
(1986) 08 BOM CK 0015

In the Bombay High Court

Case No : Criminal Writ Petition No. 614 of 1983

N. Vaghul and others

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 20-08-1986

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 197
Penal Code, 1860 (IPC) — Section 21, 406

Citation : (1986) 3 BomCR 422

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Judgement

1. This petition, under Art. 227 and S. 482, Criminal P.C. 1973, is aimed at an order directing the issue of process against petitioners for the alleged commission of various offences punishable under the Penal Code.

2. Respondent 2, complainant before the Magistrate, initiated a prosecution against the petitioners and two others for the alleged commission of offences punishable under sections 406, 420, 468 and 471 read with 109/120B, Penal Code. This complaint, briefly stated, is to the following effect :-

Complainant was a businessman trading in the name and style of M/s. Navinchandra & Co. In his capacity as a businessman, he and his concerns were dealing with the processing of industrial diamonds, export of cut and polished diamonds, building construction, transport and quarrying. Despite these extensive and varied interests, complainant and his concerns were ignorant of the export business and never had anything to do with letters of Credit, hereinafter to be describes as "L/Cs." Complainant's concerns had accounts with the Bank of India's branch at Khand Bazar. In fact, that branch's premises were located in a building constructed by Somaiya Construction Co. The branch at Khand Bazar knew of complainant never being involved in transactions involving L/Cs. Accused 1 to 6 were high officials of the Bank of India. Accused No. 7 succeeded accused No. 8 as the Manager of the Khand Bazar branch. At the

period figuring in this complaint, accused 8 and 7 were the Managers of the Khand Bazar branch with which complainant had dealings. Accused 9 and 10 were partners of a firm doing business in the name and style of Parikh Brothers. This firm was in the Export-Import business. Mayur Exports of India had entered into a contract with Kuwait Supply Co. of Kuwait to sell to the latter 8,000 metric tonnes of barley. Mayur Exports assigned the contract undertaken by it to M/s. Parikh Brothers with the concurrence of Kuwait Supply Co. To facilitate the execution of the contract, Kuwait Supply Co. had to open a L/C and for that purpose utilised the services of a banking house doing business in the style of M/s. Kuwait Finance House. For the opening of the L/C through their bankers, the Kuwait Supply Co. wanted Parikh Brothers to furnish a 5% performance guarantee. The total value of the consignment was placed in the neighbourhood of Rs. 1,60,00,000/-. The 5% performance guarantee sought covered a total sum of about Rs. 8,00,000/-. Parikh Brothers approached the Khand Bazar branch to provide the 5% guarantee on their behalf. The said branch was willing, but only if the suppliers could find a guarantor to cover the risk which the branch was to face. At that time, accused 8 was the Manager of the Khand Bazar branch. This gentleman was known to the complainant since January 1981. On February 1, 1982 accused 8 called the complainant to the bank's premises with an offer to put some business his way. Complainant responded and reached the office of accused 8. Accused 8 introduced him to the Parikh Brothers, viz., accused 9 and 10. Prior to this date, complainant was not acquainted with Parikh Brothers, though in the year 1972 they had acquired some office premises in Navjivan Building from his construction company. Complainant was informed that Parikh Brothers had entered into a big deal for supply of barley to Kuwait Supply Co.; that this was a profitable transaction; that the Khand Bazar branch was willing to furnish the 5% performance guarantee, provided complainant guaranteed performance on behalf of Parikh Brothers, that Parikh Brothers had a highly rated credit-worthiness; that the contract was to be performed shortly and swiftly, that for a small risk of Rs. 8,00,000/-, complainant would be getting commission at rate 2% covering the value of the entire consignment thus fetching him an attractive profit of Rs. 3,20,000/-. In other words the transaction was "100% safe". Complainant made it clear to accused 8 that he could not understand much of the nature of the business he was being invited to participate in. However, so great was his faith in accused 8, that if that person recommended the transaction, complainant would blindly go through with it. On more meeting took place in the office of M/s. Parikh Brothers, accused 8 again being in attendance. The commission promised to him was paid in two installments of Rs. 30,000/- and Rs. 2,00,000/- respectively on 8-3-1982 and 27-4-1982. On 4-2-1982, in pursuance of the inducement offered by accused 8 to 10, complainant executed a document titled "General Counter Guarantee". This document recorded complainant's undertaking to indemnify the Bank of India against loss incurred by the neglect or failure of the Parikh Brothers to perform the contract. The indemnity was however not to exceed a sum of Rs. 8,00,000.00 Pursuant to the execution of the counter-guarantee, the Kuwait

