
(2013) 07 BOM CK 0223

In the Bombay High Court

Case No : Criminal Writ Petition No. 776 of 2012

The Cosmopolitan Education Society and Another

APPELLANT

Vs

Prakash Manmohandas and Another

RESPONDENT

Date of Decision : 11-07-2013

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Penal Code, 1860 (IPC) — Section 34, 420

Citation : (2014) ALLMR(Cri) 1734

Hon'ble Judges : Abhay M. Thipsay, J

Bench : Single Bench

Advocate : Sunil Chaturvedi, for the Appellant; Amol A. Doijode, Advocate for R. No. 1 and Ms. R.M. Gadhavi, APP for the State, for the Respondent

Final Decision : Dismissed

Judgement

Abhay M. Thipsay, J.—Heard Mr. Sunil Chaturvedi, learned counsel for the petitioners and Mr. Amol A. Doijode, learned counsel for respondent No. 1. The petitioners are the accused Nos. 1 and 3 respectively in Complaint Case No. 15/SW/2009, pending before the Metropolitan Magistrate, 22nd Court, Andheri, Mumbai. The said case arises on a complaint filed by the respondent No. 1 herein. The learned magistrate, after examining the respondent No. 1 (hereinafter referred to as "the complainant" for sake of convenience and clarity), issued process requiring all the three accused mentioned in the complaint to appear and answer to the charge of an offence punishable u/s. 420 of the IPC r/w Section 34 of the IPC. The petitioners (hereinafter referred to as "the accused" for sake of convenience and clarity), being aggrieved by the said order of issuance of process have approached this court by invoking its constitutional jurisdiction, under Articles 226 and 227 of the Constitution of India, praying that the order issuing process as also the entire proceedings before the Magistrate be quashed and set aside.

2. The substance of the contentions advanced by the learned counsel for the

accused persons is that there was no prima facie case, for proceeding against them. It is submitted that the dispute of which a mention has been made in the complaint is purely of a civil nature. It is submitted that civil proceedings in respect of the same issue are already pending between the parties.

3. I have gone through the complaint, the annexures thereto and the order issuing process.

4. The substance of the complaint may be stated as follows:

That the accused No. 1 is an education society, registered under the Public Trusts Act. The accused No. 3 (i.e. the petitioner No. 2 herein) was at the material time the President of the said society, while the accused No. 2, one R.S. Gaitonde, was one of the trustees of the education society. The complainant and other members of Fadia family wanted to donate some money to an educational institution as a social obligation but in return they wanted the institution to give the names of some members of Fadia family to the schools run by such Institution. The complainant and other members of Fadia family, therefore, approached the accused with a proposal to donate some amount to the accused No. 1 society, as a consideration for the accused No. 1 giving the names of their parents and grand parents to the pre-primary and primary schools run by the accused No. 1. The proposal was accepted, and accordingly, on 3rd June, 2006, some members of the complainant's family paid an amount of Rs. 5 lacs to the accused No. 1 society by cheques, on varying dates. That, on receiving the said payments, the accused No. 1 society decided to change the name of Pre-Primary School from "Cosmopolitan Education Society Pre-Primary School" to "Smt. Kusumben and Shri Manmohandas Fadia Pre-Primary School". That with respect to the primary school, the accused No. 3, who was president of the governing council of the society requested the complainant to arrange for a certain portion of the payment of Rs. 11,11,111/- to be made to him in cash. Accepting this, the complainant paid an amount of Rs. 8 lacs in cash to him. The balance amount was paid by cheques issued by different members of the complainant's family. According to the complainant, the accused No. 3 for the sake of making some accounting adjustments, arranged the amount of Rs. 8 lacs received in cash to be shown as having received by cheques from different persons. The accused No. 3 then gave a list of the "donors" to the complainant for the complainant's record. That, the name of the primary school run by the accused No. 1 was decided to be changed to "Smt. Bhikiben and Shri Gangadas Fadia Primary School". The function of re-naming the schools took place on 23/12/2006 and the names of the schools were changed as desired by the complainant and his family. The complainant and his brother were already appointed as permanent members of the governing council of the accused No. 1 society. That, however, subsequently the original names of the school were restored and the membership of the complainant and his brother, in the governing council was terminated.

