

(1991) 07 BOM CK 0039

In the Bombay High Court

Case No : Criminal Writ Petition No. 369 of 1987

Hemant P. Vissanji and others

APPELLANT

Vs

Mulshankar Shivram Rawal and another

RESPONDENT

Date of Decision : 19-07-1991

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 190, 319, 482
Penal Code, 1860 (IPC) — Section 379, 427, 447

Citation : (1991) 3 BomCR 83 : (1991) CriLJ 3144 : (1992) 2 MhLj 1265

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Advocate : V.P. Vashi, for the Appellant; S.G. Surana and B.K. Patil, Additional Public Prosecutor, for the Respondent

Judgement

1. By this petition under Art. 227 of the Constitution of India read with S. 482 of the Criminal Procedure Code, 1973, the Petitioners have impugned the order dated 24-11-1986 issuing process against the Petitioners in Criminal Case No. 1004 of 1986.

2. The first Respondent filed a complaint before the Judicial Magistrate, First Class, Khalapur, in which he alleged that he was the owner of certain property in Sersan village, Taluka Khalapur and the property stood in his name in the records of the Grampanchayat concerned. The complainant alleged that accused Nos. 1 to 3 (Petitioner Nos. 1 to 3 herein), who were the Managing Directors and Senior Officers of Wallace Flour Mills Ltd. had conspired and committed trespass on his property, demolished his house by razing it to the ground and carried away the debris leaving no trace. Since the complainant stayed at Shilphata, the accused took the advantage of his absence and committed the aforesaid offences. The complainant alleged that this was done by the accused as they were enraged by the refusal of the complainant to sell the property to them. In the complain the complainant stated that he had made a complainant with regard to the offence to the Khopoli Police Station, but the police had not taken any action in the matter.

He also stated that he had filed a complaint against Mahadu Gopal Patil and others in the Court with regard to the same offence and that the said complaint was pending. He stated that he did not know the names of the present accused at that time and he came to know about them after full inquiry and that he learnt that the offence has been committed by a conspiracy on the part of the accused and with their consent. The complainant, therefore, prayed for appropriate action being taken against the accused in accordance with law. On this complaint, the learned Magistrate issued process against the accused (present petitioners 1 to 3) u/s 447, 379 and 427 of the Indian Penal Code. It is this order of taking cognizance and issuing process which is challenged by this petition.

3. Mr. Vashi, learned counsel appearing for the petitioners, contended that it is a well settled principle in criminal law that cognizance can be taken only of an offence and not of the particulars of the offence including the offenders. He invited my attention to a Judgment of the Division Bench of the Calcutta High Court in Saifar and Others Vs. State of West Bengal, . The Calcutta High Court, while considering the provisions of Sections 190(1)(b) and 251A of the Code of Criminal Procedure, held that a Magistrate takes cognizance of the offence and not merely of the particulars of the persons named in the charge-sheet and, therefore, the Magistrate can issue process against other persons, who appear to him, on the basis of the police report and other material placed before him, to be concerned in the commission of the offence in the particular case, after considering the totality of the material on record.

4. Mr. Vashi urged that a reference to S. 319 of the Code of Criminal Procedure, 1973, shows that the policy of the Code is that the offence can be taken cognizance of once only and not repeatedly upon discovery of further particulars. He pointed out that under S. 319 of the Code even during the trial of an offence, if it appears from the evidence that any person other than the accused therein has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed. Though it is true that there is no specific section in the Code of Criminal Procedure which expressly bars a Court from taking cognizance of the same offence on a second time, it is Mr. Vashi's contention that the existence of the power under S. 319 of the Code is a pointer to such a policy, namely, that an offence can be taken cognizance of once only. He submits that if it was permissible to take cognizance of the same offence repeatedly, then it was unnecessary for the Legislature to have put S. 319 on the Statute Book as it would be redundant. In my view, there is substance in the contention raised by Mr. Vashi. The policy of the Legislature appears to be that when cognizance is taken of the offence, the Court taking cognizance will take cognizance of the offence as such and not merely the particulars of the persons who are alleged to have committed the offence. It is quite conceivable that in a given case the complainant may not even know the names and other particulars of the offenders and it would therefore be sufficient for him to lodge a complaint making persons who are known offenders as the accused. When such a trial

proceeds against the known accused, if the evidence led in the trial discloses offences committed by other persons who could be tried along with the accused, then Section 319 of the Code comes into play and it would be permissible for the Court to exercise its powers thereunder. The contention raised by Mr. Vashi appears to be correct and deserves to be accepted.

5. Mr. Vashi then pointed out that in the instant case, not only did the first complaint filed by the complainant against Mahadu Gopal and others vide Criminal Case No. 745 of 1984 not disclose the fact that there were other unknown accused whose particulars were not available to the complainant at the time when the complaint was lodged, but that what is material is that the offences alleged in both the complaints i.e. Criminal Case No. 745 of 1984 against Mahadu Gopal and others and the complaint filed against the petitioners in Criminal Case No. 1004 of 1986 are identical. The counsel contends that by permitting the Magistrate to take cognizance of the complaint a second time, there is serious prejudice to the petitioners. He points out that the complainant may very well lead evidence before the trying Magistrate in his earlier Complaint No. 745 of 1984 and satisfy the Magistrate that the offences alleged against the petitioners were committed by the petitioners. It is open then to the Magistrate to exercise powers u/s 319 of the Code and if satisfied of a prima facie case against them, to issue process in the said complaint against the petitioners. While this course would require an examination of the evidence in support of the allegations against the petitioners, in the second Complaint No. 1004 of 1986, without any further ado the learned Magistrate has issued process against the petitioners. This, in the submission of the learned counsel, would be an abuse of the process of law which is capable of being cured by invoking the inherent powers of the High Court saved u/s 482 of the Code of Criminal Procedure. This contention is valid and needs to be accepted. Mr. Vashi drew my attention to the judgment of the Division Bench of our High Court in Krishna Parasharam Karekar v. The State of Maharashtra, 80 Bombay Law Reporter 167, wherein our High Court pointed out that in order to exercise powers u/s 319(1) of the Code what has to be considered is the evidence of witnesses recorded in the trial and not merely the police papers which are made available to the Court in the trial. This judgment, in my view, supports broadly the contention being advanced by Mr. Vashi.

6. Mr. Surana, learned counsel for the first respondent, contended that if the Court is persuaded to exercise its powers u/s 482 of the Code of Criminal Procedure, the petitioners, who are really the wrong doers according to the first respondent, would escape scot free. This is not correct. It would be open to the first respondent to show upon evidence in the trial of his first complaint, Criminal Case No. 745 of 1984, that the present petitioners are guilty of the offences alleged and persuade the Court to exercise its powers u/s 319 of the Code of Criminal Procedure. If the Court is satisfied by the evidence led before it in the trial of Criminal Case No. 745 of 1984, that there is a case of offence made out against the petitioners, it may be open for the Court to exercise its powers u/s

319 of the Code against the petitioners.

7. I am, therefore, of the view that the proceeding pending against the petitioners in Criminal Case No. 1004 of 1986 needs to be quashed.

8. Rule is accordingly made absolute in terms of prayer (a) with no order as to costs.

9. Order accordingly.