

(2015) 10 BOM CK 0012
In the Bombay High Court
Case No : Criminal Revision No. 140/2015

Mallika Sherawat

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 29-10-2015

Acts Referred:

Cinematograph Act, 1952 — Section 5A, 5B, 5D

Criminal Procedure Code, 1973 (CrPC) — Section 200, 201, 202, 203, 204

Penal Code, 1860 (IPC) — Section 292, 79

Citation : (2015) 10 BOM CK 0012

Hon'ble Judges : A.B. Chaudhari, J.

Bench : Single Bench

Advocate : A.S. Chakotkar, Advocate, for the Appellant; Rashi Deshpande, A.P.P., for the Respondent

Final Decision : Allowed

Judgement

A.B. Chaudhari, J.—This application is ordered to be converted in Criminal revision. Counsel for the applicant to carry out amendment forthwith.

2. Following is the prayer in this revision application:

(i) To quash and proceeding vide Criminal Complaint No. 27/2009, as well as the order taking cognizance dated 13.04.2009 and subsequent orders issuing processes pending before the JMFC at Pandharkawda (Kelapur) against the applicant/accused under Section 292 of IPC.

3. When this application was called out for hearing on 27.10.2010, learned counsel for the applicant Mr. Chakotkar, prayed for adjournment and counsel for non applicant no.2 was absent. It was, therefore, adjourned for today in order to give opportunity to both the sides. Today, again counsel for the applicant seeks adjournment while counsel for non applicant no.2 is absent. The present revision application relates to the year 2010. It is not possible to adjourn the proceedings in the manner sought by counsel for the applicant, nor for the absence of the non

applicant no.2. On one hand, there is a cry about pendency of cases and on the other hand, adjournments are sought. Be it as it may.

4. Heard learned A.P.P. for the State. Perused the record.

Non applicant no.2 filed a private Criminal Case No. 27/2009, probably pro bono publico, in the court of Judicial Magistrate First Class, Pandharkawda-Kelapur on 08.04.2009 on which the Court ordered "to put up the case for verification". It appears that, thereafter, the learned trial Judge examined the complainant and three witnesses namely; Rajendra Chavan, a mechanic, Shankar Badhe, Vice President of Municipal Council and Ankush Soyam, a carpenter. The Court then passed the order issuing process on 28.04.2009 returnable on 08.06.2009. He recorded some reasons in paragraph 2 of the impugned order. The impugned order does not show how the trial Court was satisfied in issuing the process against the applicant, though it shows that he was satisfied on the basis of oral as well as documentary evidence without mentioning which one. In my opinion, this is no satisfaction.

5. It is true that at the stage of issuance of process under Section 204 of Cr.P.C., detailed enquiry regarding merit or demerit of the cases is not required. It is also true that the proposed accused cannot participate at this stage before the Magistrate. But then there is a duty and responsibility of the Magistrate to find out whether there is a legal evidence or materials to form an "opinion" and existence of "sufficient ground" which are the key words used in Section 204 of Cr. P. C. before making an order of issuance of process. Summoning an accused is a serious matter with serious consequences on the reputation and status of a person and criminal law cannot be set in motion as a matter of course. It is the duty of the Magistrate to examine whether the complaint is based under any law or whether there is any settled legal position qua the allegations in the complaint. In this case, the trial Judge did not advert to provisions of the Cinematograph Act or decision in the case of Raj Kapoor Vs. Laxman, .

6. Even otherwise, on perusal of the averments in complaint carefully, it appears that what is alleged in the complaint is that the present revision applicant-Mallika Sherawat had performed in the movies by name; Shadi Se Pehle, Murder, Maan Gaye Mugale Azam etc. It is further alleged that in those movies and other movies, the present revision applicant was being shown and she had shown herself in short clothes thereby creating the obscene acts, which are bound to create a lascivious effect on the minds of youths and viewers and as a result thereof crimes are committed and the social health is also spoiled. In paragraph 2 of the complaint, it is stated that while dancing on songs, again she exhibits herself with short clothes and such photos are also published in magazines, weeklies, monthlies, which are being read by the youths and elders, as a result of which the social health is spoiled. These are the only allegations in the complaint. Rest of the paragraphs of the complaint show general allegations. Now, insofar as para 3 is concerned, the allegations are again of general nature and do not specify about what is being averred in the complaint.

