

(1995) 03 AHC CK 0014

In the Allahabad High Court

Case No : Criminal Miscellaneous App. No. 14761 of 1991

Mohd. Habibur Rahman Faizi and Others

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 15-03-1995

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 156(1), 200, 202, 482

Penal Code, 1860 (IPC) — Section 109, 114, 402, 405, 406

Citation : (1996) CriLJ 74

Hon'ble Judges : K.L. Sharma, J

Bench : Single Bench

Advocate : R.H. Zaidi, for the Appellant; A.N. Singh, R.G. Padia and Prakash Padia, A.G.R., for the Respondent

Final Decision : Allowed

Judgement

K.L. Sharma, J.—This is an application u/s 482, Cr. P.C. for quashing the proceedings of a complaint case No. 352 of 1991, Mushtaq Ahmad v. Molvi Habibur Rahman and Ors. pending in the Court of Chief Judicial Magistrate, Mau under Sections 406, 402, 420, 467 and 468, I.P.C. and for quashing the summoning order dated 8-4-1991 u/s 406 and 409, I.P.C.

2. I have heard Sri R.H. Zaidi learned counsel for the applicants, Sri A.N. Singh and Sri R.C. Padia counsel for the opposite party No. 2 and the learned A.G. A. for the State and perused the material brought on record.

3. Since the counter affidavit and rejoinder affidavit have been exchanged between the parties, the following admitted facts emerge from the affidavits.

4. There is a minority educational institution known as Madrasa Faiz-e-Am at Maunath Bhajan in the district of Mau which imparts Arabic and Persian education to the students belonging to the minority community. The Madrasa receives grant-in-aid from the Government in the form of maintenance grant which is

limited to the extent of the amount of salary of its teaching and non-teaching staff. The affairs of the Madrasa are being managed in accordance with the non statutory rules framed by the education department and ran under the control of Inspector Arabic and Persian Madrasa U.P. The applicant No. 1 is the Manager, applicant No. 2 is the Principal applicant No. 3 is the teacher and the applicant No. 4 is the member of the committee of management of the Madrasa. The opposite party No. 2 Mushtaq Ahmad complainant was an assistant teacher in the Madrasa. On 1-8-1985, he applied for leave without pay for only a month, but, actually discharged his duties as teacher up to 18-8-1985 and drew salary up to that date but the management committee had granted leave without pay to him on 1-8-1985 itself. The opposite party No. 2 had applied for leave without pay on the ground that he was selected for higher studies by the King Saud University Saudi Arabia and actually he went to Saudi Arabia on leave without pay only for a month. One Sri Ishtiaq Ahmad was appointed in the vacancy caused by leave. Ishtiaq Ahmad joined and started teaching and drew salary of senior teacher. The opposite party No. 2 returned from Saudi Arabia in the year 1988. He filed the complaint in question against the applicants in the court of Chief Judicial Magistrate Maunath Bhajan registered as Criminal Case No. 352 of 1991 on 20-3-1991.

5. According to the case of the applicants, the opposite party No. 2 had returned from Saudi Arabia in Feb. 1988 and he was reappointed in the Madrasa with effect from 1-3-1988 but on 23-6-1988 he submitted his resignation by registered post and his resignation was accepted. His salary was also paid with effect from 1-3-1988 to 30-6-1988. He made his complaint against the applicants to the Inspector Arabic and Persian Schools U.P. Allahabad on 5-5-1989 who conducted an inquiry and found all the allegations totally false. On 25-11-1989 the opposite party No. 2 sent a second complaint to the Chief Minister and Education Minister of Uttar Pradesh Government which was inquired into by the District Basic Education Officer Mau and submitted report on 21-12-1990 stating that all the allegations made in the complaint were totally false. Another complaint was sent which was found false on inquiry by the Assistant Director Basic Education VII Division Gorakhpur on 15-9-1989. The opposite party No. 2 also sent a report to the police station Kotwali, Mau which was investigated thoroughly and found false as reported by the S.H.O. Kotwali, Mau on 21-12-1989. He also endorsed copies of this report to the complaint Mushtaq Ahmad and to the Inspector Arabic and Persian Schools U.P. and to the District Basic Education Officer. The applicants after getting fed up with the repeated complaints and inquiries filed a Civil Misc. Writ Petition No. 30062 of 1991 (Committee of Management Madrasa Faiz-e-Am v. State of U.P.) under Article 226 of the Constitution of India for quashing the order dated 26-8-1991 and for issue of a writ of mandamus commanding the respondents not to conduct inquiries on the basis of the complaints filed by the opposite party No. 2 (opposite party No. 3 in that writ petition). This Court was pleased to admit the writ petition and issued notice and further stayed the operation of the order

