

(2014) 11 BOM CK 0090

In the Bombay High Court

Case No : Criminal Writ Petition No. 107 of 2013

Nitin Umesh Sawant

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision : 05-11-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 109, 34, 419, 420, 465

Citation : (2015) ALLMR(Cri) 1964

Hon'ble Judges : Z.A. Haq, J; F.M. Reis, J

Bench : Division Bench

Advocate : Nitin Sardessai, Advocate for the Appellant; S.R. Rivankar, Public Prosecutor, Advocate for the Respondent

Judgement

F.M. Reis, J.

1. The above Writ Petition, inter alia, seeks to quash and set aside by a writ of certiorari or any other writ the FIR no. 76 of 2013 dated 16.2.2013, registered with the Margao Town Police Station.

2. Briefly, the facts of the case are that on 28.07.2012, one Shri Sandip Naguesh Naik visited the office of the Petitioner who is an Advocate and informed him that he intended to purchase from Mrs. Estefania Alvares e Miranda, wife of late Pedro Miranda, Ms. Janet Miranda and others, a plot of land admeasuring 990 square metres which was part and parcel of the property known as "Molianchi Fili" surveyed under no. 4/1 of the Village Davorlim, Salcete, Taluka. It is the case of the Petitioner that he advised the said person to issue a public notice inviting objections from the General Public to the said proposed purchase and, accordingly, a public notice was issued by the Petitioners on behalf of said Sandip Naik on 03.08.2012 in the local newspapers "The Navhind Times" and "Gomantak", which were circulated on 07.08.2012. It is further the contention of the Petitioner that he did not receive any such objections towards the purchases but, however, the said person informed the Petitioner that he had dropped the idea of purchasing the said plot. It is further the contention of the Petitioner that

he learnt in February, 2013, about the registration of the said FIR after reading reports in the local dailies. The Petitioner further came to know that he had been named as an accused for committing offences punishable under Section 465, 468, 471, 419 and 420 read with Section 34 of the Indian Penal Code. The Petitioner thereafter learnt that the said complaint was lodged by the co-owner of plot "F" which also forms part of the said property surveyed under no. 4/1. It is further contended that one Manoj was attempting to dispose plot "F" of the larger property surveyed under no. 4/1. It is further the case of the Petitioner that if the complaint which is dated 12.02.2013 is read as a whole, it clearly discloses that the Complainants are accusing that the accusations in the complaint are against the main accused Mr. Manoj Manikrao Oklekar and some others. It is also alleged therein that public notice was issued by the Complainant nos. 3 and 4 warning any person including Mr. Manoj from attempting to fraudulently dispose of the said plot. It is also contended that said Manoj had executed a false fraudulent Power of Attorney of the Complainants wherein their signatures and photographs have been forged. It is also mentioned in the complaint that said Sandip Naik, who was the client of the Petitioner had backed out from purchasing plot "E" and that he had recovered whatever amount he had paid to the said Manoj. The only allegations as against the Petitioner are that he had not disclosed the name of the clients in the public notice where he had invited objections by way of publication in the news papers and, as such, had conspired with the other accused. It is further the case of the Petitioners that he is not involved in any offence and, consequently, the FIR lodged against the Petitioner deserves to be quashed and set aside.

3. The Respondent-State have filed a lengthy reply disputing the claims put forward by the Petitioner.

4. Shri Sardesai, learned Counsel appearing for the Petitioner, has pointed out that on meaningful reading of the complaint, the only allegation which can be attributed to the Petitioner is that he had issued a public notice at the instance of said Sandip Naik who is his client, which was in the course of his professional duties. Learned Counsel further pointed out that merely because the name of the client was not disclosed in the public notice by itself is not a criminal act and further the allegations of conspiracy as against the Petitioner is merely a bald statement without any merit on record. Learned Counsel further pointed out that there is nothing disclosed in the complaint which would suggest that at any point of time, the Petitioner had conspired with any of the accused while filing the FIR. Learned Counsel further pointed out that it is well settled by the Apex Court that upon meaningful reading of the complaint in case the accusations in the FIR even if accepted to be true, fails to show or demonstrate any offence, the same can be quashed by this Court.

In support of his said submissions, the learned Counsel has relied upon the Judgments of the Hon"ble Apex Court reported in State of Haryana and others Vs. Ch. Bhajan Lal and others, , and another Judgment of the Apex Court

reported in Central Bureau of Investigation, Hyderabad Vs. K. Narayana Rao, . Learned Counsel prayed out that the FIR against the Petitioner be quashed and set aside.

5. On the other hand, Shri S. R. Rivankar, learned Public Prosecutor appearing for the Respondent nos. 1 and 2, has pointed out that the Petitioner is involved in a very grave offence and the complaint discloses enough material to suggest that the Petitioner is involved in the crime attributed to him. Learned Public Prosecutor however does not dispute that substantially the only accusations against the Petitioner is that he had issued a public notice calling for objections.

