

(2017) 03 BOM CK 0217
In the Bombay High Court
Case No : 768 of 2016

Mr.Latesh Kumar Ganeshbhai Patel and Another	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision : 24-03-2017

Acts Referred:

[3998](#)>Constitution of India, [3998-21](#)>Article 21 -
Amendment of the Schedule
[3863](#)>Code of Criminal Procedure, 1973, [3863-41](#)>Section
41, [3863-154](#)>Section 154, [3863-155](#)>Section 155

Citation : (2017) 03 BOM CK 0217

Hon'ble Judges : A.S. Oka, Smt.Anuja Prabhudessai

Bench : DIVISON BENCH

Advocate : Shri Meghashyam Kanoji Kocharekar, Prabha Badadare, F.R.Shaikh

Judgement

1. The submissions of the parties were heard yesterday. The parties were put to notice that an endeavour shall be made to decide the Application finally at the stage of admission.

2. The prayer in this Application under Section 482 of the Code of Criminal Procedure, 1973 (for short "CrPC") is for quashing the First Information Report (for short "FIR") registered for the offence punishable under Section 124 of the Maharashtra Police Act, 1951 (for short "the said Act of 1951") and Section 52 of the Motor Vehicles Act, 1988 (for short "the said Act of 1988"). A chargesheet was filed on 13th January 2016 against the Applicants. A copy of the chargesheet is placed on record. We have allowed the learned counsel appearing for the Applicants even to argue on merits of the chargesheet as a remedy of applying for discharge is not available. We permit formal amendment to be carried out for incorporating a challenge to the chargesheet which shall be done within a period of two weeks from the date on which this Judgment is uploaded.

3. The first informant is a Police Constable attached to Bhivandi Taluka Police Station. Along with other Police personnel, on 2nd March 2016, when he was on

patrolling duty on MumbaiNashik Highway, he received an information that a Scorpio vehicle is likely to pass containing suspicious goods. Around 6.30 a.m. on 3rd March 2016, the first informant and other police personnel spotted the vehicle. According to the first informant, the the Driver and one of the occupants of the said vehicle did not give satisfactory answer to the inquiry made with them. Therefore, a report was submitted to the Police Officer. After the Police Officer came, it was realized that there were drawers below the seat of the vehicle which could not be easily seen and the same were locked. The two Panchas were called and a person was also called for taking a video film. In their presence, the drawers were opened and it was found that there were bundles of currency notes of Rs.500/and Rs.1,000/. The total cash found was of Rs.2,84,50,000/. It was suspected that the cash amount had been fraudulently obtained by the Applicants by illegal means. It was alleged that the Applicants could not give satisfactory explanation to the possession of the cash amount. The custody of the said amount was taken on the very day (3rd March 2016 at 22.32 hrs.) by the Police. The Applicants were arrested in purported exercise of power under Clause (d) of Subsection (1) of Section 41 of the CrPC. On 4th March 2016, a remand report was submitted by the Police before the learned Judicial Magistrate, First Class at Bhivandi when the applicants were produced before him. Along with the remand report, a separate report was submitted recording that the Applicants have been arrested under Clause (d) of Subsection (1) of Section 41 of the CrPC. A permission was sought from the learned Magistrate under Subsection (2) of Section 155 of the CrPC which was duly granted. Probably, on the basis of the said permission that the Police ventured to register the impugned FIR under Section 154 of the CrPC, on the basis of which, an investigation was carried out and chargesheet was filed for the offence punishable under Section 124 of the said Act of 1951 and Section 52 of the said Act of 1988.