Finance House communicated the terms of the L/C to Parikh Brothers as also the complainant. Later on, it transpired that Parikh Brothers were not as credit-worthy as touted to be. This however was a later discovery for complainant. On about 9-2-1982, accused 8 to 10 visited the complainant and explained that Parikh Brothers were encountering some difficulty in financing the purchase and despatch of some part of the barley. To allay his fears, it was made clear to complainant that the money would eventually come from Kuwait, but that the shipment was likely to be delayed because of the paucity of ready cash with the Parikh Brothers. He was asked to aid Parikh Brothers with a short term advance and it was pointed out that this was necessary to guarantee some part of the commission still due to him. Complainant was made aware that getting of finance would not be difficult for him. He was entitled to receive Rs. 27,00,000/- vis-a-vis the Andheri properly leased out and delivered to the Bank of India in January 1982. The sum had been withheld because a "No Objection Certificate" had not been tendered by the complainant. Accused 8 gave an assurance that the inability to tender the NOC would no longer be a real hurdle as he would see to it that the bank released the amount advanced. Accused 8 had a letter drafted which he got typed on the letterhead of the complaint. This letter purported to show a request made by complainant for the advance of a sum of Rs. 15,00,000/- to him, the money being urgently required by him as he was executing an export order. The truth was that this was done to facilitate the advance of money by the complainant to the Parikh Brothers, at the behest and insistence of Officers of the bank. Taking advantage of the letter addressed by him, a sum of Rs. 13,50,000/- credited to his account was made available to the Parikh Brothers. The credit in favour of Parikh Brothers was made even before the final sanction of the advance to complainant. 6,000 metric tonnes of barley were shipped by Parikh Brothers to the Kuwait Supply Co. and disbursements under the L/C, were made to Parikh Brothers. The suppliers also received the money meant for the remaining shipment of the remaining 2,000 metric tonnes of barley. But the documents in respect of the remaining consignment were found to be defective. As a result of this flaw, the Kuwait Finance House rejected the said documents and initiated the rejection to the Khand Bazar branch. This branch for the first time on 2-7-1982, called upon the complainant to pay the amount advanced against the negotiation of documents together with interest. In this manner, complainant was called upon to make good a sum of Rs. 41,00,000/-. This was unwarranted, for the guarantee given by him did not make him liable for any sum in excess of Rs. 8,00,000/-. Complainant pointed out the true position to the Officers of the bank, but to no avail. At the end of August 1982, accused 5 to 8 made an attempt to get three documents signed by the complainant and his father. They refused to comply as by this time their suspicions of the motivations and bona fides of the bank's Officers had been thoroughly roused. With a view to get a loan against the lease of Andheri premises, complainant at the insistence of accused 5 and 6, handed over four letters of appropriation signed by him and three of his relations. It was understood that the letters gave the Khand Bazar branch a lien on the fixed

deposits made by the executants of the letters. In some vital parts, the four letters were left blank. These four letters had nothing to do with the transaction between Parikh Brothers and the complainant or there and the back, etc. Therefore, it was a great surprise for the complainant to be informed in the first 10 days of October 1982, that the fixed deposits would be appropriated against the sum of Rs. 41,00,000/- which the Parikh Brothers had failed to pay the bank to reimburse it for the loss pursuant to the non-shipment of the last consignment of barley to Kuwait. Complainant's advocates in a letter addressed to accused 7 made it clear that the appropriation of the fixed deposits by the bank was wrongful, illegal and mala fide. The bank did not pay heed to the protest and appropriated Rs. 38,00,000/- belonging to the complainant and his relations which monies were subject to the control of the bank. When an attempt was made to seek redress, accused 4 declined to come to the aid of the complainant, making it clear that he would not do so as the bank was well protected with the appropriations aforementioned. A request to meet accused 3 was turned down by that Officer, the rejection being conveyed through accused 4. It was complainant's case that all the accused had perpetrated a serious fraud upon him so as to deprive him of a sum of Rs. 38,00,000/- by the commission of serious offences such as cheating, criminal breach of trust and forgeries of valuable securities and documents. At a later stage, a document bearing the tile OD174 was sought to be made the king-pin of the liability fastened upon him. As the document stood, it gave the impression of having been executed by the complainant and his father on 17-2-1982. As a matter of fact, OD174 was not executed on 17-2-1984 and came into existence quite some time after December 1982. The document relied upon had been touched up to support a fraudulent claim. Accused 1 to 8 were guilty of the offence of forgery with intention to cheat, the document being OD174. 17 reasons were given in support of the contention that OD174 was a forgery. The circumstances in which the signed OD174 came to be in possession of the bank were explained in para 25 of the complaint. The blank, but signed paper, had been furnished to the bank by the complainant and his father as guarantors M/s. Navinchandra & Co. It had nothing to do with the advances made or transactions in which the Parikh Brothers were interested. For the reasons mentioned in para 24 and the circumstances set out in para 25 (being paras of the complaint), it was averred that accused 1 to 8 were patently guilty of an offence of forgery with intention to cheat u/s 468, I.P.C. Next, accused 1 to 8 were seeking to utilise OD174 to fasten upon the complaint the liability to pay Rs. 41,00,000/-. OD174 had been dishonestly converted and the fixed deposits had been misappropriated. This rendered accused 1 to 8 liable for the commission of an offence punishable u/s 406, I.P.C. The advance of Rs. 13,50,000/- by the complainant to Parikh Brothers was at the instance of the accused 8. It was aided by deception practised upon him by accused 5 to 8. Six reasons have been cited to bear out this contention. Accused 1 to 8 with knowledge of the true position had been parties to the forgery and misuse of the documents. This was done with a view to benefit accused 9 and 10. An overall view of the transaction, indicated that accused 1 to 10 had acted

in concert and conspiracy with each other. They had by their gross fraud cause serious loss to the Bank of India. To cover up this loss they had sought to pass on the liability to complainant and his father.

3. After presentation of the complaint, the preliminary statement of complainant was recorded. Complainant in his verification stated that OD174 had not been signed by him and his father on 17-2-1982. In this connection, he referred to the report given by the Chief Vigilance Officer (C.V.O.) of the bank. Next, complainant spoke of accused 8 introducing Parikh Brothers to him and the striking of the deal whereupon he executed the Counter Performance Guarantee rendering him liable to the extent of Rs. 8,00,000/- vis-a-vis the execution of the barley contract by Parikh Brothers. He complained of being kept in ignorance about the Parikh Brothers' poor reputation for credit-worthiness. It was clarified that the advance of Rs. 13,50,000/- was only to enable the Parikh Brothers to despatch the last lot of 2,000 tonnes. Accused 8 had induced him to enter into this part of the transaction, giving him to understand, that he would persuade accused 5 to 6 to release the money required for that purpose. The Bills of Lading which had been rejected by the Kuwait party were per se bogus. Despite that, the bank had released Rs. 41,00,000/- in favour of Parikh Brothers. The grant of Rs. 27,00,000/- was made to hustle him into obliging Parikh Brothers. The fixed deposits made by him and his relations were not to be used for the transaction figuring in this case. Each accused had used a forged document to recover Rs. 41,00,000/- from him. Accused 1 to 7 had relied upon those documents despite full knowledge of the true position.

