
(1998) 12 BOM CK 0066

In the Bombay High Court

Case No : Criminal Writ Petition No's. 135 and 136 of 1997

Shri H.B. Bhongale

APPELLANT

Vs

Smt. Zarina Shoukatali Jafar and Others

RESPONDENT

Date of Decision : 09-12-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156, 197
Penal Code, 1860 (IPC) — Section 34, 380, 427, 451

Citation : (1999) 101 BOMLR 886

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Final Decision : Allowed

Judgement

D.G. Deshpande, J.—Heard Shri Mundargi for the petitioners and Shri Kankaria for the respondent No. 1 in both the petitions. Both these petitions arise out of the order of issuance of process and rejection of the application of all the Accused for discharge by the Trial Court Magistrate i.e. Judicial Magistrate, F.C., Uran (Shri D.D. Kamble).

2. The petitioner in Criminal Writ Petition No. 135 of 1997 is the Chief Officer of Uran Municipal Council and the petitioners in the Writ Petition No. 136 of 1997 are the employees of the Uran Municipal Council. They were prosecuted by respondent No. 1 by filing a complaint under Sections 380, 427 and 451 read with Section 34 of the Indian Penal Code, on the ground that the accused demolished the structure of the complainant illegally and committed theft of the articles of the complainant.

3. After the complaint was filed, the Magistrate ordered an investigation in the complaint u/s 156(3) of the Criminal Procedure Code and directed the Uran Police Station to file report. Accordingly the Police filed the report before the Magistrate and thereafter the Magistrate heard the complainant as well as the accused before issuing the process. The accused contended that whatever was done by them i.e. regarding demolition of the unauthorised structure and

removal of the articles under Panchanama, was done in discharge of their official duties and therefore, if at all they were to be prosecuted, a sanction u/s 197 of Cr.P.C. was necessary. This prayer was strongly opposed by the complainant. However, after hearing both the sides, the Judicial Magistrate, F.C., ordered issuance of process against all the accused Nos. 1 to 8 who are petitioners in both the petitions, under Sections 380, 451 and 427 read with Section 34 of the Indian , Penal Code and this order is challenged in the present petition.

4. It was contended by Shri Kankaria, appearing for the respondent/complainant, firstly, that the Magistrate has considered all the relevant aspects of the case and legal submissions made by both the parties and has given a well reasoned order. Secondly, according to Shri Kankaria in the report u/s 156 of the Cr.P.C. the Police did not produce any material before the Magistrate to show that the accused acted in their official duties while demolishing the structure of the complainant. Thirdly, according to him before starting the demolition work, neither the Chief Officer nor any of the employees of the Uran Municipal Council gave any notice to the complainant regarding illegal encroachment/construction of the illegal structure. Lastly, according to him the complainant had with him sufficient material to show that the structure was legal and/or legally constructed by obtaining necessary sanction and permission of the Municipal Council. However, he contended that the petitioners in both the petitions came in their private capacity and demolished the structure and committed theft of the articles of the complainant and therefore, since the Magistrate has considered all these aspects including the objection raised by the petitioners regarding sanction, these petitions are liable to be dismissed. He also contended that the Magistrate merely ordered an issuance of process and it is open for the petitioners to apply for discharge.

I am not at all satisfied by any of the submissions made on behalf of the complainant. The order of the Magistrate being contrary to the facts on the records, is perverse and so also it is devoid of any merit. For example, the Magistrate has in its order at internal page 9 observed "Nothing on record to show that whether the accused No. 1 i.e. the Chief Officer has acted within preview of his official duties or not". This observation is totally contradictory to the Police report. Because in the Police report it has been stated that since the construction was illegal and there were complaints, the Chief Officer decided to demolish it and had applied for Police help and thereafter the demolition work was carried out and the Panchanama of the properties seized from the spot was prepared and that all the petitioners who were accused before the Magistrate, acted in discharge of their duties. It appears from the observation of the Magistrate that he has not cared to go through the entire police report and has deliberately avoided to consider this aspect of the matter.

5. From the allegations made in the complaint so also from the material given to the Magistrate by the Police, there can be no interference but a conclusion can very well be drawn that the petitioners in carrying out demolition of the shop of

the complainant were acting in their official capacity. Seeking help of the police and preparing panchanama and also disclosing to the police that they were ready to return the articles of the complainant on his giving an undertaking and on complainant's compensating the counsel for the cost incurred in the work of demolition, all these point out to only one thing and that is that the petitioners were acting in discharge of their official duties.

6. It was repeatedly urged by Mr. Kankaria that the complainant had with him an approved plan for the construction and that before starting demolition work, no notice was given by the Uran Municipal Council to the complainant. Now neither this Court nor the Magistrate was called upon to decide the legality or illegality of the action of the petitioners. What is required to be decided is to whether the petitioners got protection u/s 197 of the Cr.P.C.

7. Since the Magistrate committed a fundamental error of assuming that there was nothing on the record to show that the petitioners were acting in their official capacity, all subsequent reasoning based on this assumption are totally wrong and they are liable to be quashed. Since the basis of complying the principles laid down in this case is wrong neither the reasoning nor conclusion of the Magistrate can be upheld for all these reasons.

8. Now lastly it was contended by Mr. Kankaria that accused can apply for discharge before the Magistrate. I do not find that this exercise is necessary to be done by the accused particularly when there were objections regarding want of sanction were not considered by the Magistrate at length. Thus, to conclude it has to be held that the demolition work and removal of the articles was done by the accused petitioners in discharge of their official duties and hence the proceedings cannot be prosecuted against the petitioners u/s 197 of the Cr.P.C.

9. In the result, both the petitions are allowed. Rule is made absolute and the proceedings issued against the petitioners on the complaint of respondent No. 1 are hereby quashed.