dated 26-8-1991. Learned counsel Sri R.H. Zaidi appearing for the applicants has vehemently and strenuously argued that in view of the admitted facts of the case it becomes apparent on the face that the complaint filed by the opposite party No. 2 was false and frivolous and the necessary facts constituting the offence mentioned in the complaint did not really exist and as such the complaint is liable to be quashed and the summoning order is also liable to be quashed. Mr. A.N. Singh learned counsel for opposite party No. 2 has stated in reply that mere mention of the offence in the complaint on the basis of the facts stated therein is sufficient to constitute prima facie a case against the applicants and the complaint or the summoning order thereon is not liable to be quashed. The learned counsel on both sides have cited a number of cases in support of their respective contentions. Before proceeding to discuss the facts mentioned in the complaint dated 20-3-1991 I would like to refer to the decisions relied upon by the learned counsel for the parties.

6. In the case of Roshan Lal Raina Vs. State of Jammu and Kashmir, it has been held that without proof of entrustment, there can be no question of the accused being found guilty of the offence u/s 409, I.P.C. Considering the facts and circumstances in the criminal appeal, the Hon''ble Supreme Court set aside the conviction of the accused u/s 409, I.P.C. as illegal.

7. In the case of Jaswantrao Manilal Akhaney v. The State of Bombay reported in 1956 Cri LJ 1116, the Hon''ble Supreme Court had the occasion of considering the facts which are necessary to constitute the offence under Sections 409 and 405, I.P.C. The following observations of the Hon''ble Court are very material.

(c) Penal Code (1860), Sections 409 and 405-

"For an offence under Sections 409, Penal Code, the first essential ingredient to be proved is that the property was entrusted. When Section 405 which defines "criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers possession of the property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party, the person so put in possession only obtaining a special interest by way of a claim for money advanced for spent upon the safe keeping of the thing or such other incidental expenses as may have been incurred by him."

As regards the mens rea necessary for the offence u/s 405, I.P.C. the Hon''ble Supreme Court observed as follows:

(d) Penal Code (1860), Section 405 Criminal breach of trust-Mens-rea-

"A deprivation even for a short period is within the meaning of the expression. If the Managing Director of a bank entrusted with securities owned by the pledger disposes of those securities against the stipulated terms of the contract entered into by the parties, with the intention of causing wrongful loss to the pledger and wrongful gain to the bank, there can be no question but that the Managing Director has necessary mens rea required by Section 405."

8. The Sikkim High Court followed the same principles enunciated by the Hon''ble Supreme Court in the case of Puspa Kumar Rai Vs. State of Sikkim, and in the case of (Mrs.) Dhanalakshmi v. R. Prasanna Kumar (SC) reported in (27) 1990 ACC 39 the Hon''ble Supreme Court had an occasion to consider in a criminal appeal the question whether an order of the High Court quashing the proceedings u/s 482, Cr.P.C. was justified. The Hon''ble Supreme Court made the following observation:

"If the allegations set out in the complaint do not constitute the offence of which cognizance is taken by the Magistrate it is open to the High Court to quash the same in exercising of the inherent powers u/s 482. It is not, however, necessary that there should be a meticulous analysis of the case, before the trial to find out whether the case would end in conviction or not. The complaint has to be read as a whole. If it appears on a consideration of the allegations, in the light of the statement on oath of the complainant that ingredients of the offence/ offences are disclosed, and there is no material to show that the complaint, is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court."