4. After the above statement of the complainant was recorded the learned Magistrate, on 19th November 1983, passed an order worded thus :-

"Issue process under sections 468 and 471 against accused 1 to 10 r/w. 109, I.P.C., u/s 406 against accused 1 to 7 r/w. 109 and u/s 420 against accused 8, 9 and 10 r/w. 109 I.P.C. Issue bailable warrant for Rs. 10,000/- each against all above accused."

5. In the instant petition accused 1 to 8 plead that there was no material warranting the issue of process against them. Accused 1 to 8 were "public servants" within the meaning of S. 21 of the Indian Penal Code. The complaint was not preceded by a sanction of the concerned Government to prosecute them. Therefore, it was not maintainable. Next, the allegations in the complainant and the verification taken together, did not make out an offence against any of the petitioners. At any rate, there was no legal evidence to warrant the issue of process against the petitioning accused. From the correspondence preceding the complaint, it was clear that the real nature of the dispute between the parties was civil in nature. It was submitted that in so far as petitioners 1 to 7 were concerned they had been wrongly made parties to the complaint. This was done in order to snatch an order from the Criminal court to intimidate and harass petitioners who were persons of high status and respectability. The ill-concealed motive was to pressurise the bank into not pressing its claims against

complainant. The Magistrate had erred in directing the issue of process. Proceedings taken before the Magistrate required to be quashed and it was that relief which the accused 1 to 8 sought in this petition.

6. In reply, complainant contends that there was material not only to warrant the issue of process against the petitioners, but sufficient to warrant their "conviction". As a general principle, a magisterial order directing the issue of process was non-reviewable. This is because the aggrieved party had the right to seek a discharge after putting an appearance before the Magistrate. In so far as the present case was concerned, the complaint had to be read along with the many documents relied upon by the complainant. This material clearly indicated the existence of sufficient ground for proceeding further. In so far as the defence of S. 197, Cr.P.C., was concerned, the petitioners were not public servants. Alternatively, when there was no evidence on record, it could not be said that S. 197, Cr.P.C., applied. It was submitted that commission of crimes could not be said to be a discharge of official duties by a public servant. It was this which had been attributed to the petitioners and, therefore, they could not take recourse to S. 197.

7. Having regard to the submissions narrated above, the points for decision would be :-

1. Whether no ground for further proceeding had been made out against accused 1 to 8 to warrant the issue of process against them ?

2. Whether the complaint against the accused persons was not tenable inasmuch as sanction to prosecute them had not been obtained ?

8. As a preliminary to a consideration of the points mentioned above, it will be necessary to dilate upon the nature, extent and limits of the jurisdiction invoked by the petitioners. The title to the petition also refers to Art. 227 of the Constitution. This however is a formality, for in substance and in reality, the sheet-anchors of the petition are the "inherent powers" of the High Court which have been given statutory recognition u/s 482, Criminal P.C., 1973. Section 482 is a verbatim reproduction of S. 561A, Criminal P.C., 1898. I mention this to show that precedents given u/s 561A are also apposite for a proper consideration of the powers of the High Court u/s 482 of the 1973 Code. The High Court has general jurisdiction over all the Criminal Courts subordinates to it and has been invested with inherent powers to prevent the abuse of process of any Court or otherwise secure the ends of justice. In the very nature of things, as the power is broad, there is need for circumspection. It ought not to be exercised capriciously or arbitrarily. The object of exercising this power is to do real and substantial justice for the administration of which alone Courts exist. The section saves the inherent powers of the High Court designedly with a view to achieve a salutary public purpose, viz., to prevent the degeneration of a Court proceeding into a weapon of harassment of the innocent. In the instant case, the accused seek to quash the prosecution initiated against them. The normal rule in such cases is to

let the law take its course. In other words, the person whose attendance is requisitioned by a Criminal Court has to attend that Court, face an enquiry, be charged if an offence is made out, face a trial, be questioned and if so desired be permitted to lead evidence in defence and then await the verdict. This, however, is not to say that every person who is proceeded against for the alleged commission of an offence has to undergo this long and arduous ordeal. Where the allegations set out in the complainant or charge-sheet do not constitute any offence, but the Magistrate has wrongly assumed the existence of some offence, it is open to the High Court exercising its inherent power to quash the order of the Magistrate. If there be prima facie grounds for proceeding against the accused and the Magistrate, therefore, issues process against them, it is not open to the High Court to launch a detailed and meticulous examination of the case on merits, and set aside the order of the Magistrate. Conversely, where there is no material on record to connect the accused with the incident leading to their prosecution, the High Court will quash the proceeding launched against the accused. A criminal proceeding started by a complaint which does not contain any definite accusation is an abuse of the process of the Court and has to be quashed. Faced with a private complaint, the Magistrate has to go by the provisions of Chaps. XV and XVI of 1973 Code. The position is that if the allegations in the complaint be clear, they are to be taken as reflective of the truth. If the Magistrate after a consideration of the recitals in the complaint and other material before him takes cognisance, the High Court will not interfere. Shortly stated, and to use the language of the statute itself, it all depends upon whether "sufficient ground" has been made out or is absent. If it is absent, the Magistrate has to dismiss the complaint and record in brief his reasons for so doing. If he believes otherwise, viz., that "sufficient ground for proceeding" exists, then he has to direct the issue of process to the accused. The subject under consideration has been the topic of a wide ranging debate covering decades and numerous precedents. One of the celebrated decisions on the subject is that of the Supreme Court in Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, . Fazal Ali J. speaking for the Bench categorised four types of cases in which an order of a Magistrate issuing process could be quashed or set aside. These were :-

"(1) where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction or absence of a complaint by legally competent authority and the like."

The nature, extent and the limit of the jurisdiction can be best understood, to quote Mr. Justice Fazal Ali again in *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, -

"It is, therefore, manifestly clear that proceeding against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers u/s 482 of the present Code."

