(1998) 12 SHI CK 0008

In the High Court Of Himachal Pradesh

Case No : Criminal Revision No. 29 of 1998

Shanta Kumar APPELLANT

Vs

Virbhadra Singh RESPONDENT

Date of Decision : 16-12-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 204, 251, 397, 401, 482
Penal Code, 1860 (IPC) — Section 499, 500

Citation : (1999) 2 ShimLC 116

Hon'ble Judges : R.L. Khurana, J

Bench : Single Bench

Advocate : Rajindra Kishore Sharma and R. Dogra, for the Appellant; M.S. Chandel, for the Respondent

Final Decision : Dismissed

Judgement

R.L. Khurana, J.—The Petitioner, hereinafter referred to as the accused, has directed the present petition under Sections 397, 401 and 482 of the Code of Criminal Procedure, 1973 (for short: the Code) against the order dated 8.12.1997 of the learned Chief Judicial Magistrate, Shimla, whereby his application made under Sections 91 and 94 of the code for seizure and production of the record was dismissed.

2. Briefly stated, the facts of the case leading to the present petition are these. On the basis of the complaint filed by the Respondent, hereinafter referred to as the complaint, the accused is facing trial for the offence u/s 500, Indian Penal Code. The complainant has averred that the accused, during the course of his election compaign, when the accused was contesting the election to the Lok Sabha from Kangra constitutency, had made derogatory public statements on different occasions which were published in various newspapers. According to the news item published in Indian Express in its issue dated 25.2.1996, the accused is reported to have stated that the amount of commission paid on raising of loans by the State Government had been deposited in foreign bank accounts of the

relatives of certain influential persons of the State. Similarly in the newspaper Jansatta dated 20.4.1996, the accused is reported to have made a statement making direct allegations against the complainant to the effect that in obtaining the loans by the State during the year 1994-95, the complainant was directly involved in taking the "Dalali" of rupees three crores.

3. On the basis of the above news items, the complainant is prosecuting the accused for the offence u/s 500, Indian Penal Code. It is averred that the allegations made by the accused are false to his own knowledge and the same have been made with the intention to harm the reputation of the complainant in the eyes of the general public.

4. On the accused having put in appearance in response to the process issued to him u/s 204 of the Code, he was served with a notice of accusation as required u/s 251 of the Code. The accused did not plead guilty and has claimed to be tried.

5. While the case was pending for evidence of the complainant an application was made by the accused on 23.4.1997 under Sections 91 and 94 of the Code for summoning of the record as detailed in para 7 of the application and to take such record into possession and custody of the Court for the purpose of cross-examination of the complainant and his witnesses. Such application was allowed ex parte by the learned Magistrate on the same day, that is, 23.4.1997.

6. The complainant thereafter on 15.5.1997 made an application for recalling of the order dated 23.4.1997 allowing the summoning of the record u/s 91 of the Code.

The learned Magistrate after hearing the parties vide his order dated 2.8.1997 recalled his earlier order dated 23.4.1997 and it was directed that the application made by the accused under Sections 91 and 94 of the Code "shall be decided afresh on merits after affording to both the parties an opportunity of being heard."

7. The order dated 2.8.1997 was assailed by the accused by way of a revision petition being Cr.R. No. 79 of 1997 before this Court. Such revision petition was dismissed on 1.10.1997 as being not maintainable having been filed against an interlocutory order.

8. The learned Magistrate after hearing the parties vide his impugned order dated 8.12.1997 has dismissed the application made by the accused under Sections 91 and 94 of the Code and has thus refused to summon the record as detailed in para-7 of the application. The accused has thus approached this Court by way of the present revision petition.

The accused has averred in para-7 of his application as under:

7. That it is, therefore, desirable in the interest of justice to summon the following record from the persons, shown and mentioned in the following paras and seize the same and taken in possession by this learned court, for the

purpose of cross-examination of the witnesses at the time of the next hearing of the case:

A : Record from the possession of the Chief Secretary to the Government of Himachal Pradesh, Shimla.

(i) All records concerning loan of Rs. 308 crores raised during the period 1994-95, for which a commission of Rs. 90 lakhs was paid to EIDER FINANCIAL LIMITED, Chandigarh and Rs. 135.5. Lakhs to ALLINAZ CAPITAL AND MANAGEMENT SERVICES, New Delhi. All documents relating to procedure adopted for selection, negotiations of these two companies.

(ii) Reserve Bank of India instructions relating to the loans, payment of commission.

(iii) Report of Comptroller and Auditor-General, Himachal Pradesh, for the year 1995-96 in connection with the raising of loans by the H.P. Government.

