
(2017) 11 BOM CK 0004
In the Bombay High Court
Case No : 670 of 2015

Shailesh S/o Harish Kulkarni

APPELLANT

Vs

State of Maharashtra through P.S.O. Sadar, Nagpur

RESPONDENT

Date of Decision : 06-11-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 482](#), [Section 397](#), [Section 197](#) / [Section 197\(1\)](#) - Saving of inherent powers of High Court - Calling for record

Citation : (2017) 11 BOM CK 0004

Hon'ble Judges : A.S. Chandurkar

Bench : SINGLE BENCH

Advocate : V. V. Bhangde, A. Madiwale, Masood Shareef

Judgement

1. The applicant who is the original complainant has filed the present criminal application under Section 482 of the Code of Criminal Procedure, 1973 (for short, the Code) as he is aggrieved by the order dated 11-6-2015 passed by the learned Additional Sessions Judge-III, Nagpur by which the nonapplicant No.2 herein stands discharged in the complaint proceedings.

2. The facts in brief are that the complainant is a railway contractor engaged in execution of various contracts. In those contracts, it was stipulated that in the event of any disputes or differences the same would be settled through arbitration. One such dispute arose which was then referred to the Arbitrator. According to the complainant, in those proceedings a particular document was filed on behalf of the Railway authorities which appeared to the complainant to be fabricated. On that basis, a private complaint came to be filed alleging fabrication of the documents resulting in commission of offence under Section 193 and 204 of the Indian Penal Code.

3. In those proceedings process came to be issued by the learned Magistrate. The nonapplicant No.2 - accused No.1 moved an application for his discharge on

the count that no offence as alleged was made out in the complaint. Reply was filed by the complainant and the learned Judicial Magistrate First Class rejected that application. The accused No.1 being aggrieved filed a revision application under Section 397 of the Code. The learned Judge of the Sessions Court allowed that revision application on the ground that though it was necessary for the complainant to have obtained sanction under Section 197 of the Code, no such sanction was obtained. It could not be said that there was deemed sanction to the prosecution of accused no.1. It was also held that there was no allegation made in the complaint against the said accused that he had filed the alleged fabricated document in the arbitration proceedings. On that basis said accused came to be discharged.

4. Shri V. V. Bhangde, learned Counsel for the complainant submitted that though the complainant had applied for grant of sanction under Section 197 of the Code, in the facts of the case no such sanction was required to be obtained. Relying upon the judgment of the Hon'ble Supreme Court in *Inspector of Police and another vs. Battenapatla Venkata Ratanam and another* 2015(5) SCALE 253 which judgment was also relied upon before the Sessions Court it was submitted that though the accused no.1 had been working as a public servant, as the allegation was with regard to fabrication of records which was not part of his duty, sanction was not at all necessary. It was submitted that without properly appreciating the ratio of this decision it was held otherwise by the learned Judge of the Sessions Court. It was further submitted that even if the complainant had applied for grant of sanction, the same would not preclude the complainant from urging that sanction was in fact not necessary to be obtained. In that regard, the learned Counsel placed reliance on the decisions in *P. Nallammal and another vs. State* (1999) 6 SCC 559, *Central Council for Research in Ayurveda and Siddha and another vs. Dr. K. Santhakumari* (2001) 5 SCC 60 and *State of Rajasthan and another vs. Surendra Mohnot and others* (2014) 14 SCC 77. It was then submitted that necessary allegations were made in the complaint alleging commission of offence of fabrication by the accused no.1. The learned Judge of the Sessions Court misconstrued the averments in the complaint while holding otherwise. He also submitted that there was delay on the part of the learned Judge of the Sessions Court in deciding the discharge application. He referred to the *Roznama* and submitted that though the learned Counsel for the parties had been heard, the proceedings were unnecessarily adjourned for passing the final order. This delay was unwarranted especially when the relevant case law was also placed on record. For said purpose, the learned Counsel placed reliance on the decision in *Joint Commissioner of Income Tax Surat vs. Saheli Leasing and Industries Limited* (2010) 6 SCC 384 and submitted that even on this ground the impugned order was vitiated.

