

(1989) 09 BOM CK 0064

In the Bombay High Court

Case No : Criminal Writ Petition No. 75 of 1988

Vaijanath Parshwanath Udgirkar

APPELLANT

Vs

Baliram Surajmal Chaudhari and Another

RESPONDENT

Date of Decision : 06-09-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 127, 197, 201, 202, 300
Penal Code, 1860 (IPC) — Section 161, 384, 385, 448, 504

Citation : (1989) 91 BOMLR 735

Hon'ble Judges : I.G. Shah, J

Bench : Single Bench

Final Decision : Allowed

Judgement

I.G. Shah, J.—Original complaint in Criminal Case Number 33 of 1980 on the file of Judicial Magistrate First Class, Ahmedpur, District Latur has, preferred this Petition to challenge the order passed in Criminal Revision Petition No. 116 of 1987, allowing the Revision and setting aside the order dated 3rd July 1987 and application Exhibit 28 and discharging the present Respondent No. 1 who was the accused in Criminal Case by the learned Additional Sessions Judge, Latur.

2. Briefly stated, facts giving rise to this Petition are as under:-

The present Petitioner filed a complaint in the Court of Judicial Magistrate First Class, Ahmedpur alleging that the present Respondent Number 1 committed an offence punishable under Sections 161, 384, 385, 448, 504 and 506 of Indian Penal Code. It was alleged in the complaint that on 26th June, 1980, at about 1 p.m. while the complainant was sitting at his house at Koshtgaon, the present Respondent Number 1 who was then Police Sub-Inspector of Police Station Kingaon came alongwith three policemen and was accompanied by Shriram and Kisanrao Numder and two others, who were not known to the Petitioner, and the Respondent Number 1 demanded from the petitioner a golden ring, a golden locket and a golden necklace, which he claimed was kept with him by two offenders. The Petitioner Informed the Respondent Number 1 that the said

articles were not kept with him and he did not know the offenders and he did not know anything about the same and due to that, the Respondent Number 1 became annoyed and threatened the petitioner that he should quietly handover the said articles, else, the consequences would be very bad and saying so, he took out his pistol and kept it in front of the petitioner. The petitioner then told the Respondent Number 1 that he was unnecessarily committing atrocities on him and it was sheer injustice; but Respondent Number 1 then threatened and gave abuses and told him further that he would not escape and if he wanted to escape, he should quietly give Rs. 3000/-otherwise he would hand-cuff him and take his procession through the village and would reduce him in the eyes of the people.

The petitioner further stated in the complaint that in the meanwhile witness No. 1- Phoolchand arrived at the house and then he and the Petitioner told the Respondent Number 1 that they did not have money, but they would bring money from the village and that the Petitioner would not be run down in the eyes of the people. Petitioner further stated in the complaint that the Respondent Number 1 then asked them to do so early and meet him in the Gram Panchayat and thereafter, he and the persons accompanying him went towards the Gram Panchayat. Petitioner further claimed in the complaint that thereafter, he collected the amount of Rs. 3000/- from the villagers and then he, alongwith witnesses No. 1 to 3, went to the Gram Panchayat and in the presence of said persons and witnesses No, 4 to 13 who were near the Respondent No. 1, amount of Rs. 3000/-was paid to the Respondent No. 1 by witness No. 2, and thereafter. Respondent No. 1 sitting in the Gram Panchayat prepared a nil panchanama of the house of the Petitioner and obtained signatures of witness No. 13 and Kisanrao Mundhe on the said Panchanama. On the complaint, it is further stated that Respondent No. 1 gave threat to the Petitioner that he should not tell about the amount being taken to anybody, otherwise he would be involved on some other charge and would be put in jail. In the complaint it is further stated that due to the said incident, the Petitioner could not move about for two days as he was shocked due to the incident and he could not give a complaint also.

However, on 28th June, 1980, he told about the said incident to witness No. 12, and he, alongwith witness No. 12, went to the Police Station to ask about the incident in question to Respondent No. 1, but Respondent No. 1 arrogantly replied and told them that they may do whatever they wanted to do, and thereafter, the Petitioner in presence of witness No. 12 gave a written complaint to District Superintendent of Police, Osmanabad on 30th June, 1980 and he also sent the copies of same to the Superior Officers of the Department. In the complaint, it is also claimed that the District Superintendent of Police then directed the Deputy Superintendent of Police, who is witness No. 14 to enquire into the matter, and accordingly, Deputy Superintendent of Police made an enquiry, but no action was taken against the Respondent and as he became sure that no action is likely to be taken in the matter, he was filing the complaint in the Court.

