao and Sri Ch. Samson to conduct further enquiry. Accordingly, the Co-operative Sub-Registrars conducted further enquiries and submitted reports dated 10-12-2003, 30-5-2004 and 26-6-2004. Basing on the further reports, surcharge proceedings initiated against the complaint came to be dropped, vide order of the Deputy Registrar, vide Rc.No. 1926/2001-C, dated 30-4-2005. The criminal proceedings initiated against the complainant also ended in acquittal, vide judgment dated 9-5-2008 passed in C.C.No. 324 of 2004 on the file of III Additional Chief Metropolitan Magistrate, Visakhapatnam at Gajuwaka. The complainant filed complaint before III Additional Chief Metropolitan Magistrate, Gajuwaka alleging that A-1 to A-3 conspired together to create false evidence against him to unseat him from the post of President of the society at the instance of the past committee members, who were in office for ten years and resorted to commit various misdeeds. It is also stated in the complaint that A-1 without the orders of the District Co-operative Officer, Visakhapatnam conducted second inspection and completed the inspection hurriedly within five days without serving notice on him. A-1 to A-3 acted dishonestly and caused great injury to his reputation and therefore, they are liable for punishment under Sections 120-A, 167, 176, 177, 182, 191, 192, 204 and 405 IPC read with Section 128 of the Act. For better appreciation, I may refer the relevant portion of the complaint, which reads as hereunder:-

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As explained earlier at the abetment and instigation of A-2 and A-3, the A-1 has prepared the fictitious and false 2nd Report (Doc-4) and further unwarranted

actions such as issue of Surcharge order and complaint to Police could have been averted, had the -3 had taken action in right direction by invoking for enquiry under the same Section of 60(1) of the Act, but his rebuttal to do so is an evidence to prove that A-3 also joined hands in abetment of A-1 and the criminal conspiracy already plotted by A-1 and A-2, which are criminal offences u/s. 107 and 120-A of IPC committed by A-3.

(iv) Therefore, A-3 is liable for prosecution u/s. 24, 43 ,44, 107, 120-A and 167 of IPC for the criminal offences committed by him.

12. It is further submitted that Accused 1 to 3 being public servant u/s. 21 of IPC and while performing their respective duties, they should be very cautious, impartial and judicious in discharging their duties but whereas they committed criminal offences dishonestly by overlooking all the norms and rules and by adopting criminal means and methods as per their wish due to which the complainant has suffered as follows:

i. He was terminated from the post of President of the Society, before completion of his elected term.

ii. He was arrested by the police, taken away with had cuffs and was in remanded for seven days.

iii. He was suspended from the job for about 5 months, which has adversely affected his seniority in service, promotion and financial loss.

iv. He could not attend to the funeral of his mother as he was in remand.

v. He has lost the respect among his family, members.

vi. He has lost reputation from the Society and with in his department which could not be regained till date.

vii. he has faced lot of problems from June, 1993 to May, 2008 (for 15 days) in attending offices of Deputy registrar of Co-operative Societies, District Cooperative Office, Visakhapatnam, and various courts such as APCT, Vijayawada, High Court of Andhra Pradesh, Supreme Court of India, District Judge Court and VII ACMM Court, Gajuwaka and wasted lot of time and money, hardship and inconvenience in punctually attending various courts due to long distance and hazard of inclement weather and health conditions.

viii. He was under mental agony for quite longer period of 15 years has adversely affected on his health.

xi. He was maliciously prosecuted without any valid reasons.

13. It is submitted that the Notices required as per rules were already issued to the three Accused through the Counsel of complainant on November, 2008. Postal receipts, on which no reply received from A-2 and A-3. The A-1 has sent his reply notice, through his Lawyer which also contains false statements.

14. It is further submitted since A-1 and A-3 are in service of A.P. Government, the complainant has sent a notice dt. 29-11-2008 and a reminder dt. 10-1-2009 to the Secretary, Cooperative and Agriculture Department, Government of Andhra Pradesh, Hyderabad seeking sanction u/s. 195(1) of Cr.P.C., 1973 in order to prosecute those officials, copies of those notices together with postal and acknowledgment are placed. Unfortunately, no reply received from the Government of Andhra Pradesh though 4 months lapsed. The complainant went to Supreme Court in challenging the orders passed by Honourable High Court in Criminal Appeal No. 789/2008 and the Honourable Supreme Court of India set aside C.C. 324/2002 against the Accused before VIII Metropolitan Magistrate Court, Gajuwaka, the certified copy of the order is filed herewith (DOC-17).