5. Shri Masood Shareef, learned Counsel for the nonapplicant no.2 - accused no.1 supported the impugned order. According to him, it was rightly found by the Sessions Court that in the entire complaint there were no allegations of fabrication of records at the instance of the accused no.1. It was rightly found

that in absence of such allegation the accused no.1 was entitled for discharge. He referred to the averments made in the complaint to substantiate his submissions. It was then submitted that the accused no.1 having acted in discharge of his duty, it was necessary for the complainant to have obtained necessary sanction under Section 197 of the Code. The complainant was aware of this position and had therefore, applied for grant of sanction. Having done so, it was not now permissible to contend that such sanction was not necessary. It was urged that the accused no.1 was entitled for necessary protection and absence of such sanction entitled the accused to be discharged. It was also submitted that the complainant had approached this Court praying that necessary directions be issued to the concerned Authority for granting sanction to the prosecution of the accused. Those proceedings, however, were not decided in favour of the complainant. In these facts, it was submitted that there was no question of any deemed sanction and on account of absence of sanction the accused was entitled for discharge. In support of his submissions, the learned Counsel placed reliance on the decisions in General Officer Commanding, Rashtriya Rifles vs. Central Bureau of Investigation and another (2012) 6 SCC 228, Sankaran Moitra vs. Sadhna Das and another (2006) 4 SCC 584, L. Narayana Swamy Vs. State of Karnataka and others (2016) 9 SCC 598, State of UP vs. Parasnath Singh (2009) 6 SCC 372 and Sunil S/o Ramrao Paraskar Vs. State of Mah. and others 2006 (6) Mh.L.J. 690.

6. Shri A. Madiwale, the learned Additional Public Prosecutor for the nonapplicant no.1 supported the impugned order.

7. I have heard the learned Counsel for the parties and with their assistance, I have perused the material placed on record. Perusal of the complaint filed by the applicant herein indicates that during the course of arbitration proceedings a document at AnnexureXIII which was a letter addressed to the complainant was sought to be relied upon alongwith a postal receipt to indicate its dispatch to the complainant. These original documents were produced by one Shri Sanjeev Kumar which were examined by the complainant as well as Members of the Arbitral Tribunal. According to the complainant, the said document appeared to be a fabricated document. In paras 4 and 6 of the complaint, it is stated that the accused with intention and common knowledge used that document to make a show that the same has been dispatched when in fact that document was not dispatched but some other document was so dispatched. According to the complainant, these acts were done knowingly and deliberately by the accused. Hence, as per the complaint, the accused had knowingly and deliberately fabricated and produced false documentary evidence.

8. On reading of the entire complaint, it can be seen that according to the complainant, the act of using the registered post receipt of another document to prove the dispatch of letter dated 24-3-2003 was a fraudulent act done knowingly by the accused. On the basis of the averments made in the complaint it can be said that the necessary averments concerning the accused were present

therein. The learned Judge of the Sessions Court while considering this aspect of the matter has observed in para 22 of the order that there was no allegation against the accused no.1 that he had filed the alleged document in the arbitration proceedings. On the contrary, it was pleaded that the said document was filed by one Shri Sanjeev Kumar. As per the complaint, the complainant was aggrieved by the act of the accused of fabricating the document with the intention of using the same as documentary evidence before the Arbitral Tribunal. The reference to the document being filed before the Arbitral Tribunal by Shri Sanjeev Kumar was merely stated as a fact. Said Shri Sanjeev Kumar was not an accused and the prima facie allegations of knowingly and deliberately fabricating that document were levelled against the accused. In that view of the matter, I find that the learned Judge of the Sessions Court erred in observing that there was no allegation against the accused no.1 with regard to that document. Merely because that document was tendered by Shri Sanjeev Kumar, the same was not a reason to hold that the accused no.1 was not alleged to be connected with it. These observations in the impugned order are therefore liable to be set aside.