3. It appears, that the Judicial Magistrate, First Class, Ahmedpur sent the said complaint for enquiry to the Police u/s 202 of the Criminal Procedure Code. However, no report was received from the Police. Therefore, the Judicial Magistrate, First Class, issued process under Sections 161, 384, 385, 448, 504 and 506 of the Indian Penal Code. Thereafter, during the pendency of the case, the Respondent filed an application on 21st May, 1987, which is at Exhibit 28. In the said application, several points were raised by the Respondent and it was contended that no cognizance of the offence could be taken by the Judicial Magistrate First Class, as there was no sanction obtained u/s 197(2) of the Criminal Procedure Code as well as Section 6 of the Prevention of Corruption Act, and therefore, the prosecution should not be allowed to proceed further and the complaint should be dismissed and accused should be acquitted. It also appears that the question of limitation was also raised and it was contended that as cognizance in the instant case was taken after the period of limitation, as provided u/s 468 of the Criminal Procedure Code, the proceedings were barred and deserved to be dropped. The learned Judicial Magistrate First Class, however, rejected the said application Exhibit 28, holding that the act complained of did not fall within the purview of the duty of the Police Officer, and therefore, sanction u/s 127 of the Criminal Procedure Code was not necessary. The learned Judicial Magistrate First Class also held that the sanction required under the provisions of the Corruption Act was alsti not necessary as the process was issued only u/s 385, 448, 504 and 506 of the Indian Penal Code. It does not appear that the learned Magistrate did not deal with the question of limitation which was tried to be agitated before him in the application - Exhibit 28. However, the learned Magistrate definitely appears to have rejected the said application in view of the orders passed, rejecting the application-Exhibit 28.

4. Being aggrieved by the said order, the Respondent No. 1 preferred Criminal Revision Petition No. 116 of 1987 to the Sessions Court of Latur and the learned Additional Sessions Judge allowed the said Revision Petition holding that the sanction u/s 197 of the Criminal Procedure Code was necessary as the acts complained of, fall within the purview of the duty of the Police Officer and at the most they could be considered being in excess. The learned Additional Sessions Judge also found that the sanction u/s 6 of the Prevention of Corruption Act was also necessary as the offences complained of also includes offence u/s 161 and though the learned Magistrate has stated in the order below Exhibit 28, the process was issued under offence of Section 161, the order of process includes the process in respect of the offence u/s 161 of the Prevention of Corruption Act also. The learned Additional Sessions Judge also found that as one of the offence alleged to have been committed was u/s 161 of the Indian Penal Code and as it also amounted to an offence under the Prevention of Corruption Act, the said offence was exclusively triable by the Special Judge, and therefore, the learned Judicial Magistrate First Class, had no jurisdiction to take cognizance of the offence. The learned Additional Sessions Judge also found that once the offence u/s 161 was also alleged to have been committed alongwith other offences,

which are normally triable by the Judicial Magistrate First Class, due to the tagging of the offence u/s 161 of the Prevention of Corruption Act, the jurisdiction would be of the Special Judge only in respect of all the offences and the learned Judicial Magistrate First Class was barred, and thus was in error in taking cognizance of the offence. Keeping with said findings, the learned Additional Sessions Judge allowed the Revision Petition and set aside the order dated 3rd July, 1987 and allowed the application Exhibit 28 and discharged the Respondent. Being aggrieved, by the said order passed by the learned Additional Sessions Judge, Complainant has come to this Court and has filed the present Criminal Writ Petition.

5. The order passed by the learned Additional Sessions Judge is challenged on three counts:-

(i) The order passed by the learned Judicial Magistrate First Class is an interlocutory order, and therefore, is not revisable u/s 397 of the Code of Criminal Procedure.

(ii) That the learned Additional Sessions Judge erred in holding that the acts complained of fell within the purview of the duty of the police officer, so as to attract the provisions of Section 197 of the Criminal Procedure Code; and

(iii) The process was issued by the lower Court only in respect of the offences u/s 385, 448, 504 and 506 of the Indian Penal Code as per the observations made by the learned Judicial Magistrate, First Class, in order passed below Exhibit 28, and therefore, the Judicial Magistrate First Class, had the jurisdiction to entertain the complaint and take cognizance of the offence.