B : Records from the possession of the Finance Secretary to the Government of Himachal Pradesh, H.P. Secretariat, Shimla.

(iv) Conduct of rules and procedure for obtaining loans by the Government itself or by different Corporations of Boards through Government.

(v) Instructions issued from time to time during the year 1994-95 relating to the raising of the Rs. 308 crores loan.

(vi) Documents relating to all other loans raised by the State of Himachal Pradesh directly or through Corporations or Boards, during and from the years 1993-1996, along with the terms and conditions.

C : Records from the possession of Secretary Himachal Pradesh State Electricity Board Vidyut Bhawan, Kumar House, Shimla.

(vii) All records of Himachal Pradesh State Electricity Board regarding raising of loan and its resolution, utilization and paying of commission during the years from 1993 to 1996.

(viii) Entire record relating to raising of loan of Rs. 300 crores by Himachal Pradesh State Electricity Board on the instructions of the State Government, including letter No. HPSEB/F&A/LS-EF/94-30406 dated 16.7.1994.

D : Records from the possession of the Managing Director, HIMFED, Shimla.

(ix) All the documents from the HIMFED relating to the payment of the commission of Rs. 90 Lakhs and Rs. 135.5 lakhs.

E : Records from the possession of Mrs. Rama Sinha, Chairman Eider Financial Services Ltd., Chandigarh House No. 667, Sector 6, Panchkula.

(x) All records concerning negotiations correspondence, settlement regarding raising of loans and payment of commission between Eider Financial Services

Ltd. and the Government of Himachal Pradesh.

F : Records from the possession of Allianz Capital and Management Services Ltd., New Delhi, through Shri G.K. Takku, B-44, Pushpanjali, Vikas Marg, Extension, New Delhi-110092.

(xi) All records concerning negotiations, correspondence settlement, regarding raising of loans and payment of commission between Allianz Capital & Management Services, New Delhi and the Government of Himachal Pradesh.

While making out a case for the summoning of the record, the accused has averred in para-5 of the application that the documents relate to the subject matter of the complaint and they are quite essential for the effective cross-examination of the witnesses and the complainant and they will further service the ends of justice in reaching a correct and effective conclusion in the matter in controversy.

9. The complainant while resisting the application has admitted that commission (Dalali) was paid to various agencies/persons for the purpose of raising of loan. It was averred that the precise case set out in the complaint is that the accused had made false and defamatory statements in his Press conferences to the effect that the complainant was personally involved and he had received a "Dalali" of rupees three crores which has been deposited in the foreign bank accounts. It was, therefore, contended that the records sought to be summoned have neither any bearing on the controversy involved nor are relevant for the purpose of the case.

10. The learned Magistrate while rejecting the prayer of the accused for summoning of the record has observed in para-13 of the impugned order, as under:

...Thus now it is to be seen whether the documents sought to be produced are relevant or having some connection with the subject matter of the inquiry. The applicant/accused has sought to produce the records concerning loan of Rs. 308 crores, raised during the period 1994-95, for which a commission of Rs. 90 Lakh was paid to EIDER FINANCIAL LIMITED, Chandigarh and to ALLIANZ CAPITAL AND MANAGEMENT SERVICES, New Delhi, and other record relating to procedure adopted for selection, negotiations etc. This record in my opinion if allowed to be produced will only prove the raising of loan and payment of commission to the Companies, which fact is not in dispute before this Court as is clear from para No. 8 of the complaint and para No. 4 of the present application. He has further sought to produce instructions relating to the loans, payment of commission of the Reserve Bank of India and report of Comptroller and Auditor General, Himachal Pradesh for the year 1995-96 in connection with the raising of loans by the Himachal Pradesh Government. This record also if allowed to be produced may prove that certain irregularities have been committed in raising the loans and the payment of commission which fact is not subject-matter of inquiry before this Court. The production of conduct rules and procedure for obtaining loans and instructions issued from time to time regarding raising of said loans are also in my opinion not relevant nor will be of any help in solving the fact in dispute. The other record also sought to be produced by the applicant/accused in my opinion is not going to prove that the commission paid in raising of loans had been deposited in foreign bank account or the sharing of alleged commission by the complainant or his involvement in taking the ''Dalali''. The learned Counsel for the applicant/accused contended that if the record mentioned in his application is directed to be produced, he will be able to prove that his case is covered under one of the exception as mentioned in Section 499 of I.P.C. and what prevailed on the complainant to pay said commissions. However, in my opinion the record sought to be produced is not going in any manner to prove the imputations levelled against the complainant except that loan was raised, service charges or, commission paid and some irregularities might have been committed in raising said loans which are inviolation of the instruction of Reserve Bank of India. Thus, the record sought to be produced is neither necessary or desirable, nor relevant for the purpose of present inquiry.