6. We have carefully considered the submissions of the learned Counsel. We have also gone through the records. The Apex Court in the said Judgment in the case of Central Bureau of Investigation, Hyderabad vs. K. Narayana Rao (supra) has observed at Paras 24, 25, 26, 30 and 31 thus :

"24.The ingredients of the offence of criminal conspiracy are that there should be an agreement between the persons who are alleged to conspire and the said agreement should be for doing of an illegal act or for doing, by illegal means, an act which by itself may not be illegal. In other words, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both and in a matter of common experience that direct evidence to prove conspiracy is rarely available. Accordingly, the circumstances proved before and after the occurrence have to be considered to decide about the complicity of the accused. Even if some acts are proved to have been committed, it must be clear that they were so committed in pursuance of an agreement made between the accused persons who were parties to the alleged conspiracy. Inferences from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation. In other words, an offence of conspiracy cannot be deemed to have been established on mere suspicion and surmises or inference which are not supported by cogent and acceptable evidence.

25. In the earlier part of our order, first we have noted that the respondent was not named in the FIR and then we extracted the relevant portions from the charge-sheet about his alleged role. Though statements of several witnesses have been enclosed along with the charge-sheet, they speak volumes about others. However, there is no specific reference to the role of the present respondent along with the main conspirators.

26. The High Court while quashing the criminal proceedings in respect of the respondent herein has gone into the allegations in the charge-sheet and the materials placed for his scrutiny and arrived at a conclusion that the same do not disclose any criminal offence committed by him. It also concluded that there is no material to show that the respondent herein joined hands with A-1 to A-3 for giving false opinion. In the absence of direct material, he cannot be implicated as

one of the conspirators of the offences punishable under Section 420 read with Section 109 IPC. The High Court has also opined that even after critically examining the entire material, it does not disclose any criminal offence committed by him. Though as pointed out earlier, a roving enquiry is not needed, however, it is the duty of the Court to find out whether there is any prima facie material available against the person who has been charged with an offence under Section 420 read with Section 109 IPC.

30. Therefore, the liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the Bank. In the given case, there is no evidence to prove that A-6 was abetting or aiding the original conspirators.

31. However, it is beyond doubt that a lawyer owes an "unremitting loyalty" to the interests of the client and it is the lawyer's responsibility to act in a manner that would best advance the interest of the client. Merely because his opinion may not be acceptable, he cannot be mulcted with the criminal prosecution, particularly, in the absence of tangible evidence that he associated with other conspirators. At the most, he may be liable for gross negligence or professional misconduct if it is established by acceptable evidence and cannot be charged for the offence under Sections 420 and 109 IPC along with other conspirators without proper and acceptable link between them. It is further made clear that if there is a link or evidence to connect him with the other conspirators for causing loss to the institution, undoubtedly, the prosecuting authorities are entitled to proceed under criminal prosecution. Such tangible materials are lacking in the case of the respondent herein."

(Emphasis supplied)

7. Taking note of the said observations of the Apex Court, and as already pointed out herein, on reading of the complaint against the Petitioner, the only allegation against the Petitioner is that he had issued a public notice on behalf of his client. This act is in the course of his professional duties and merely because such notice has been issued it would not by itself be a case for any criminal action. On going through the complaint, there is total absence of any tangible material to show that the Petitioner had associated with the other conspirators or that there was any agreement with them or he is involved in any alleged crime. In such circumstances, on meaningful reading of the complaint as a whole, we find that the allegations made in the FIR against the Petitioner even if they are taken on their face value and accepted in their entirety, it does not prima facie constitute any offence or make out a case against the Petitioner. The judgment of the Apex Court in the case of K. Narayana Rao (supra) referred to herein above was considered by the Division Bench of this Court in the judgment reported in Smt. Mohana Raj Nair Vs. Central Bureau of Investigation, Union of India and State of Maharashtra, , wherein it has been observed at para 16 thus :

"16.The entire matter can be concluded simply by following the principles in

Central Bureau of Investigation, Hyderabad Vs. K. Narayana Rao, cited by Mr. Dada. There, as here, an Advocate was sought to be prosecuted. There, as here, the case against the advocate was on "mere suspicion and surmises not supported by cogent and acceptable evidence." In that case, too, the advocate was not named in the FIR, and there was no specific reference to his role with the other accused. The Supreme Court held that it is the duty of the Court to ascertain whether there is any prima-facie material; and this, and nothing more, has been our endeavour as well. Unless we find that there is at least a prima-facie case against an advocate who gave an opinion a "best judgment assessment", as it were, based on her knowledge of the law, her appreciation of the facts and her reading of the documents that he played an active role in the fraud alleged, we cannot but conclude that there is no case to be made out against that advocate."

Considering the said judgment of the Apex Court and the material produced before us, we find that mere publication of a notice on behalf of the client on the basis of his opinion and as there is no specific reference to his role with the other conspirators, the allegations of conspiracy are based on mere suspicion and surmises and consequently the FIR lodged against the petitioner only deserves to be quashed and set aside. As such, we find that the FIR lodged against the petitioner only for the aforesaid reasons deserves to be quashed and set aside. It is made clear that the FIR lodged against the petitioner only is quashed and set aside and not against the other persons.

8. In view of the above, we pass the following :

ORDER

(1) The FIR no. 76/2013 dated 16.02.2013, registered with the Margao Town Police Station, as against the Petitioner only stands quashed.

(2) Rule is made absolute in the above terms.