15. In view of the above submission and basing on the documents produced, it is proved beyond doubt that all the Accused 1, 2 and 3 have committed criminal offences as shown against each which were not done in good faith in pursuance of Section 52 of IPC and hence Section 128 of APCS Act 1964 shall not be a bar to prosecute them. The enquiry officer enquired the offences relating to Complainant and Accused were taken at Balajinagar Lay-out, Gajuwaka and subsequently the Malkapuram P.S. registered the C.C.No. 324/02 on the file of this Honourable Court. Hence this complaint maintainable before this Honourable Court.

Hence these petitions by the accused to quash the proceedings in Daily Document Register No. 2528 of 2009 on the file of III Additional Chief Metropolitan Magistrate/ Visakhapatnam.

2. Heard learned counsel appearing for the petitioners-accused and learned counsel appearing for the 1st respondent-complainant.

3. Learned, counsel appearing for the petitioners-accused submits that inspection under Sections 52 of the Act has been conducted by A-1 in exercise of powers conferred on him by virtue of office as Cooperative Sub-Registrar and that the 2nd respondent sent proposals to A-3 for issue of Surcharge proceedings basing on the Inspection reports and thereupon, A-3 issued Surcharge proceedings and their acts are protected u/s 128 of the Act and therefore, prosecution of A-1 to A-3 cannot be maintained. He would also submit that A-3 issued proceedings exercise of quasi-judicial authority and in case of the said orders being set aside on appeal by A.P. Co-operative Tribunal it cannot be a ground to initiate criminal prosecution against A-3. Learned counsel refers Section 128 of the A.P. Co-operative Societies Act and Section 197 of Cr.P.C.

4. For better appreciation, I may refer Section 128 -of the Act and Section 197 of the Criminal Procedure Code.

128. Protection of Acts done in good faith:-

No suit, prosecution or other legal proceedings shall lie against the Registrar or any person subordinate to him or acting on his authority for anything which is in

good faith done or intended to be done in pursuance of any provision of this Act or of any rule or bye-law made thereunder.

197. Prosecution of Judges and public servants

(1) When any person, who is or was a judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction.

(a) In the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of person who is employed or, as the case may be was at the time of commission of the alleged offence employed, in connection with the affairs of a State Government:

[Provided that where the alleged offence was committed by a person referred to in Clause (b) during the period while a proclamation issued under Clause (1) of Art. 356 of the Constitution was in force in a State, Clause (b) will apply as if for the expression "State Government" occurring there, the expression "Central Government" were substituted.]

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the member of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

[(3-A) Notwithstanding anything contained in sub-section (3), no Court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a proclamation issued under Clause (1) of Article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.]

[(3-B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with

the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a proclamation issued under Clause (1) of Article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the Court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

5. Learned counsel appearing for the 1st respondent-complainant submits that the second inspection by A-1 without there being any proceeding from the competent authority itself speaks of his not acting in good faith and malice against the 1st respondent-complainant and that too without providing sufficient opportunity to the 1st respondent-complainant to explain the discrepancies during the inspection and therefore, A-1 cannot claim the benefit u/s 128 of the Act. He would further contend that A-2 and A-3 without verification of the records properly, issued surcharge proceedings and the said Surcharge proceedings came to be set aside by A.P. Co-operative Tribunal, Vijayawada and on remand of the matter, the accusations leveled against the 1st respondent-complainant found to be not established and therefore, A-2 and A-3 are liable to be prosecuted for various offences indicated in the complaint. In a way, his contention is that the accused stepped out of their official power and therefore, their actions are not protected either u/s 128 of the Act or u/s 197 of the Code of Criminal Procedure in which case, no sanction need be obtained from the Government to prosecute them for various offences indicated in the complaint. In support of his submissions, reliance has been placed on the following decisions:-

(1) Shambhoo Nath Misra Vs. State of U.P. and others,

(2) Raj Kishor Roy Vs. Kamleshwar Pandey and Another,

(3) The Primary Agricultural Co-op. Society Vs. B. Malla Reddy and Others,

6. In Shambhoo Nath's case (1 supra), the Supreme Court held that fabrication of record and misappropriation of public funds by public servant is not his official duty and therefore, sanction for his prosecution is not necessary. In Raj Kishore's case (2nd supra), the Supreme Court held that the proceedings cannot be quashed u/s 452 Cr.P.C. for want of sanction since the question whether the accused officer had acted in official course of duty or not and whether therefore sanction is necessary or not should be left open to be decided in the main judgment which may be delivered upon conclusion of trial. In The Primary Agricultural Co-op. Society (3rd supra), a Division Bench of this Court held that a second enquiry or successive enquiry u/s 51 of the A.P. Cooperative Societies Act in respect of the very same allegations hit by the theory of double jeopardy to

which no one can be subjected to.