6. Now, as far as the objection based on the contention that the order passed by the Judicial Magistrate First Class is an interlocutory order not revisable by the Sessions Court sitting in Revision, it must be stated that the said contention is not correct. The order passed is in respect of objections which would go to the root of the case if the objections are upheld, and therefore, in view of the decision in *Madhu Limaye Vs. The State of Maharashtra*, it cannot be said that the Revision before the Additional Sessions Judge was not maintainable at all.

7. As far as the contention that the acts complained of did not fall within the purview of the duties of the police officer, i.e. Respondent No, 1, it could be said that the said contention has some substance. The initial part of the incident which took place on 26th June 1980, no doubt could be said to be within the purview of the duty or the functions of a police officer ; but the further part which is stated in the complaint that the Respondent started abusing and threatening the Petitioner and asking him to pay Rs. 3000/- quietly, else he would be hand-cuffed and his procession would be taken out through the village etc. cannot be said to be falling within the purview of the duties or functions of a Police Officer; and therefore, it would not be necessary to obtain sanction u/s 197 of the Criminal Procedure Code even if it is held that in view of the notification issued by the State of Maharashtra, the Police Officers have been

extended the protection of Section 197. The Supreme Court in the Ruling in *Bhagwan Prasad Srivastava Vs. N.P. Mishra*, clearly held that Section 197 is neither to be too narrowly construed nor too widely. It is not the "duty" which requires examination, so much as the "act" because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. There must be a reasonable connection between the act and the discharge of official duty. The act must fall within the scope and range of the official duties of the public servant concerned. In that case, a Civil Assistant Surgeon had filed a complaint against the Civil Surgeon, that while in operation theatre, the Civil Surgeon abused the complainant before patients and hospital staff and ordered the hospital cook to "turn out this badmash", meaning the complainant and the cook actually pushed out the complainant; the Supreme Court held that there was nothing to show that the said act was part of the official duty of the Civil Surgeon and no sanction was required u/s 197 for the prosecution of the Civil Surgeon. In the present case also, on the premises of the contentions raised in the complaint filed by the present Petitioner, the Police Officer had accused him and here also, gave threats and demanded Rs. 3000/- under threat and an injury to his reputation, and therefore, the said act would also constitute an offence of extortion and it can never be said to be covered in the duty or the acts to be performed by the police officer in discharge of his duties or purported duty also. Under these circumstances, when the question as to whether prima facie the complainant makes out an offence or not is to be considered, one has to proceed on the basis of the allegations made out in the complaint.

8. The allegations made in the present complaint definitely make out a case of an offence of extortion punishable u/s 385 of the Indian Penal Code as well as Sections 504 and 506 of the Code. The acts complained of, as stated earlier, could never be said to have been done while performing the duty or the act of the public servant acting, as a Police Officer. It cannot also be covered in the purported duty, and therefore, the view taken by the learned Additional Sessions Judge that the acts complained of would fall within the duty of the police officer or that he had only exceeded in his duties cannot be accepted as a correct view. The learned Additional Sessions Judge was definitely in error in holding so. Hence, the provisions of Section 197 is not actually attracted and the protection given to the police officer is not available to him. Atleast, it would be necessary to give an opportunity to complainant to prove his case and the contentions by leading evidence before the Court.

9. As far as Section 161 of the Indian Penal Code is concerned, there is some substance in the contention raised on behalf of the Respondent. The allegation in respect of that definitely would amount to an offence u/s 5 of the Prevention of Corruption Act. As per the provisions of Section 6 of the Prevention of Corruption Act, previous sanction is necessary and the Court is debarred from taking any cognizance of such offence unless the previous sanction, as required by the said section is obtained. In the present case, there is no doubt that previous sanction has not been obtained. There is also a provision in the Criminal Law Amendment