On behalf of the complainant it is contended that an order of a Magistrate directing the issue of process, though theoretically justiciable, should not be reviewed except in the grossest possible case. The support for this contention was placed upon certain words used in Sections 203 and 204 of the 1973 Code. The submission is that if the Magistrate wants to dismiss a complaint because of the opinion that there is no sufficient ground for proceeding, he is under an obligation to briefly record his reasons for, so doing. In contrast, no reasons are required to be given when he takes cognizance of an offence because of the belief that there is sufficient ground for proceeding. This, according to learned Counsel, indicates the desire of the Legislature to keep unfettered the process of the Court so that crimes can be tried and the offenders punished or exonerated if they be innocent. To put it differently, if there be specific allegations made against the accused which are capable of being translated into evidence and if the said evidence constitutes a crime, an order directing the issue of process cannot be interdicted. But S. 482 permits quashing of cognizance wrongly or illegally taken. It is no answer to say that cognizance is taken of an offence and not of the offender and, therefore, when cognizance has been taken and process directed to be issued, the same cannot be quashed. The word "cognizance" means becoming aware of and when used with reference to a Court or Judge, means to take notice of judicially. A specific offence and a specific person are amongst the essentials of taking cognizance of an offence. It is true that the complaint need not specify the name of the offender, for the complainant can very well say that the offence has been committed by a person unknown to him. It will then be for the Magistrate to take cognizance and direct investigation of the offence so that the offenders can be traced. But this argument is of no consequence where it is alleged that the transaction set out in the complaint constitutes an offence and that the committers of the offence are the persons arraigned. In such a case to allow the complaint to continue, if there be no material against the named offenders, would be to allow the continuation of an instrument of oppression. Complainant cannot say that he has made out an offence and that cognizance having been taken of the offence, the enquiry should

proceed apace so that he can get an opportunity to rope in later as many as he wants, though in the complaint itself, there be no material to warrant the belief or even suspicion that they have committed an offence. Reliance was placed upon Union of India (UOI) Vs. Prafulla Kumar Samal and Another, wherein it was held that even material warranting grave suspicion sufficed for the framing of a charge against an accused. Yes, this exposition of what constitutes material sufficient for framing of a charge is undoubtedly applicable to what constitutes "sufficient ground for proceeding" vide S. 204 of the 1973 Code. But the material contemplated by the observations must be comprised in specification of facts which could be objectively ascertainable. Invective, vituperation, surmise, suggestion, inference or insinuation however cleverly and strongly expressed, cannot take the place of material which would constitute sufficient ground for proceeding further. If the complaint consists of bare assertions or insinuations even if coupled with conclusions, that would not make out "sufficient ground" for proceeding further. Bearing this exposition in mind, I now turn to a scrutiny of the material that led the Magistrate to direct the issue of process against the petitioners.

9. Accused 1 to 4 are high officials of the central office of the Bank of India, but not concerned with day-to-day operations of the several branches of the bank, much less, any particular branch in the metropolitan city of Bombay. Accused 5 to 6 are Officers of bank dealing with affairs of the bank's branches in the Bombay Metropolitan Zone. It is necessary to consider the case of these six persons apart from that against the remaining two accused, viz., accused 7 to 8. The admitted position is that except in a supervisory capacity, accused 1 to 6 could have had nothing to do with the day-to-day conduct of the bank's Khand Bazar branch.

10. Accused 1 is the Managing Director/Chairman, and, as such, the senior-most Officer of the Bank of India. In the complaint, he has been described as "senior-most Officer attached to Bank of India and in charge of its banking operations". If the idea is to point accused 1 as some sort of a master Don, the depiction fails to carry conviction. A person may be in over-all charge of an institution. That does not render him liable for all the misdemeanours and crimes committed by every employee of the organisation. Complainant's advocates wrote a number of letters to accused 1 complaining of the conduct of accused 3 to 5. On 2-2-1983, complainant had an interview with him and gave a full picture of the true position. On that occasion, accused 1 is said to have given an assurance that he would take a proper decision after going through the entire papers which were in a mess. Letter dated 9-2-1983 was addressed to accused 1 by complainant's advocates wherein a detailed picture of the forging of OD174 was set out and there was a definite allegation that the forgery was the work of bank Officers at all levels. Another letter sent by the complainant's advocates to accused 1 was that dated 16-5-1983. It is said that in reply to that letter, despite knowledge, the bank continued to maintain that OD174 and the appropriation letters which were alleged to be forgeries were genuine. There is a recital in the complainant

about all accused, inclusive of accused 1, having perpetrated a serious fraud upon the complainant with the object of depriving him of Rs. 38,00,000/- and forging and making use of forged documents. Para 24 of the complaint contained a number of grounds designed to show that OD174 was a forgery. These grounds are argumentative and inferential. How OD174 must have been fabricated is explained in para 25 of the complaint. Para 26 suddenly avers that for the reasons stated in paras 24 and 25, accused 1 to 8 are patently guilty of forgery, etc. The conclusion does not follow from what precedes it. The preceding paragraph is argumentative and inferential. It does not specify facts indicating the place, manner and mode of committing the offences ascribed to various offenders. In effect, complainant jumps from a conclusion to the reasoning and not vice versa. The allegation is that because OD174 and the appropriation letters had been forged, it followed that accused 1 along with others, was guilty of the forgery, of making use of forged documents and breach of trust, etc., etc. Para 29 of the complaint is another attempt to fasten guilt upon the accused persons. The accused mentioned in this para are accused 5 to 10. Para 30 of the complaint is a summary of what has been set out in the preceding para vis-a-vis accused 5 to 8. This does not restrain the complainant from reciting in para 31 that all the accused, inclusive of accused 1, were therefore parties to forgery and misuse of documents. Para 32 contains a recital that the guilt of accused 1 to 10 is obvious and that they had acted in conspiracy with each other to commit offences of cheating, forgery, breach of trust, etc., etc. At the end it is said that accused 1 to 8 parted with Rs. 41,00,000/- long before the completion of the shipment and thereby caused a serious loss to the Bank of India. To cover up their culpability, they had forged documents and tried to get the bank reimbursed at the cost of the complainant.