7. The apex Court in number of cases has laid down the scope and ambit of Court's power u/s 482 Cr.P.C. Every High Court has inherent powers to act *ex debito justitiae* to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent powers u/s 482 Cr.P.C. can be exercised:

(i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of court, and

(iii) to otherwise secure the ends of justice.

Inherent powers u/s 482 Cr.P.C. though wide have to be exercise sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute.

7(a) In *R.P. Kapur Vs. The State of Punjab*, the Supreme Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings:

(i) Where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;

(ii) Where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;

(iii) Where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge. The powers possessed by the High Court u/s 482 of the Code are very wide and the very plentitude of the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court should normally refrain from giving a *prima facie* decision in a case where all the facts are incomplete and hazy; more so, when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage.

7(b) In *State of Karnataka Vs. L. Muniswamy and Others*, the Supreme Court observed that the wholesome power u/s 482 Cr.P.C. entitles the High Court to

quash a proceeding when it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. The ends of justice must be administered according to laws made by the legislature.

7(c) The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made *prima facie* establish the offence. It is also for the court to take into consideration any special features, which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.

7(d) It is also well settled that it would be an abuse of process of the court to allow any action, which would result in injustice and prevent promotion of justice. In exercise of the powers, could would be justified to quash any proceeding if it finds that initiation/ continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice.

7(e) A three judge Bench of the Supreme Court in *Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others*, 251 : 2008 (2) ALT (Crl.) 220 (SC) : 2008 (4) SCJ 422 has examined scope and ambit of Section 482 of the Criminal Procedure Code and observed that the inherent powers u/s 482 should be exercised for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be fully justified in preventing injustice by invoking inherent powers of the court.

8. Keeping in view the propositions of law laid down in the above-referred cases, let me now examine whether continuation of proceedings against the petitioners/ accused is for the advancement of justice or would it amount to abuse of process leading to injustice.

9. A-1 conducted inspection of the society for which the 1st respondent-complainant was the President at the relevant point of time. Pursuant to the order issued by his superior office, he submitted inspection report and the second inspection report. This fact is evident from the judgment in O.A. 88 of 1994 on the file of the Co-operative Tribunal, Vijayawada. For better appreciation, I may refer the relevant portion of the judgment in O.A.No. 88 of 1994 and it is thus:-

The Inspecting Officer, submitted his inspection report on 1-9-1992. The 1st respondent on perusal of the above Inspection report found that the report is perfunctory. Hence in his even R.C. No. dated 12-9-1992 instructed the Inspecting Officer to examine again the following two issues.

1. Land deal transaction of Vepagunta, Gopalapatnam and Prahladapuram lands.
2. Bank Loan scheme carried out by the then Board since they were not thoroughly examined and fixation of the responsibility is very vague. Hence the CSR/Inspecting Officer was directed to examine the issues and give self-sufficient report. Accordingly he submitted Inspection report on 12-2-1993. Basing on the revised report the 1st respondent in his even Rc. No. dated 4-4-1994 issued surcharge notice to the appellant to make good Rs. 1,71,641/-.

It is for the superior authority to accept the first inspection report or the subsequent inspection report. He conducted inspection in exercise of the powers vested in him by virtue of his office. A-2 considered the inspection report and recommended for issuance of Surcharge proceedings. A-3 acted on the proposal sent by A-2 and issued Surcharge proceeding. The 1st respondent-complainant questioned the surcharge proceeding by filling an appeal before the A.P. Co-operative Tribunal; Vijayawada and got the surcharge proceeding set aside and the matter came to be remanded for fresh enquiry. On further enquiry, the 1st respondent-complainant came to be absolved from the accusations. A-1 to A-3 acted well within the powers conferred on them under the provisions of the Act. Therefore, it can be said without any doubt that their acts are protected u/s 128 of the Act. It is not the case of the 1st respondent-complainant that A-1 to A-3 initiated enquiry suo motu. It is a matter of record that the committee of the society headed by the 1st respondent-complainant and former committee of the society headed by the Ex. President filed complaints against each other. The said complaints necessitated inspection of the society u/s 52 of the Act. Further proceedings are consequent to the inspection reports. The prosecution of A-1 to A-3 for the Acts done in exercise of powers under the provisions of the Act is wholly unsustainable. Accordingly, both the criminal petitions are allowed quashing the proceedings in Daily Document Register No. 2528/2009 on the file of III Additional Chief Metropolitan Magistrate Court, Visakhapatnam at Gajuwaka.