5. Thus, the substance of the complaint is that though the school authorities had

accepted the proposal and had agreed to change the names of the schools and to name the same after the family members of the complainant's family; and though they had received the entire amount agreed to be donated in that regard, still, after changing the names as agreed, they arbitrarily again restored the original names and thus deceived the complainant and the members of his family. It appears to be the case of the complainant that a false stand is now being taken by the accused persons that they had not received the full amount of donation that had been agreed to be paid and that, therefore, they have again restored the original names of the schools.

6. The learned magistrate while issuing process recorded his satisfaction that the complainant had made out a prima facie case of cheating by the accused persons.

7. A number of contentions have been advanced by the learned counsel for the accused persons, but the substance of the same is that the complaint is false. The contentions are such, as are based on the factual aspects of the matter. It is suggested that the change in the names was to be for a limited period. This does not, prima facie, seem to be correct from the averments in the complaint and the correspondence annexed thereto. It is also suggested that the whole of the agreed amount has not been paid by the complainant and his family members and, therefore, the original names of the schools have been restored. It is also contended that it is quite unlikely that the accused No. 3, who was the "President", would handle any finances himself and it is suggested that the complainant and the members of his family were dealing with the Secretary of the trust, who has not been made an accused. It is also suggested that it is quite unlikely that cash will be received from the complainant and his family and that the same amount would be shown as having received from some other persons by cheque.

8. It is not possible to accept these submissions. There is nothing inherently improbable or absurd in the version of the complainant. Whether the averments made in the complaint are true or false, can be decided only on the basis of evidence as may be adduced during the trial.

9. It is well settled that at the stage of issuance of process, the magistrate is required to take the averments made in the complaint and in the other material placed before him, at face value. At that stage, he is not expected to judge and/or meticulously analyze whether the allegations levelled and averments made in the complaint, must certainly be true and/or whether the case would ultimately result in conviction. It is also well settled that the Magistrate has a discretion in the matter of issuance of process and once the magistrate has exercised his discretion on the basis of the materials placed before him, the same cannot be interfered with by the superior courts. The only cases in which the order issuing process can be successfully challenged are, where the averments in the complaint, even if taken at face value, do not prima facie make out any offence, or the cases where the complaint, on the face of it, suffers from any legal defect, such as bar of limitation, absence of sanction, etc. Such is not the case here.

10. In *Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others*, , Their Lordships of the Supreme Court of India had an occasion to discuss the legal position in this regard. Their Lordships observed:

... The magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the magistrate has exercised his discretion, it is not for the high court, or even this court, to substitute its own discretion for that of the magistrate or to examine the case on merits, with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused.

Their Lordships, by way of illustration, catalogued the cases when the order to issue process may be quashed. These are:

....(1) Where the allegations made in the complaint or the statements 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.

11. Undoubtedly, the list is not exhaustive and merely illustrative, but provides sufficient guidelines to indicate the contingencies in which criminal proceeding can be quashed.

12. There is also another aspect of the matter. The order issuing process is amenable to the revisional jurisdiction of the court of sessions and also of this court. Instead of exhausting the statutory remedy of applying for a revision, the accused have directly approached this court invoking its constitutional jurisdiction. When this aspect of the matter was pointed out, the learned counsel for the accused submitted that there would be no bar to approach this court directly invoking its constitutional jurisdiction. Undoubtedly there would be no jurisdictional bar and a party can very well invoke the constitutional jurisdiction of this court even without exhausting the statutory remedy available to a party. However, it is also well settled that when an efficacious alternative remedy exists in favour of a party, which has not been availed of, this court may decline to exercise its constitutional jurisdiction in favour of such a party.

13. This is not a case where the order issuing process is liable to be quashed - and that too by exercising the constitutional jurisdiction of this court which is of

extraordinary nature. The petition is rejected.