Section 91(1) of the Code provides:

91. Summons to produce document or other thing.-(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

11. The High Court of Bombay in Bashir Hussain Peshimam Vs. Gulam Mohomed Ismail Peshimam and Others, while dealing with the scope and ambit of Section 94 of the Code of Criminal Procedure, 1898 (which corresponds to Section 91 of the Code) has held:

In the first place, it is clear that no right is conferred upon any party to a criminal proceeding to obtain production of any document or thing under this section. Secondly, though it is clear that the provisions of the section could be invoked at any stage of any investigation, inquiry or trial as is indicated by the expression ''whenever'' used at the commencement of the section, the words ''such Court may issue'' clearly show that the section confers discretion upon the Court enabling it to order production of any document or other thing. Thirdly, before the Court exercises its discretion and orders the production of any document or thing under this section, it must satisfy itself that such production of the document or the thing is either necessary or desirable for the purposes of the trial and lastly, as has been held by the Sind Court, in deciding that question the Court has to exercise its discretion judicially, in the sense that it must satisfy itself that the document or the thing has a bearing upon and is relevant to the case....

12. In Chandubhai Jethabhai Desai Vs. The State and Another, it has been held that the discretion conferred on the Court u/s 94 of the Code of 1898 (now Section 91 of the Code) is an absolute discretion. The only condition for the exercise of the discretion being that in the opinion of the Court, the production of the document should be necessary or desirable for the purposes of inquiry, trial or other proceedings before the Court.

13. The High Court of In Re: Somiah and Others, , while dealing with the question of power of the Court u/s 94 of the old Code (now Section 91 of the Code) has held:

The existence of power and jurisdiction to call for the documents by the Magistrate under certain circumstances as contemplated in Section 94 of the Code, cannot be equated to his being compelled to exercise that power whenever the accused prays for the production of certain documents. Unless and until the Court is satisfied in each case, taking into consideration the facts and circumstances, that it is necessary and desirable to call for the documents, the Court is not bound or obliged to send for such documents. The consideration or satisfaction contemplated u/s 94 is a proper, reasonable and objective one and the Court has to give justiciable reasons for its conclusion, to enable the appellate or revisional Court to know whether the Court has applied its mind to the point at issue and decided the same in accordance with law.

To the similar effect, it has been held by the Calcutta High Court in Ajay Mukherji v. The State and Ors. 1971 Crl.L.J. 1329 and by a Division Bench of the High Court of Andhra Pradesh in The Public Prosecutor, Andhra Pradesh v. Pocku Syed Ismail and Anr. 1973 Crl. L.J. 931.

14. While dealing with the scope of interference by the High Court in exercise of its revisional powers with the order of the trial Court passed u/s 91(1) of the Code, the Hon''ble Supreme Court in Assistant Collector of Customs and Another Vs. L.R. Malwani and Another, has held that whether a particular document should be summoned or not is essentially within the discretion of the trial Court and that except for very good reasons, the High Court should not interfere with the discretion conferred on the trial courts in the matter of summoning documents.

In the light of the above principles, the only question to be examined is whether the discretion has been rightly exercised by the learned Magistrate in declining to summon the record u/s 91 of the Code.

On the very face of it, the learned Magistrate has given cogent and good reasons in support of his order. In the present case, there is no dispute that payment of commission was made by the State Government for the purpose of raising loans. The question involved is whether the allegations made by the accused against the complainant in his Press conferences that the complainant was personally involved and that he received commission (Dalali) of rupees three crores are correct or false.

The requisite record will only prove the raising of loan, payment of commission therefore and irregularities, if any, committed in the raising of such loans. These documents are not relevant and material to prove the truthfulness of the allegations made by the accused against the complainant.

15. Another ground raised by the accused in seeking the summoning of the record in para 6 of his application is that the documents are of sensitive nature and the same are in possession of the persons who are directly under the control of the complainant and as such, there is a reasonable apprehension in the mind of the accused that the documents may be destroyed by the concerned authorities.

16. Admittedly, at the relevant time of the making of the application by the accused, the complainant was the Chief Minister of the State and in such capacity was having the direct control over various officers and records of different departments of the State. However, the complainant presently is not the Chief Minister. He is not even a Minister in the present Government. Therefore, he has no control either on the officers or on the record. As such, there is no likelihood of the record being tampered with or destroyed or that the same is not likely to be made available when required.

For the reasons stated above, the present petition is dismissed. The parties, through their Counsel, are directed to appear before the learned trial Magistrate on 4.1.1999. Records of the trial Court be returned forthwith so as to reach well before the date fixed.