Thus, it is only paragraph 2, which is specific about the allegations. But then perusal of the instant revision application particularly paragraph 21 shows that all those films had passed the test of Censor Board and accordingly certificates were issued by the Censor Board. In case, any person is aggrieved by such certificate, remedy lies under Section 5D of the Cinematograph Act. But then certification by the Censor board, could not have been ignored and in the instant case, even by Magistrate. The Magistrate did not bother to apply his mind to the Cinematograph Act and various judgments of the Supreme Court and the Bombay High Court on the point before making the order of issuance of process. An order of issuance of process must precede the application of mind to the law. At any rate, there is no answer from the non applicants in answer to paragraphs 21 and 22 of the revision. Reply of non applicant no.2 dated 04.10.2010, contains nothing but preliminary objection of maintainability of this application on the ground that the remedy by way of revision is before the Sessions Court. The answer is simple, namely; concurrent revisional power of the High Court. However, there is no reply to the specific averments in this application about certification of the above films by the Censor Board of which there is mention in paragraph 21. It will have to be, therefore, presumed that non applicant no.2 has no answer to the fact about certification by the Censor Board and non filing of any appeal against such certification if at all non applicant no.2 is aggrieved. In my opinion, it was the duty of the Magistrate first to verify whether those films had certification from the Censor Board or not. But perhaps, he did not know the decision in the case of Raj Kapoor (supra).

7. In that view of the matter, I am satisfied that the case at hand is squarely covered by decision of the Supreme Court in Raj Kapoor (supra). Following are the relevant paragraphs of the said judgment which read thus:

"7. Indeed, the Penal Code is general, the Cinematograph Act is special. The scheme of the latter is deliberately drawn up to meet the explosively expanding cinema menace if it were not strictly policed. No doubt, the cinema is a great instrument for public good if geared to social ends and can be a public curse if directed to anti-social objectives. The freedom of expression, the right to be equally treated and the guarantee of fair hearing before heavy investments in films are destroyed belong to Indian citizens under the Constitution. But all freedom is a promise, not a menace and, therefore, is subject to socially necessary restraints permitted by the Constitution. Having regard to the instant appeal of the motion picture, its versatility, realism, and its coordination of the visual and aural senses, what with the art of the cameraman with trick photography, vistavision and three dimensional representation, the celluloid art has greater capabilities of stirring up emotions and making powerful mental impact so much so the treatment of this form of art on a different footing with pre-censorship may well be regarded as a valid classification, as was held in K.A. Abbas. K.A. Abbas v. The Union of India and Anr.. Maybe, art cannot be imprisoned by the bureaucrat and aesthetics can be robbed of the glory and grace and free expression of the human spirit if governmental palate is to

prescribe the permit for exhibition of artistic production in any department, more so in cinema pictures. So it is that a special legislation viz. the Act of 1952, sets up a Board of Censors of high calibre and expertise, provides hearings, appeals and ultimate judicial review, pre-censorship and conditional exhibitions and wealth of other policing strategies. In short, a special machinery and processual justice and a host of wholesome restrictions to protect State and society are woven into the fabric of the Act. After having elaborately enacted such a legislation can it be that a certificate granted under it by expert authority can be stultified by a simple prosecution or a shower of prosecutions for an offence under Section 292 I.P.C., driving the producer to satisfy a "lay" magistrate that the certificate of the Board of Censors notwithstanding, the film was offensive? The Board under Section 5B has to consider, before certification, all the points Section 292 I.P.C. prescribes. Indeed, neither the Penal Code nor the Cinematograph Act can go beyond the restrictions sanctioned by Part III of the Constitution and once the special law polices the area it of pro tanto out of bounds for the general law. At least as a matter of interpretation, Section 79 I.P.C. resolves the apparent conflict between, Section 292 I.P.C. and Part II of the Act relating to certification of films. If the Board blunders, the Act provides remedies. We are sure the public-spirited citizen may draw the attention of the agencies under the Act to protect public interest.