In the case of R.P. Kapur Vs. The State of Punjab, the Hon''ble Supreme Court again in a criminal appeal had the occasion to consider the nature and scope of the inherent powers of the High Court u/s 561-A of the Code of Criminal Procedure 1898 which now corresponds to the Section 482, Cr.P.C. 1973. The Hon''ble Supreme Court made the following observation explaining the nature and scope of the inherent jurisdiction of the High Court:

"The inherent power of High Court u/s 561-A, Criminal P.C. cannot be exercised in regard to matters specifically covered by the other provisions of the Code. The inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused persons must be tried under the provisions of the Code and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction.

Some of the categories of cases where the inherent jurisdiction to quash proceedings can and should be exercised are:

(i) Where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceeding in respect of the offence alleged. Absence

of the requisite sanction may for instance furnish cases under this category.

(ii) Where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged in such cases no question of appreciating evidence arises, it is a matter merely of looking of the complaint or the First Information Report to decide whether the offence alleged is disclosed or not.

(iii) Where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction u/s 561A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. This is the function of the trial Magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained."

In the latest and most important case namely State of Haryana and others Vs. Ch. Bhajan Lal and others, , the Hon"ble Supreme Court again examined a catena of judicial decisions rendered in the past and exhaustively examined the scope of investigation in the F.I.R. as well as the power of the High Court to quash the investigation and complaint proceedings in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India or in exercise of the inherent powers u/s 482, Cr. P.C. and laid down the following guidelines for being followed by the High Court in this regard. It is therefore worthwhile to reproduce the following guidelines laid down by the Hon"ble Supreme Court:

"In following categories of cases, the High Court may in exercise of powers under Article 226 or u/s 482 of Cr.P.C. may interfere in proceedings relating to cognizable offences to prevent abuse of the process of any Court or otherwise to secure the ends of justice. However, power be exercised sparingly and that too in the rarest of rare cases.

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers u/s 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated u/s 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/ or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/ or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

(8) Where allegations in the complaint did constitute a cognizable offence justifying registration of a case and investigation thereon and did not fall in any of the categories of cases enumerated above, calling for exercise of extraordinary powers or inherent powers, quashing of FIR was not justified."

9. The principles of law for the exercise of inherent powers of the High Court either u/s 482, Cr.P.C. or for the exercise of extraordinary power under Article 226 of the Constitution of India, declared by the Hon"ble Supreme Court right from the year 1960 up to date are holding the field and are being followed by the High Court. If any case falls within the specified categories of exceptions and the facts and circumstances of the case warrant interference by the High Court, only then the summoning orders and criminal proceedings are quashed. Therefore it depends on the facts and circumstances of each case whether such an interference is called for. The evaluation of the facts and circumstances of a particular case on the basis of the material adduced before the criminal court will enable the High Court to decide whether it is a case in which the accused persons should be directed to appear and file formal objection before the learned Magistrate in obedience to the summoning order for reconsideration or it is a case in which there is no prima facie ground on the basis of the complaint and the material given in support thereof for the Magistrate to proceed against the accused person and the appearance of the accused person before the Magistrate will serve no purpose except loss of dignity, reputation and personal liberty. Therefore, in the latter case the High Court has to make an order to meet the ends of the justice by quashing the criminal proceedings.