4. The first submission of the learned counsel appearing for the Applicants was that merely because a permission was granted under Subsection (2) of Section 155 of the CrPC, there was no power vesting in the Police to register FIR under Subsection (1) of Section 154 of the CrPC. The submission is that the investigation carried out on the basis of the impugned FIR registered for noncognizable offence is completely illegal. It is further submitted that Section 52 of the said Act of 1988 does not incorporate any penal provision. In any case, there is no violation of Section 52 of the said Act of 1988. Further submission is that even Section 124 of the said Act of 1951 will have no application as, later on, the information about the offence was communicated to the Income Tax Authorities and at highest, the case may be of evading the payment of Income Tax. Though, there is no specific prayer made in that behalf, it was contended that when the allegation was of commission of a noncognizable offence, in exercise of the powers under Clause (d) of Subsection (1) of Section 41 of the CrPC, the Applicants could not have been arrested. Therefore, the arrest is illegal. We may note here that on 4th March 2016, the Police custody remand

was granted by the learned Magistrate for a period of 14 days. As far as the applicability of Clause (d) of Subsection (1) of Section 41 of the CrPC is concerned, reliance was placed by the Applicants on a decision of the learned Single Judge of this Court in the case of Avinash Madhukar Mukhedkar v. State of Maharashtra, 1983 0 CrLJ 1983

5. The learned APP submitted that even assuming that due to mistake, the impugned FIR was registered, the investigation has been carried out on the basis of the express provisions of Subsection (2) of Section 155 of the CrPC, and therefore, the investigation and the consequent chargesheet does not become badinlaw. Inviting our attention to the chargesheet, the submission of the learned APP is that the offence punishable under Section 124 of the said Act of 1951 is squarely attracted as the specific case made out is that the property (cash) has been fraudulently obtained as the Applicants and they could not offer any explanation for possessing the cash. The submission is that during the trial, the Applicants will have to account for such possession of cash to the satisfaction of the learned Magistrate as provided under Section 124 of the said Act of 1951. The learned APP has also supported the action of invoking Clause (d) of Subsection (1) of Section 41 of the CrPC and submitted that there is no illegality attached to that.

6. The first question to be considered is whether any offence is made out against the Applicants. We have perused the Section 52 of the said Act of 1988, which reads thus: "52. Alteration in motor vehicle. (1) No owner of a motor vehicle shall so alter the vehicle that the particulars contained in the certificate of registration are at variance with those originally specified by the manufacturer : Provided that where the owner of a motor vehicle makes modification of the engine, or any part thereof of a vehicle for facilitating its operation by different type of fuel or source of energy including battery, compressed natural gas, solar power, liquid petroleum gas or any other fuel or source of energy, by fitment of a conversion kit, such modification shall be carried out subject to such conditions as may be prescribed: Provided further that the Central Government may prescribe specifications conditions for approval, retrofitment and other related matters for such conversion kits; Provided also that the Central Government may grant exemption for alteration of vehicles in a manner other than specified above, for any specific purpose. (2) Notwithstanding anything contained in subsection (1), a State Government may, by notification in the Official Gazette, authorise, subject to such conditions as may be specified in the notifications, and permit any person owing not less than ten transport vehicles to alter any vehicle owned by him so as to replace the engine thereof with engine of the same make and type, without the approval of registering authority. (3) Where any alteration has been made in motor vehicle without the approval of registering authority or by reason of replacement of its engine without such approval under subsection (2), the owner of the vehicle shall, within fourteen days of the making of the alteration, report the alteration to the registering authority within whose jurisdiction he resides and shall for ward the certificate of registration to that

authority together with the prescribed fee in order that particulars of registration may be entered therein. (4) A registering authority other than the original registering authority making any such entry shall communicate the details of the entry to the original registering authority. (5) Subject to the provisions made under subsection (1), (2), (3) and (4), no person holding a vehicle under a hirepurchase agreement shall make any alteration to the vehicle except with the written consent of the registered owner. Explanation. For the purpose of this section, "alteration" means a change in the structure of a vehicle which results in change in its basic feature.] The Section deals with alteration in a motor vehicle. It provides that no owner of a motor vehicle shall so alter the vehicle that the particulars contained in the certificate of registration are at variance with those originally specified by the manufacturer.