11. In relation to accused 2, the specification is that he had received report of the CVO which showed that OD174 and four appropriation letters came into existence after December 1972; his being the recipient of notices sent on behalf of the complainant; and has being informed by the complainant of the true position and in particular the attempts made by accused 5 to 6 to get from him a receipt in full and final satisfaction of the claim amounting to Rs. 45,00,000/-. It is further said that he promised to convey the views of the complainant to accused 1. Accused 2 is also alleged to have been privy to the design to recover Rs. 41,00,000/- from complainant.

12. I need not detail the specifications in relation to accused 3 to 4. These are a mere reproduction of whatever has been said against accused 1 and 2.

13. There is slightly more material against accused 5 to 6. They are the Manager and Deputy Manager of the Bank of India's Bombay Metropolitan Zone. In so far as accused 5 is concerned, it is said that he sanctioned a loan of Rs. 13,50,000/- to complainant. The loan was sanctioned on 23-3-1982, though the actual disbursement was made on 13-3-1982. This could have been done only if accused 5 had an unhealthy interest in accused 9 and 10. But it must not be

forgotten that the loan was sanctioned upon a request made by the complainant, who pleaded urgency in the grant thereof because "we are executing urgent export orders" (see letter dt. 15-2-1982 addressed by complainant to Khand Bazar branch). Complainant admittedly was an esteemed constituent of the bank. At the end of August 1982, an attempt is said to have been made by accused 5 to 8 to get complainant and his father to sign three documents which already bore the signature of accused 9 and 10. A reference to this is to be found in para 16 of the complaint. This apart, what is clear is that the efforts of accused 5 to 8, were rebuffed. Thus at the most accuse 5 to 8 in trying to get complainant and his father to sign the documents may be said to have committed an act preparatory to the commission of an offence. In the first week of September 1982, accused 5 is said to have informed complainant of the bank's readiness to grant him the balance of the loan given against the lease of the Andheri premises without the production of a NOC. All this is said to have been done to enable the Parikh Brothers to fatten upon money belonging to the complainant. Complainant, unaware of the true intentions of the bank's Officers and Parikh Brothers, made over four blank appropriation letters to accused 5. These appropriation letters were later utilised, rather misused, to denude complainant and his relations of the fixed deposits made by them with the bank. The money of course went for the use of the Parikh Brothers. Accused 5 denied in writing a claim of complainant that the bank acted illegally in appropriating the fixed deposits pursuant to the letters of appropriation. He refused to grant inspection of documents to complainant on the specious ground of absence of litigation. An advance of Rs. 13,50,000/- was given to the complainant to enable him to come to the aid of the Parikh Brothers. This was done upon a request made by him on 15-2-1982. Accused 5 to 8 who are said to have aided him in getting this money at an early date are accused of having been "helpful" so as to aid the Parikh Brothers and thus cheat the complainant. The material in relation to accused No. 6 consists of all that recited against the fifth accused and accused 1 to 4.

14. Dr. Desai for the petitioners says that the material against accused 1 to 8 is totally deficient in showing the existence of any ground, much less sufficient ground, for proceeding further with an enquiry. The object of the enquiry must be discovery of the truth or falsehood of the allegations in so far as they pertain to these accused. In reply, quite apart from the details referred to above, it is contended that despite the receipt of the report of the CVO, the petitioners went on maintaining that OD174 and the appropriation letters were genuine. On the basis of these documents, complainant was sought to be deprived of Rs. 41,00,000/- Sums lying with the bank to the credit of himself and his relations were appropriated towards advances made to Parikh Brothers. This, if nothing else, made the accused guilty of the offence punishable u/s 471, Penal Code. Section 471 is aimed against fraudulent or dishonest use as genuine of any document, which the user knows or has reason to believe to be forged document. According to complainant's Counsel even the insistence upon the use

of the documents by the petitioners was enough to render them liable u/s 471. In this connection, reliance was placed upon legal Legal Remembrancer of Govt. of West Bengal Vs. Haridas Mundra,

In that case two forged bills were used to make entries in the books of the account of a concern. This led to a prosecution u/s 471. But that by itself is of no relevance to the present case. The very words of S. 471 indicate that the use as genuine of a forged document has to be with an intent dishonest or fraudulent. A mere erroneous belief and persistence in a wrong or perverse opinion cannot be said to be offence tainted with a dishonest or fraudulent intent.

15. The other material said to establish the existence of a prima facie case against the petitioners is the preliminary statement of the complainant, commonly referred to as the verification, has this -

OD174 though it bore the signature of complainant and his father, was not signed by them on 17-2-1982 as the document purported to show on the face thereof. In this connection, complainant relied upon the CVO's report. That report made no reference to OD174 or the appropriation letters. In other words, and that is a conclusion of the complainant, these documents in a fabricated state, came into existence after December 1982 when the report of the CVO was drawn up and circulated. Presently, I shall not refer to the allegations against accused 8 in the verification. All that is said against accused 5 and 6 is an assurance on the part of accused 8 that he would see to it that they sanctioned at an early date the loan of Rs. 13,50,000/- which was required to finance purchase of barley by Parikh Brothers. Complainant refers to the patently bogus character of the bills of lading and mentions, that despite this, a sum of Rs. 41,00,000/- was released to finance Parikh Brothers. The appropriation letters were taken from him on the understanding that they would be used to give him a sum of Rs. 27,00,000/- against the Andheri property. This sum was not to be utilised for the purpose of Parikh Brothers. Yet, the appropriation letters were later utilised to reimburse the bank for advances made to Parikh Brothers. Complainant makes a reference to the insistence of the petitioners upon using forged documents to recover Rs. 41,00,000/-. At the end, complainant says that the reliance placed on the documents by accused 1 to 7, is despite full knowledge of the true position. The true position, according to him, is that OD174 and the appropriation letters were forged and could not have been used to advance his monies to the Parikh Brothers or to reimburse the bank for the defaults committed by Parikh Brothers in respect of monies granted to them. In fact, at the very inception Parikh Brothers had undertaken not to seek any finance except the Counter Performance Guarantee from the bank. As to the documents, these consist of the alleged forgeries, correspondence exchanged between parties, extracts from accounts, etc., etc. It is on the above material that the existence or otherwise of sufficient ground has to be tested.