Act, 1952 namely Section 7, which provides that the offence specified in Section 6(1) of the said Act shall be triable by the Special Judges only, and this section specifies the offences punishable u/s 161 also amongst others, and therefore, when the Complainant had made out a case u/s 161 of the Indian Penal Code also in the complaint against the Respondent, the case would be triable only by a Special Judge. The Judicial Magistrate First Class, therefore, had no jurisdiction to take cognizance of the said offence u/s 161. If some other offences were also alleged to have been committed together with the offence u/s 161, the said other offences also could be tried only by the Special Judge. As stated earlier, the complainant does make out a case in his complaint of the offence punishable u/s 161 and there is some force in the contention that the process also was issued u/s 161 of the Indian Penal Code, the learned Magistrate had no jurisdiction in respect of the said offence, and therefore, the other offences also which are alleged to have been committed while committing the offence u/s 161 of the Indian Penal Code, should have been tried by a Special Judge instead of the Judicial Magistrate, First Class.

10. Apart from this, while considering this aspect, it would be necessary to consider the allegations in the complaint and the complainant does make out a case of an offence punishable u/s 161 though the same facts also appear to be constituting an offence of extortion and therefore, on the premises of the said complaint, the learned Magistrate ought to have held that as the offence u/s 161 of the Indian Penal Code is alleged to have been committed, he had no jurisdiction and he should have proceeded as required by Section 201 of the Criminal Procedure Code and ought not to have issued process at all. Under these circumstances, as the Learned Judicial Magistrate First Class had no jurisdiction at all to take cognizance" of the offence alleged in the complaint in view of the fact that the offence u/s 161 of the Indian Penal Code was also alleged to have been committed by Respondent No. 1, that ultimate order passed by the learned Additional Sessions Judge of discharging the Respondent No. 1 can be said to be correct, though it is clear that the sanction u/s 197 is not necessary for such prosecution. The complainant, i.e. the present Petitioner no doubt would be able to even now file a fresh complaint as the provisions of Section 300 of the Criminal Procedure Code would not come as a bar.

11. For a bar of Section 300, to come into play, the person must have been tried by a Court of competent jurisdiction for an offence and he must have been convicted or acquitted for such offence. In the present case, as the learned Judicial Magistrate First Class had no jurisdiction in view of the discussion made above, Section 300 of the Criminal Procedure Code would not come in play at all and the present Petitioner would be able to file a fresh complaint also before the Special Judge. The other course left open would be to set aside the order passed by the Learned Additional Sessions Judge, which is based on the provisions of Section 197 and direct the learned Magistrate to act as per Section 201 of the Criminal Procedure Code.

12. Section 201 provides that if a complaint is made to a Magistrate, who is not competent to take cognizance of an offence, he shall

(a) if the complaint is in writing, return it for presentation to the proper Court with an endorsement to that effect;

(b) if the complaint is not in writing, direct the complainant to the proper Court.

So in the present case, the Magistrate would be required to return the complaint for presentation to the proper Court with an endorsement to that effect. In view of the fact that the matter is old, it would be proper to take recourse to the second option and set aside the order of the Additional Sessions Judge, and also of the Judicial Magistrate First Class and direct the learned Magistrate to act as per Section 201(a) of the Criminal Procedure Code.

13. On behalf of the Respondent No. 1 it was tried to be contended before me that the cognizance itself cannot be taken in view of the provisions of Section 468 of the Criminal Procedure Code, which provides for limitation. It was tried to be contended that the cognizance in the present case, has not been taken atleast in 1982 and the offence is alleged to have taken place on 16th June, 1980, and therefore, the bar of limitation would be there. However, in the present case, it is clear that the Petitioner filed, the complaint on 3rd September, 1980 and in the complaint, explained the delay. When the complaint was filed, it was definitely within time. It appears that the learned Magistrate had sent the complaint for enquiry u/s 202 of the Criminal Procedure Code to the Police, though, in fact, normally he should not have done so when the allegations were made against the Police Officer. It is also clear that the police did not make any enquiry and did not submit any report till 1982 and the learned Magistrate had issued process in the year 1982. Therefore, taking into consideration the said facts, even if the provisions of Section 468 of the Criminal Procedure Code are to be considered, it must be held that the present case would be normally covered u/s 473, which would require extension of period of limitation.

14. In the result, the Petition will have to be allowed. The order passed by the Learned Additional Sessions Judge as well as the learned Magistrate are set aside. The Judicial Magistrate First Class, Ahmedpur is directed to proceed with the case as per Section 201 of the Criminal Procedure Code. Rule made absolute accordingly.