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9. The position that emerges is this. Jurisprudentially viewed, an act may be an offence, definitionally speaking but; a forbidden act may not spell inevitable guilt if the law itself declares that in certain special circumstances it is not to be regarded as an offence. The chapter on General Exceptions operates in this province. Section 79 makes an offence a non-offence. When? Only when the offending act is actually justified by law or is bona fide believed by mistake of fact to be so justified. If, as here, the Board of Censors, acting within their jurisdiction and on an application made and pursued in good faith, sanctions the public exhibition, the producer and connected agencies do enter the statutory harbour and are protected because S. 79 exonerates them at least in view of their bona fide belief that the certificate is justificatory. Thus the trial court when it hears the case may be appropriately apprised of the certificate under the Act and, in the light of our observations, it fills the bill under S. 79 it is right for the court to discharge the accused as the charge is groundless. In the present case, the prosecution is unsustainable because S. 79 is exculpatory when read with S. 5A of the Act and the certificate issued thereunder. We quash the prosecution.

10. Two things deserve mention before we close. Prosecutions like this one may well be symptomatic of public dissatisfaction with the Board of Censors not screening vicious films. The ultimate censorious power over the censors belongs to the people and by indifference, laxity or abetment, pictures which pollute public morals are liberally certificated, the legislation, meant by Parliament to protect people's good morals, may be sabotaged by statutory enemies within.

Corruption at that level must be stamped out. And the Board, alive to its public duty, shall not play to the gallery; nor shall it restrain aesthetic expression and progressive art through obsolete norms and grandma inhibitions when the world is wheeling forward to glimpse the beauty of Creation in its myriad manifestations and liberal horizons. A happy balance is to

"....consider, on the one hand, the number of readers they believe would tend to be depraved and corrupted by the book, the strength of the tendency to deprave and corrupt, and the nature of the depravity or corruption; on the other hand, they should assess the strength of the literary, sociological and ethical merit which they consider the book to possess. They should then weigh up all these factors and decide whether on balance the publication is proved to be justified as being for the public good."[Calder and Boyars Ltd. 1969-I QB 151 at p.172].

8. In the light of the above pronouncement by the apex Court and in the light of the fact that the trial Judge had hardly applied its mind to the settled law and the provisions of the Cinematograph Act interpreted by the Supreme Court before issuing the order of process coupled with the fact that non applicant no.2 also did not place the entire material before the Court including the legal position as set out above and obtained the order of issuance of process, I am satisfied that this Court would be failing in its duty if the revisional power is not exercised since the revision is maintainable against the order of issuance of process in view of judgment in *Urmila Devi Vs. Yudhvir Singh*, , which read thus:

"21. Having regard to the said categorical position stated by this Court in innumerable decisions resting with the decision in *Rajendra Kumar Sitaram Pande v. Uttam*, as well as the decision in *K.K. Patel*, it will be in order to state and declare the legal position as under:

21.1. The order issued by the Magistrate deciding to summon an accused in exercise of his power under Sections 200 to 204 CrPC would be an order of intermediatory or quasi-final in nature and not interlocutory in nature.

21.2. Since the said position viz such an order is intermediatory order or quasi-final order, the revisionary jurisdiction provided under Section 397 , either with the District Court or with the High Court can be worked out by the aggrieved party.

21.3. Such an order of a Magistrate deciding the issue process or summons to an accused in exercise of his power under Sections 200 to 204 CrPC, can always be subject-matter of challenged under the inherent jurisdiction of the High Court under Section 482 CrPC.

22. When we declare the above legal position without any ambiguity, we also wish to draw support to our above conclusion by referring to some of the subsequent decision. In a recent decision of this Court in *Om Kumar Dhankar v. State of Haryana*, the decisions in *Madhu Limaye*, *V.C. Shukla*, *K.M. Mathew*, *Rakesh Kumar Mishra v. State of Bihar* ending with *Rajendra Kumar Sitaram*

Pande, was considered and by making specific reference to para 6 of the judgment in Rajendra Kumar Sitaram Pande, this Court has held as under in para 10: (Om Kumar Dhankar case, SCC p.255)

"10. In view of the above legal position, we hold, as it must be, that revisional jurisdiction under Section 397 CrPC was available to Respondent 2 in challenging the order of the Magistrate directing issuance of summons. The first question is answered against the appellant accordingly."

23. Therefore, the position has now come to rest to the effect that the revisional jurisdiction under Section 397 CrPC is available to the aggrieved party in challenging the order of the Magistrate, directing issuance of summons."

9. In view of above, following order is passed.

(i) Criminal Revision No. 140/2015 is allowed.

(ii) Rule made absolute in terms of prayer clause (i).