16. As said earlier, material warranting belief that a prima facie case exists, or to put it differently, that there is sufficient ground for proceeding, has to consist of

fact specification. It is not enough to say that so and so has forged such and such document, has committed criminal breach of trust to this or that extent or has knowingly used as genuine a document which he knows or has reason to believe to be false. These are conclusions, assertions, inferences and allegations bereft of material whereupon a belief can be founded. Even for the formation of a suspicion one is not to be carried away by strong words indignantly uttered. The indignation may be simulated and the strong language may be a cloak to cover the hollowness of the accusation. If this is borne in mind, it will be clear that there is not the slightest material against the accused 1 to 6. Accused 1 is the Principal Officer of the Bank of India. From this, it does not follow that he was conversant with the doings of the various branches of the said bank. It is not complainant's case that OD174 and four appropriation letters were ever in his custody. That he was made conversant with complainant's case or that he gave an assurance to look into the matter cannot be construed as evidence of a fake show of reasonableness designed to ward off the complainant or his suspicions. Accused 1's directing a refutation of complainant's version contained in communications sent by his advocates can certainly not be described as criminal. That the CVO's report had come to him does not warrant the inference that he had read it. But even otherwise, a refusal to accept the correctness of the said report does not mean that accused 1 harboured any criminal intentions. That the CVO's report was a well reasoned one or that it could be rejected only for good reasons cannot render accused 1 liable for a crime. If mistaken opinions and beliefs are to be equated with crimes, everyone of us would be in the danger of being booked under the Penal Code. Fortunately, things have not come to this pass till now. Accused 1 to 4 have been dragged in because they preferred to accept the version of their subordinates rather than complainant supported as he was by the CVO. But that would not make them guilty of an indictable offence. Complainant is not unaware of the hollowness in his complaint as against accused 1 to 4. That is why the recourse to the slightest that could help him to implead these four persons. Para 22 of the complaint speaks of a letter written to accused 4 and the meeting with that person. The impression sought to be given is that accused 4 though convinced of the genuineness of the version, fobbed him off by saying that he did not want to render any assistance inasmuch as the bank stood reimbursed by having frozen all the monies lying to the credit of the complainant and his relations. Stunned by this, complainant and his advocates requested for an appointment with accused 3. Accused 4 after meeting accused 3 replied that that person was not in a position to meet complainant and his advocate. At the most, this would show bureaucratic insensitiveness. As yet, the statute book does not recognise this callousness as a crime. Can it be viewed as suspicious conduct, conduct indicative of accused 3 and 4 being party to the conspiracy spoken of in the last para of the complaint ? But there is no evidence of the conspiracy, except in the use of strong words to that effect in the complaint of the complainant. Para 23 of the complaint speaks of "total lack of response from the concerned Officers of the bank". Now a bank, even the Khand Bazar branch, consists of hundreds of employees apart from accused 1 to 6. The

complaint is liberally sprinkled with words like forgery, fraud, dishonesty, fabrication, cheating, breach of trust, conspiracy, concoctions, beneficiaries of fraud, etc., etc. These words do not make good the missing essentials, though they may seem a good cloak to the basic hollowness of the complaint. Accused 5 and 6 are sought to be dragged in because of the work done by them in the grant of an advance to complainant to enable him to finance the purchase of the barley by Parikh Brothers. On his own admission, complainant was led into this because of the commitment he had already made. Letter dated 15-2-1982 speaks of the urgent requirement for the advance as an export order had to be executed. If some concessions were given to a privileged client and, complainant was that, I do not see how the assistance rendered by accused 5 and 6 can be looked upon as evidence of dishonesty, fraud or even a desire to favour the Parikh Brothers at the cost of the complainant. Prima facie, letter dated 15-2-1982, gives the impression of complainant executing, not financing an export order. The plea that this letter was written at the behest of accused 8, may be true. Nonetheless, complainant knew the true implications of the words to which he was lending his signature. That accused 5 and 6 wanted him to sign the documents which already have the signatures of accused 9 and 10, is hardly proof of their culpability. Possibly they were trying to take steps to protect the interests of the bank. That accused 5 obtained the letters of appropriation from complainant and his relations is again an indication of steps being taken to protect the interests of the bank. An advance was going to be given to the complainant. This was to be done in the absence of a vital document like the NOC. The bank had to have sufficient security for making the advance. Letters of appropriation to act upon the fixed deposits in the event of defaults were perfectly legitimate. In fact, so legitimate were they that even the complainant saw nothing wrong in making them over after deliberation to accused 5. That these letters were subsequently "touched up" to give the impression of their being eligible for use in the case of default by the Parikh Brothers is neither here nor there. The touching up is not shown to be the hand work of accused 5. Because that he requisitioned them, it does not follow that he was responsible for the alleged fabrication. To recapitulate, the material placed before the Magistrate in relation to accused 1 to 6, does not indicate the existence of such facts or circumstances as would be reflective of the commission of any crime. This deficiency is not made good by the mere use of expressions like perpetration of fraud, forging of documents to cheat, commission of criminal breach of trust and dishonest use of a false document to foist a liability, etc., etc. Accused 1 to 6 had no direct connection with complainant in the matter of the transaction with the Parikh Brothers or the advances made to him upon the lease of the Andheri premises. These were dealings between the complainant on the one hand and the Khand Bazar branch of the other. If a supervisory capacity, accused 5 and 6 did append their signatures to the grant of advances of complainant, that was because of their supervisory office vis-a-vis the bank's branches in the Metropolitan Zone of Bombay. Refuting the complainant's claim or about his being liable for the loss flowing from the last consignment of Parikh

