

(2012) 08 BOM CK 0111

In the Bombay High Court

Case No : Criminal Writ Petition No. 278 of 2011

Kailas Kharjule

APPELLANT

Vs

The State of Maharashtra and Shri Dhole

RESPONDENT

Date of Decision : 17-08-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) BomCR(Cri) 93

Hon'ble Judges : AV. Nirgude, J;A.H. Joshi, J

Bench : Division Bench

Advocate : S.J. Salunke, for the Appellant; G.R. Ingole, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

A.H. Joshi, J.—The petition is coming for final hearing. Claim in the petition is for compensation for illegal detention. Rule was issued, and the respondents are served. Affidavit in reply is filed. The petitioner has also tendered the rejoinder.

2. The petition contains averments as regards confinement as follows :-

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3. The police personnel of Local Crime Branch, Nanded under the head of respondent No. 4 had been at the shop of petitioner at about 1.00 p.m. on 14.2.2011 and taken him at Nanded and detained him. The petitioner asked about his arrest but instead of giving any reply, the respondent No. 4 initiated the physical and mental torture to the petitioner. The petitioner was severely beaten by respondent No. 4. The very purpose of beating the petitioner by the respondent No. 4 is of unlawful gain. The respondent No. 4 insisted him to pay an amount of Rs. 50,000/- otherwise the petitioner would have been involved in the illegal activities falsely.

4. The petitioner was unable to pay this amount. On 14.2.2011 itself, the brother

of the petitioner namely Bajrang visited the Local Crime Branch Police Station and inquired to the respondent No. 4 about the illegal detention and custody of the petitioner but the reply of the concern police personnel of L.C.B. Nanded was that routine inquiry was going on and the petitioner will be released on 15.2.1011 in morning.

5. On 15.2.2011, the wife of the petitioner namely Archana met the respondent No. 4 and requested to release him. Again the respondent No. 4 assured her that they are going to release the petitioner after the inquiry and the petitioner is kept in formal custody. The respondent No. 4 and other police personnel assured the wife of the petitioner that Kailas will be released on 16.2.2011.

6. In the meantime, the mental and physical torture of the petitioner was going on at the hands of respondent No. 4. He was severely beaten and abused by the respondent No. 4 and police personnel of Local Crime Branch, Nanded. They were insisting him to pay Rs.50,000/- otherwise they would involve him in a Criminal Case. This illegal detention and confinement of the petitioner from the date of 14.2.2011 was only for grabbing the amount from the petitioner.

7. In the meantime, no formalities of communicating about the arrest of the petitioner to the family members was shown by the police personnel nor the petitioner was produced before any Court which is mandatory. An utter disregard is shown by the police personnel and more particularly by respondent No. 4 to the constitutional provisions of the law. From 14.2.2011 to 17.2.2011, the petitioner was in illegal detention and confinement of the respondent No. 4. He was kept behind the bars without any reason. In this time, the grounds of arrest were never communicated to the petitioner. He was never allowed to communicate either with his lawyer or family members. He was not produced immediately and within statutory period before any Judicial Magistrate and beyond the period of 24 hours he was illegally confined and detained for unlawful gain. He was severely tortured by respondent No. 4 so that, the petitioner shall bring and pay Rs.50,000/- otherwise he was threatened to be involved in false cases. Even, the guidelines issued by the superior authorities in respect of arrest of the jewelers were intentionally overlooked.

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[quoted from page nos. 3 to 5 of paper book]

3. According to the petitioner :-

(a) Petitioner Li's wife sent a letter by fax to the Superintendent of Police, Nanded on 17.2.2011 at 1.34 p.m. and thereafter filed Criminal Writ Petition No. 143 of 2011 for Habeas Corpus.

(b) The police came to know about filing of Writ Petition. Therefore, they registered the Crime No. 64 of 2010 and have shown that on 17.2.2011 at 22.55 hours the petitioner was arrested.

(c) Thereafter, the petitioner was produced before the Judicial Magistrate, First Class, Nanded at 3.00 p.m. on 18.2.2011 when he was remanded to police custody and thereafter in Magisterial custody.

(d) Ultimately, the investigation was completed and charge sheet has been filed and the Criminal case is in progress.

(e) Petitioner has been wrongfully detained between 14th to 17th February, 2011 and also in violation of mandatory directions of Hon"ble Supreme Court, and he is entitled for compensation, etc.

4. Petition has been opposed by filing affidavit in reply.

5. The police have admitted that :-

(a) The petitioner was called at Hingoli.

(b) He was interrogated.

(c) During the process of interrogation, the petitioner was free and was allowed to go away on his assurance to return and he did so.

(d) The petitioner wrote undertakings dated 14.2.2011 and 17.2.2011 before leaving the office. These documents are at pages 100 and 102, which are annexed to affidavit filed by Devidas Namdeorao Dhole.

6. Respondents rely on these documents saying that when the petitioner was produced in the court of Judicial Magistrate, First Class, Nanded on 18.2.2011, the petitioner had represented to the court against the police.

7. A rejoinder is filed today. Petitioner"s version in the rejoinder in this regard reads as follows :-

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4. The contention in para No. 5 that, the petitioner has given the letter dated 17.2.2011 to respondent No. 4 about the misunderstanding of his wife or instigation Li of his relatives to his wife is false. Neither the said handwriting of the letter dated 17.2.2011 which is at page No. 102 is of the petitioner. The documents annexed by the respondent No. 4 prima facie shows that, the documents are forged and concocted. The contention in para No. 5 of the affidavit of respondent No. 4 is denied in toto.