7. We have carefully perused the entire chargesheet. The specifications of the vehicle involved in the offence provided by its manufacturer are not a part of the chargesheet. Therefore, it is not possible to hold that the particulars of the vehicle mentioned in Registration Certificate are at variance with the specifications provided by the manufacturer. In fact, that is not the case made out in the chargesheet. Hence, there is no material to show that the provision of Subsection (1) of Section 52 of the said Act of 1988 has been infringed. Moreover, there is no penal provision contained in Section 52 in the sense that the Section itself does not provide for any punishment. At highest, for violation of Section 52, a recourse can be taken to Section 171 of the said Act of 1988. However, on perusal of the entire chargesheet and by taking the material therein as true, we find that no case of violation of Subsection (1) of Section 52 of the said Act of 1988 is made out. Therefore, the chargesheet filed for the offence punishable under Section 52 of the said Act of 1988 cannot be sustained.

8. Now, we turn to Section 124 of the said Act of 1951, which reads thus: "124. Possession of property of which no satisfactory account can be given. Whoever has in his possession or conveys in any manner, or offers for sale or pawn, anything which there is reason to believe is stolen property or property fraudulently obtained, shall, if he failed to account for such possession or to act to the satisfaction of the Magistrate, on conviction, be punished with imprisonment for a term¹[which may extend to one year but shall not, except for reasons to be recorded in writing, be less than one month and shall also be liable to fine which may extend to²[five thousand rupees]."

9. In the present case, there is a prima facie material on record to show that cash of Rs.2,84,50,000/was found in the vehicle which was in possession of the Applicants. In the statement of the first informant, it was stated that it was suspected that the cash amount has been obtained by the Applicants by illegal means and fraudulently. In the chargesheet, there are similar allegations. In the statement of the first informant, it was mentioned that there was reason to believe that the cash was fraudulently obtained by the Applicants. As provided in Section 124 of the said Act of 1951, the offence will be complete if the person

found in possession of the property fails to account for such possession to the satisfaction of the learned Magistrate. Therefore, what is pleaded by the Applicants in this Application is a defence to the charge under Section 124 of the said Act of 1951. Suffice it to say that there is material against the Applicants for filing chargesheet for the offence punishable under Section 124 of the said Act of 1951. Whether the Applicants account for the possession of the said cash is a matter of evidence.

10. Now, we come to the second question regarding the registration of the impugned FIR. It is not in dispute that the offence alleged is a noncognizable offence. It will be necessary to make a reference to Section 154 of the CrPC, which reads thus: "154. Information in cognizable cases. (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under subsection (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

11. On plain reading of Subsection (1) of Section 154, every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing and the substance thereof shall be entered in a book to be kept by such officer in charge at the police station in the form prescribed by the State Government. Section 155 of the CrPC reads thus: "155. Information as to noncognizable cases and investigation of such cases. (1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a noncognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a noncognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in

respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are noncognizable."

12. Subsection (1) of Section 155 mandates that when an information is given to an officer in charge of a police station of the commission of a noncognizable offence within the limits of such station, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in that behalf and refer the informant to the learned Magistrate. No police officer can investigate a noncognizable offence without an order of a Magistrate having a power to try such case or commit the case for trial. Only after an order is passed under Subsection (2) of Section 155 of CrPC by the learned Magistrate permitting the police to investigate, Subsection (3) of Section 155 comes into picture which provides that any officer who is armed with a permission under Subsection (2) of Section 155 can exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in case of a cognizable offence. Thus, by virtue of power under Subsection (2) of Section 155, an officer armed with a permission can investigate into a noncognizable case by exercising the same powers as an officer in charge of a police station may exercise in a cognizable case. In the present case, admittedly, on 4th March 2016, a specific permission was granted under Subsection (2) of Section 155 by the learned Magistrate. Even if such permission is granted, the offence does not become a cognizable one for the purposes of Subsection (1) of Section 154 of the CrPC. As stated earlier, only if the information relates to the commission of a cognizable offence that the same can be reduced into writing and the substance thereof shall be entered in a book in accordance with the provisions of Subsection (1) of Section 154 of the CrPC. As narrated earlier, the information regarding a noncognizable offence is to be entered in a book maintained in the prescribed form as provided in Subsection (1) of Section 155. The only effect of the order under Subsection (2) of Section 155 is that the officer in charge of the police station can exercise all the powers (except arrest without warrant) relating to investigation which could be exercised in relation to a cognizable offence while carrying out investigation into a noncognizable offence. Therefore, in our view, the registration of the FIR under Subsection (1) of Section 154 on the basis of the permission granted under Subsection (2) of Section 155 is illegal. If such practice of registering FIR under Subsection (1) of Section 154 is being followed in any part of the State, the same will have to be forthwith discontinued.