Brothers falling through cannot be evidence of any crime. Complainant claimed that the bank was seeking to make him liable for the loss on the basis of forged documents. This allegation was being contradicted by accused 1 to 6 who were asserting that the document, viz., OD174 and the four appropriation letters were genuine and that what false was the complainant's labelling them to be forgeries. Taking the complaint at its best, all that can be said against accused 1 to 6, is that despite good material to support the complainant's stand, they persisted in overlooking the same and holding him liable to reimburse the bank.

17. In so far as accused 7 is concerned, complainant's case as against him is that he was a successor to accused 8 as Manager of the Khand Bazar branch. Accused 7 took over from accused 8 from 7-8-1982 and continued to function in that capacity till May 1983. Accused 7, it is alleged, was a signatory to letter dated 6-8-1982 which informed complainant of the loan for Rs. 1,50,000/- having been sanctioned. A follow up letter dated 24-8-1982 was sent by accused No. 7 in which complainant was asked to refund the amount. This is because the usual case of the complainant against all the accused they must have been parties to the fabrication of OD174 and the appropriation letters. This does not carry the complainant's case any further, and certainly not against accused 7. Taking all these recitals together it does not follow that any crime is made out against accused 7.

18. In relation to accused 8, the complainant stands on a stronger footing. It was argued that the material as against accused 8 was not credible and did not constitute legal evidence to justify the issue of process against him. It is not possible to agree with this submission. Para 6 of the complaint shows that accused 8 was responsible for introducing the Parikh Brothers to the complainant. He did not stop at an introduction. It was accused 8 who invited complainant to participate in the furnishing of a Counter Performance Guarantee which at a minimum risk would ensure a lucrative return of lacs. Then there is the alleged assurance given by accused 8 of complainant being called upon to participate in a venture which was 100% safe. Complainant made it clear that he could not comprehend the true nature of the transaction but would go headlong into it, provided it had the recommendation of accused 8. Parikh Brothers, it subsequently transpired, had a poor reputation for credit-worthiness. They had been placed on the "prior clearance list". In other words, unless cleared by specific authorisation of certain higher-ups, no advances could be made to party on the basis of their own security. Accused 8 was supposed to know of the straitened financial condition of the Parikh Brothers. This was not made known by him to the complainant. The suppression of a vital detail when inviting another to stand guarantee for a person may be evidence of dishonesty and/or fraud. The deal between the Khand Bazar branch on the one hand and the complainant on the other was negotiated on papers drawn up during the tenure of accused No. 8 as the Manager of the Khand Bazar branch. If so, the advances were made to Parikh Brothers from out of funds released for complainant during the tenure of accused 8. The complainant speaks of unusual interest shown by

accused 8 in obliging Parikh Brothers. Complainant's penchant for exaggeration and vituperation notwithstanding, it must be said that a satisfactory case for the issue of process against accused 8 had been established. To that extent the Magistrate's order cannot be faulted.

19. It was contended that even if the record at present does not make out a prima facie case against accused 1 to 7, complainant should not be excluded from the opportunity to establish such a case against them, at a later stage. I am concerned only with the material on the basis of which Magistrate has taken cognizance. What material comes subsequently, and what effect can be given thereto, is a question that has not yet arisen. At the appropriate stage that will have to be resolved by the Magistrate upon a proper application being made to him. On 19-11-1983, there was no material before the Magistrate to warrant the issue of process against accused 1 to 7.

20. Petitioners contend that the complaint launched against them is not maintainable inasmuch as the same was not preceded by sanction from the appropriate Government. In support of this contention, reliance is placed upon S. 197 of the Code of 1973. That section, in so far as it is relevant for our purposes, reads thus :-

"When any person who is or was a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction - (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union or the Central Government."

Though the petition pleads the bar of S. 197, Cr.P.C., in relation to all the petitioners, Mr. Desai fairly conceded that the plea could be taken advantage of only by accused 1 and 2. Mr. Desai submits that accused 1 and 2 were public servants as contemplated by Clause 12 of S. 21, Penal Code. This clause reads :-

"The words "public servant" denote a person falling under Every person - (a)

(b) in the service or pay of a corporation established by or under a Central, Provincial or State Act or a Government Company as defined in S. 617, Companies Act, 1956 (1 of 1956)."

It was further argued that the acts allegedly amounting to an offence ascribed to accused 1 and 2 would attract the words "acting or purporting to act in the discharge of official duty" occurring in S. 197 of the Code of 1973. To this, the complainant's reply is that accused 1 and 2 are not public servants vis-a-vis S. 21, Penal Code. This is deduced from the relevant provisions of the Banking Regulation Act, 1949, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the Banking Companies (Acquisition and Transfer of

Undertakings) Act, 1980 (see Sections 46A, 14 and 14 respectively of the three Acts). The submission is that accused 1 and 2 according to the above provisions are "public servants" for the limited purpose of Chap. IX, Penal Code. This chapter covers Sections 161 to 171 of the said Code. For all other purposes, they are excluded from the description of "public servant". Having regard to the specific words used by the Banking Acts aforementioned, reliance cannot be placed upon Clause 12 of S. 21, Penal Code. At any rate, it cannot be said that what is ascribed to accused 1 and 2, viz., commission of forgery, dishonest use of a forged document and criminal breach of trust constitute acts done "in the discharge or purported discharge of official duty". At third alternative put forth on behalf of the complainant is that further evidence is necessary to rule upon the submission, for that alone would show whether accused 1 and 2 merely used their office to commit the offences ascribed to them or whether the discharge of their duties was so interwoven with the acts constituting the offence, that it became impossible to sever the two. A very interesting and erudite argument has been advanced by Counsel on both the sides. In view of my finding on the first point, it is not really necessary to give a considered finding on the tenability or otherwise of the special defence raised on behalf of accused 1 and 2. But it is necessary that I take note of some of the submissions made by Counsel.