10. Now coming to the facts and circumstances of the present case, the complainant opposite party No. 2 filed the complaint for the offence under Sections 406, 409, 420, 467 and 468, I.P.C. against the applicants. The allegations made in the complaint do not indicate such necessary facts as may constitute any of the offences mentioned by the complainant. It appears that on the face of these allegations that the complainant had a personal and private grudge against the applicant No. 1 who is the Manager and the applicant No. 2 who is the Principal and the applicant No. 4 Abdul Hannan is the Member of the Committee of Management because the complainant after having resigned as a teacher of the Madrasa demanded payment of his salary for the period of his absence from India when he had gone to Saudi Arabia. The admitted facts in the counter affidavit of the complainant opposite party No. 2 clearly indicate that on Ishtiaq Ahmad was appointed in his leave vacancy on the sanction of his leave without pay and he had joined and started teaching in the Madrasa and drew his salary as a senior teacher. It apparently shows that the complainant was not at all entitled to salary for the period of his absence when his leave was without pay. The Madrasa receives maintenance grant from the Government and its affairs are supervised by the Inspector Arabic and Persian Schools of U.P. Government. The salary bills of the teachers are prepared by the Management but scrutinised by the Inspector before sanctioning the payment of the bills. This makes the allegations of the complainant most improbable on the fact that the Manager and the Principal forged and fabricated his signature for drawing his salary from the maintenance grant during the period of his absence from the year 1985 to 1988 and misappropriated the same. The complainant who had gone abroad and had no occasion to see the preparation of the bills in respect of the salary of the teachers, could not know as to who forged and fabricated his signature on the salary bills, if any, in respect of his salary. Mere making allegation that the Manager and the Principal did so, is not enough when there is no personal knowledge of the fact constituting the offence. In para 10 of the complaint the complainant himself mentioned that he had sent applications and complaints to the Superintendent of Police as well as to the higher officers of the Government, but no action had been taken. The complainant is competent to state the fact that he had sent the complaint but he is not competent to say without verification from the Superintendent of Police or other Officers of the Government to whom he had sent the complaint whether any investigation or inquiry had been made into the complaints or not. The learned Magistrate merely relied upon the incompetent statement of the complainant without making any inquiry from the Superintendent of Police and the officers of the Government whether any inquiry was actually held in the complaints or not. The complaint does not show whether the money or any property was entrusted by the complainant to the Manager and the Principal of the Madrasa and whether it was misappropriated by them. Without making all these inquiries the learned Magistrate by a mechanical order summoned the applicants for the offence under Sections 406 and 409, IPC. In view of the decisions already quoted herein-above the offence u/s 409 or 406 cannot be prima facie made without proof of

entrustment. It was a Government fund from which the salaries of the every staff including that of the complainant during his service period was disbursed. Therefore the competent person to make objection to the disbursement of the salary was the Inspector Arabic and Persian Schools U.P. Government. Neither the complainant requested the Magistrate to summon original document from the custody of the Madarasa or from the Inspector Arabic and Persian Schools nor the learned Magistrate considered necessary to summon these essential documents which alone could display whether any act relating to the misappropriation of Government money or criminal breach of trust was committed. Thus from a perusal of the allegations in the complaint filed by the opposite party No. 2 and the statement recorded by the learned Magistrate under Sections 200 and 202, Cr.P.C. the necessary facts to constitute the offence under which the applicants have been summoned by the impugned order dated 8-4-1991 are apparently missing and on the basis of the available material the learned Magistrate was not justified to say that there is sufficient ground for summoning the accused persons for the offence under Sections 406 and 409, I.P.C. It appears that the learned Magistrate has passed the summoning order in a most mechanical manner and without applying his mind to the allegations in the complaint and to the evidenciary value of the evidence given by the complainant and to the provisions of law under which he has exercised his jurisdiction.

11. In the case of Punjab National Bank and others Vs. Surendra Prasad Sinha, the Hon"ble Supreme Court has made the following observations-

"Judicial process should not be an instrument of oppression or needless harassment. The Court should be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of private complainant as vendetta to harass the persons needlessly. Therefore, in case of default in repayment of bank loan, when the debt became time barred and the bank had adjusted the debt for the FDRs in its possession which were deposited by the guarantor by way of security, after their maturity, and a complaint was laid by the guarantor impleading the Chairman, Managing Director of the bank and a host of officers on the charges under Sections 109, 114 and 409 of the Penal Code it would be the responsibility and duty of the Magistrate to find whether the concerned accused were legally responsible for the offences charged for, before issuing the process. Thus the complaint on the basis of which the process was issued was filed as vendetta to harass the persons needlessly, the complaint was quashed."