13. An argument was canvassed that as the impugned chargesheet is filed after carrying out investigation on the basis of the impugned FIR which is illegal, even chargesheet deserves to be quashed and set aside. There is a fallacy in this argument. A permission was granted under Subsection (2) of Section 155 by the

learned Magistrate to investigate, and, therefore, the chargesheet does not become illegal on the ground that the FIR was registered. We have already recorded a finding that there was sufficient material to file a chargesheet for the offence punishable under Section 124 of the said Act of 1951. The chargesheet has been filed after carrying out the investigation on the basis of permission granted by the learned Magistrate under Subsection (2) of Section 155 of CrPC.

14. Now, we come to the issue of illegal arrest. Perhaps, the police officer who arrested the Applicants completely ignored Subsection (2) of Section 41 of the CrPC. Subsection (1) of Section 41 of the CrPC confers the power on any police officer to arrest any person without warrant and without an order from the learned Magistrate in the cases specified under Clauses (a) to (i) thereof. Subsection (2) of Section 41 of the CrPC is material, which reads thus: "41. When police may arrest without warrant. (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person- (a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i)

(2) Subject to the provisions of Section 42, no person concerned in a noncognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate."

15. The Subsection (2) of Section 41 unequivocally lays down that no person concerned in a noncognizable offence shall be arrested except under a warrant or under an order of the Magistrate. The power under Subsection (1) can be exercised by arresting a person without any order from the Magistrate and without a warrant. However, in case where noncognizable offence is alleged, the officer can exercise the power under Subsection (1) to arrest provided either there is a warrant issued or an order to that effect is passed by the learned Magistrate. In this case, admittedly, there was neither a warrant issued nor an order passed by the learned Magistrate permitting arrest of the Applicants. We have, therefore, no hesitation in coming to the conclusion that the arrest of the Applicants by exercising the power under Clause (d) of Subsection (1) of Section 41 of the CrPC was completely illegal. In this case, though a specific contention is raised in the grounds in this Application that the arrest is illegal, there is no

consequential prayer made in the Application. As the illegal arrest infringes the fundamental rights guaranteed under Article 21 of the Constitution of India, it will be open for the Applicants to file appropriate proceedings for seeking appropriate relief on the basis of violation of Article 21 of the Constitution of India.

16. Therefore, the Application succeeds in part and we pass the following order :ORDER:

(a) We hold that the registration of the First Information Report impugned in this Application is illegal;

(b) We hold that the chargesheet to the extent of the applicability of Section 124 of the Maharashtra Police Act, 1951 is legal and valid. However, the defences of the Applicants during the trial is kept open. However, that part of the chargesheet by which the offence under Section 52 of the Motor Vehicles Act, 1988 is alleged is quashed;

(c) We hold that the arrest of the Applicants for purported exercise of powers under Clause (d) of Subsection (1) of Section 41 of the Code of Criminal Procedure, 1973 is illegal. We grant liberty to the Applicants to take appropriate proceedings in that behalf in accordance with law;

(d) The Rule is partly made absolute on above terms.