9. Inso far as the aspect of grant of sanction is concerned, the complainant in para 9 has pleaded that he had sought permission from the Competent Authority on three occasions but there was no communication in that regard by the said Competent Authority. On that basis it was pleaded that sanction was deemed to have been granted by the Competent Authority. Under Section 197 (1) of the Code, no Court can take cognizance of an offence alleged to be committed by a public servant while acting or purporting to act in the discharge of his official duty. The aspect of sanction goes to the jurisdiction of the Court inasmuch as taking of cognizance itself of such offence is barred in absence of sanction. The Constitution Bench of the Hon"ble Supreme Court in *Matajog Dobey V. H. C. Bhari*, AIR 1956 SC 44 has held that the Court is required to see if it could take cognizance of the case without previous sanction. For this purpose, the Court has to find out if the act complained of was committed by the accused while acting or purporting to act in the discharge of official duty. Thus unless the Court comes to the conclusion that sanction is either required or otherwise it cannot be said that the jurisdictional aspect has been considered by the Court. It is well settled that in the matter of jurisdiction, the parties cannot confer the same on the Court. It is for the Court concerned to at least prima facie come to the conclusion that it has jurisdiction to proceed with the matter. When the question as regards requirement of previous sanction arises, it has to examine as to whether previous sanction is necessary or not while taking cognizance.

10. In the present case, according to the complainant such sanction was necessary and despite attempting to seek the same there was no communication in that regard. Hence, according to the complainant, sanction was deemed to have been granted. On the other hand, according to the accused such sanction having been sought and the same not having been granted, the cognizance of the offence in question could not have been taken. The learned Judge of the

Sessions Court in this regard proceeded on the basis that it was an admitted fact that sanction to prosecute the accused was necessary but the same was not filed on record. It ought to have seen that what was admitted was that sanction had been sought by the complainant but the same had not yet been received. Though there cannot be any deemed sanction under Section 197 of the Code, the question that was required to be examined by the Court as a jurisdictional question was whether in the facts of the case such sanction was necessary or not. According to the complainant, in view of the decision in Inspector of Police and another (supra), such sanction was not necessary. Though it is true that the complainant had averred that sanction was necessary, it was open for him to contend that on a correct application of legal precedent such sanction was in fact not necessary. As held in P. Nallamal and another, Central Council for Research and Surendra Mohnot and others (supra) a concession made on a legal proposition can be resiled from. In my view, irrespective of the stand taken as regards requirement of sanction, the Court ought to have addressed itself to that issue and ought to have independently come to the conclusion that previous sanction in the facts was either required or not. Accepting the stand of a party either way would amount to abdicating the examination of the jurisdictional question.

11. In the present case I find that the learned Judge of the Sessions Court has not addressed himself to the question as to whether in the facts of the case sanction was necessary or not before proceeding with the complaint. The learned Judge of the Sessions Court ought to have independently examined the said matter and should have come to a conclusion that sanction was either necessary or not necessary in the facts of the case. He however proceeded on the basis that as sanction was sought and there was no order granting such sanction, the cognizance of the complaint was barred. By adopting this course, the Sessions Court failed to examine the jurisdictional aspect as regards requirement of sanction. On this count, I find that the impugned order is liable to be set aside.

12. Though it is true that the complainant had filed Criminal Writ Petition No.380/2014 praying that the Competent Authority be pleased to accord sanction which proceedings came to be withdrawn with liberty to renew the request after which Writ Petition No.2560/2015 was filed seeking similar relief which proceedings were dismissed for want of prosecution, said proceedings do not further the case of either party. The question as regards requirement of sanction is still unanswered.

13. As the impugned order suffers from nonconsideration of the question as to the requirement of sanction, I find that the proceedings deserve to be reexamined by the Sessions Court. The parties would have to address the Sessions Court on that aspect. I therefore do not deem it necessary to refer to the decisions relied upon by the learned Counsel for the parties on the question of requirement of sanction or otherwise. The aspect of delay in deciding the proceedings by the Sessions Court has not vitiated the proceedings as urged.

14. In view of aforesaid, the following order is passed:

(1) Order dated 11-6-2015 passed in Revision Application No.402/2012 is set aside.

(2) The revision application is restored to the file of the Sessions Court. The Sessions Court shall reconsider the revision application as well as the question as to whether sanction under Section 197 of the Code is necessary or not in the facts of the case. It is clarified that this question shall be considered on its own merits without being influenced by any observations made in this order.

(3) The parties shall appear before the Sessions Court on 8-1-2018 and the Sessions Court shall decide the proceedings expeditiously in accordance with law.

(4) At this stage, the learned Counsel for the nonapplicant no.2 seeks stay of the effect and operation of this order. As the parties have been directed to appear on 8-1-2018, the stay as sought stands granted.