21. Section 46A, Banking Regulation Act, 1949, lays down that a chairman, director, manager and other employees of a banking company "shall be deemed to be a public servant for the purposes of Chap. IX Penal Code". In the Acquisition and Transfer of Undertakings Act of 1970, S. 14 prescribes that every custodian of a corresponding new bank, viz., a nationalised bank, shall be deemed to be a public servant, again, "for the purposes of Chap. IX, Penal Code", Act No. 40 of 1980 in S. 14, repeats the deeming being restricted to Chapter IX of the Penal Code. The reply given on behalf of accused 1 and 2 to the very arresting reply of complainant is that the same was introduced by way of abundant caution. It did not exclude the operation of Clause 12 of S. 21, Penal Code. Bank employees are "public servants" for the purposes of S. 21 Clause 12(b), Penal Code, is the ratio of the decisions reported in 1979 All LJ 922, Kurian Vs. State of Kerala, and Kundan Lal Sharma Vs. State of Punjab, None of these decisions refers to S. 46A, Banking Regulation Act of 1949 or S. 14 of the 1970 or 1980 Acquisition and Transfer of Undertakings Act. To my mind, where the banking statutes show a limitation, it will not be permissible to overcome these limits, by recourse to the general words used in Clause 12(b) of S. 21, I.P.C. If the legislature wanted certain specific bank employees to be considered "public servants" for a limited purpose, the contrary cannot be held by taking recourse to the wide sweep of S. 21, I.P.C.

22. This brings me to the tantalizing, albeit vexed problem, as to whether the offences ascribed to accused 1 and 2 can be said to have been committed by them "while acting or purporting to act in the discharge of their official duties". The interpretation of these words is not free from doubt. The difficulty is in no way surmounted by the principles enunciated time to time. This is because the

difficulty really lies in the actual application of the principles enunciated, rather than the enunciations of the principle. There has therefore been continued conflict of decisions as to the interpretation to be placed upon the words extracted above. At least three different views have been expressed.

23. The first view is that the section applies only where the offence is such that it can be committed only by a public servant and not by anybody else. This view has been rarely expressed and subsequently declared to be wrong. The sections makes it clear that the test is not whether the offence is capable of being committed only by a public servant and not by anyone else, but whether it is committed in the circumstances specified in the section. In other words, the question as to whether the particular offence comes u/s 197, depends not on the nature of the offence, but on the circumstances under which it is committed. The second view is that the section applies only if the act complained of is itself done by the public servant in pursuance of his public office, although it may be in excess of the duty or in the absence of such duty. The third view is that the section refers to cases where the act constituting the offences is committed in the course of the same transaction in which the official duty is performed or purports to be performed. Differently put, and to use the words of Amrik Singh Vs. The State of Pepsu,

"If act complained of has been done by virtue of the office, sanction would be necessary irrespective of whether it was in fact a proper discharge of his duties by the public servant, because that would really be a matter of defence on the merits."

In the same volume in a different case at page 857 it was observed -

"It is not the duty we have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The section has content and its language must be given meaning."

But the mere fact that an offence is committed while the public servant is engaged in the performance of an official duty does not automatically require Governmental sanction for the offender to be prosecuted. This is because the offence may have been committed purely on private account. The section does not imply that every act which constitutes the offence must be the official duty of the public servant concerned. If that were not the case, the section would have no operation at all as it would be a contradiction in terms in as much as an official act cannot at the same time be an official duty. To clarify, the section contemplates an act which is done by a public officer in his official capacity but which, at the same time, is neither his duty nor his right as such public officer to do, as in that case he would not be committing an offence at all and there would be no question of prosecuting him or obtaining sanction for such prosecution. The other facets of the question have been the subject of a number of decisions by the Supreme Court of which I need only mention the cases reported in Baijnath Gupta and Others Vs. The State of Madhya Pradesh, and P. Arulswami

Vs. The State of Madras, . It would be difficult to scrutinize the applicability or exclusion of the requirement of sanction on the basis of the recitals appearing in the present complaint. The complaint recites material facts and the question of sanction is not entirely independent of supplementary details which can come only through further evidence. Mr. Desai submits that S. 197, Cr.P.C. is automatically attracted because of the complainant's admission that accused 1 and 2 sought to render him liable in the discharge of bank duties. This contention has to be weighed along with the allegation that this insistence was to cover a loss sustained by the bank by the dishonest release of funds to aid the Parikh Brothers. Translated into evidence, this allegation could not sustain the defence of sanction being required. In that event, accused 1 and 2 would have used their office to commit an offence. Performance of an official duty could not be pleaded as a defence to the commission of that offence. I have already held that accused 1 and 2 are not public servants within the contemplation of S. 21 vis-a-vis the offences attributed to them. Therefore, the secondary question of whether the offences were committed in the discharge of official duties does not survive. But if it does, it will have to be held that the same cannot be ruled upon in the absence of fuller evidence.

24. The result is that the petition succeeds in respect of accused 1 to 7. In so far as accused 8 is concerned, the process directed to be issued against him is correct. Hence the order.

ORDER

Process issued against petitioners 1 to 7 vis-a-vis offences punishable under sections 468, 471 and 406 read with 109, quashed and set aside. The complaint as against petitioners 1 to 7 is dismissed. The complaint, in so far as it pertains to accused 8, shall proceed. Rule in the above terms made absolute.

Order accordingly.