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8. According to the petitioner, his statement made before the police that there was no complaint against police, was made by the petitioner under the threat of respondent nos. 3 and 4.

9. Learned advocate for the petitioner has placed reliance on reported judgments as follows :-

- (A) Bhim Singh, MLA Vs. State of Jammu & Kashmir and Others,
- (B) Smt. Nilabati Behera vs State of Orissa AIR 1993 SC 196
- (C) State of M.P. Vs Shaymsunder Trivedi 1995 AIR SCW 2793
- (D) D.K. Basu Vs. State of West Bengal,

10. Relying on these judgments, it is urged that in exercise of writ jurisdiction, this court has jurisdiction to grant relief by way of award of compensation towards :-

(a) Custodial ill treatment and torture at the hands of police and towards violation of human rights.

(b) Whenever rules relating to arrest are not followed and arrest is illegal.

11. While considering the aspect of mutual contentions, this court has to consider :-

(a) Whether the respondents have admitted the fact of wrongful detention?;

or

(b) Whether the ~ wrongful detention and violations LI foundation of petition is irrefutably demonstrated and proved.

12. On facts of the present case, following questions arise :-

(a) Whether the petitioner was arrested and taken from Hingoli to Nanded by using criminal force?

(b) Whether the petitioner was detained without actually effecting the arrest?

(c) Whether the petitioner was arrested but his arrest was not recorded?

(d) Whether the petitioner was actually confined as alleged in the petition?

(e) Whether the petitioner was prevented from complaining before the Magistrate against wrongful arrest, illegal demands and threats given by respondent nos. 2 and 3?

(f) Whether the petitioner proves that at any time after his first arrest he had submitted any complaint or representation against his wrongful arrest?

13. It is not in dispute that the petitioner was present in the office of Local Crime Branch between 14.2.2011 to 16.2.1011, for the purposes of inquiry or interrogation. Admittedly there is no record of arrest.

14. According to the petitioner he was under detention and / or arrest between 16.2.2011 and 17.2.2011 and that petitioner Li's brother had gone to meet him and found that he was kept in wrongful detention. Yet no complaint whatsoever was made to Higher Authorities by the petitioner or petitioner's brother or wife between 14th to 16th.

15. The fax message is sent at 1.43 p.m. on 17.2.2011 itself and order of disposal of Writ Petition is passed by this court on 18.2.2011 when the fact of arrest was brought to the notice of the court.

16. The petitioner was already before this court by way of his Writ Petition and therefore there are no grounds or reasons for him to believe that he was under the threat of police due to which he could not have complained to the Magistrate that he was either wrongfully detained or ill treated, etc.

17. The petitioner has not shown or brought before this court any correspondence by the petitioner after disposal of the Writ Petition during process of investigation till filing of present Writ Petition stating that he was ill treated, police demanded bribe, etc.

18. The facts that the petitioner was not detained and was rather called for investigation, etc. were all placed on record by filing affidavits in this court way back in December, 2011; while the rejoinder denying these aspects is filed in this court on 7.8.2012.

19. Considering all these facts the points noted in para No. 13 are liable to be answered in negative. Moreover, these points could have been proved in his favour by the petitioner in a suit for compensation. The petitioner was keen on getting the judgment in the summary jurisdiction of this court, knowing fully well about the limitations of the fact findings by a court exercising prerogative writs.

20. In the midst of hearing, we had noted the extent of disputed facts. Therefore, we had indicated that it would be better if the petitioner chooses the remedy of a suit, because the fact of exact date of arrest and of ill treatment, torture, wrongful detention are in dispute and have not been demonstrated by undisputed facts. Learned Advocate was firm, on instructions, to pursue this petition than to elect to file a suit. It seemed to us that learned advocate for the petitioner had instructions to elect to adhere to the remedy under Article 226 of the Constitution of India in supersession of ordinary law remedy. He therefore insisted to pursue present petition, by relying on the judgment in the case of D.K.Basu and other judgments. When a party invokes jurisdiction and insists upon a finding by this court only, it amounts to election of one remedy and abandoning the another. Therefore, we have proceeded to hear and decide this case in our summary jurisdiction and have recorded the findings as noted in para 20 above. Considering that the suit is a time consuming remedy, this court would appreciate urge of the party in insisting on getting a judgment from this court. A desire and insistence stand on a different footing. When the party is keen in adhering to writ petition and elects to do so by excluding to go for suit in spite of indication, the findings as indicated are invited. We express our distaste as to the likely frustration of remedy of suit, still we do this unpleasant task of deciding the petition ourselves.

21. Therefore though we had hesitation, we are required to decide this petition on merits. Whenever violation of fundamental rights or human rights is writ large

and disputed questions are involved, this court would be keen not only to admonish the erring executive but also would be keen on restitution of the wrong that may have been caused. Whenever a disputed question arises and fact finding is required, it is a need of law that such fact finding be done before proper forum i.e. Civil Court. While the excesses by police are writ large and rampant in general and seen every day, a presumption that every action by police is per se excess by police is not available. In the present trend of increasing crime rate, it would be unsafe to presume in either way.

22. In the premises disclosed herein above, this court is constrained to hold that the petitioner has failed to prove that the arrest was effected on 14.2.2011 and that he was actually detained till the time offence was registered and the arrest was actually recorded on 17.2.2011.

Petitioner has failed to prove that the arrest was illegal due to violation of principles laid down in D.K.Basu s case.

In the result the petition fails and is dismissed. Rule is discharged. Parties shall bear own costs.