Apart from materials available before the learned Magistrate the admitted facts and circumstances of this case make out a case calling for the interference of the High Court by invoking its inherent jurisdiction u/s 482, Cr.P.C. The opposite party No. 2 had a personal grievance in respect of his service as a teacher in the school against the Manager and the Principal of the Madrasa who also happened

to be his close relative. He was not entitled on the basis of his own allegations and admissions to receive the salary for the period during which he did not discharge his teaching duties in the Madarasa and factually and physically he remained in Saudi Arabia. In his place one Ishtiaq was appointed as a substitute who actually discharged teaching responsibility and drew his salary regularly on approval by the Inspector of Arabic and Persian Schools. There was not even the remotest possibility even on the allegations and admission of the complainant himself for any misappropriation of Government fund or for any criminal breach of trust. There was no allegation and no evidence to indicate that he entrusted any property to the Manager and the Principal of the Madrasa which they had refused to return on his demand and committed the breach of trust. The question of criminal misappropriation of the Government fund could be objected only by the Inspector of Arabic and Persian Schools on receiving the complaints. The applicants have brought on record the various reports and inquiries conducted on the basis of the complaints sent by the opposite party No. 2 to the Superintendent of Police and to the higher officers of the Government as mentioned by him in his complaint. All these authorities also conducted inquiries into the complaints because those complaints pertained to the misappropriation and defalcation of the Government money in the accounts of the Madarasa but every officer right from the Station Police Officer Kasya, the District Basic Education Officer, the Assistant Director of Basic Education and the Additional Director of Education reported that the allegations made by the complainant are totally false and only salary of Ishtiaq Ahmad substitute has been correctly drawn and disbursed to Ishtiaq Ahmad. There was no complaint from Sri Ishtiaq Ahmad about the non payment of his salary. Despite the result of all these inquiries the complainant opposite party No. 2 continued in his mischief and made a false and frivolous complaint to the Magistrate knowing well what he was doing, was factually false and untenable in law, but out of ulterior motive to harass and humiliate the Manager, Principal teacher and member of the Management Committee of the Madrasa he lodged this complaint. In such circumstances, the complaint is liable to be quashed.

12. The learned counsel for the opposite party No. 2 submitted that the inquiry reports were not placed before the learned Magistrate and cannot be assessed for the purpose of deciding the question whether the complaint is malicious, false and frivolous. His contention loses substance in view of the fact that the complainant has himself referred to his complaints to the Superintendent of Police and the higher officers of the department, but it is surprising that neither he summoned the complaints from those concerned authorities through Court nor the court considered necessary to summon the complaints and to verify whether any inquiry or investigation had been done and if so with what result. This effort, which should have been ordinarily and normally made not only by the complainant but also by the Court, has not been made at all. Even apart from these reports of inquiries on the complaints of the complainant himself, allegations and the statements brought before the Magistrate, as I have already

said, have not provided a sufficient ground for summoning the accused persons. Therefore, I find it an exceptional case in which the inherent power of the court should be invoked and exercised for meeting the ends of the justice in order to protect dignity, reputation and personal liberty of the applicants. I am further of the opinion that in such a case where a complainant is wholly acting without any factual or legal justification with an ulterior motive to defame, harass and spite, the responsible persons without any sense of responsibility on their own part, the mere quashing of the criminal complaint and the summoning order would not be sufficient to meet the ends of justice. Such a complainant should be taxed with deterrent costs for his mischievous deeds in filing a false, frivolous and vexatious complaints. The cost is assessed at Rs. five thousand (Rs. 5000.00).

13. For the aforesaid reasons, this application is hereby allowed and the criminal proceedings in criminal case No. 352 of 1991 Musthaq Ahmad v. Maulvi Habibur Rehman Faizi and others pending in the Court of C.J.M. Mau and the summoning order dated 8-4-1991 passed in the said case are hereby quashed. The opposite party No. 2 is hereby directed to deposit in the court of C.J.M. Mau in the aforesaid case a sum of Rs. 5000/- as costs within two months from the date of judgment failing which the same shall be realised as fine in accordance with the Criminal Procedure Code and upon deposit the said amount shall be paid either to the Manager or to the Principal of the Madrasa within two weeks for being credited in the bank account of Madrasa and for the use of the Madrasa.

14. Let a certified copy of this judgment be sent to learned Chief Judicial Magistrate, Mau within 7 days for information and necessary action, future guidance and compliance report be sent to the Registrar of this Court within reasonable time.