IN THE HIGH COURT OF JUDICATURE AT BOMBAY
AURANGABAD BENCH, AT AURANGABAD

CRIMINAL WRIT PETITION NO. 961 OF 2013

Shri P. Mohandas s/o P. Pillayar. ... Petitioner.

Versus

Fayyaz Ahmed Qureshi s/o
Haji Qureshi & anr. ... Respondents.

Mr. Prabhakar K. Joshi, advocate for petitioner.

Mr. S.S. Kazi, advocate for Respondent No. 1.

Mr. U.S. Mote, Additional Public Prosecutor for Respondent No. 2 - State.

CORAM : SMT. SADHANA S. JADHAV,J
DATE : APRIL 8, 2015

P.C.:

1 Heard the learned Counsel for the Petitioner, the learned Counsel for respondent No. 1 and learned APP for State.

2 Rule. Rule made returnable forthwith and heard finally by consent of the parties.

3 The Petitioner herein is questioning validity of the Order dated 22/7/2013 passed by the Chief Judicial Magistrate, Aurangabad thereby issuing process for offence punishable under Section 406, 409 and 500 read with Section 34 of the Indian Penal Code and also seeking prayer of quashing the complainant.

4 Such of the facts necessary for deciding the present Writ Petition are as follows :

That Fayyaz Ahmed Qureshi filed a complaint before the Chief Judicial Magistrate at Aurangabad alleging therein that he happens to be the Chief Editor of Daily Hindi Newspaper “Aurangabad Dainik Citizens”. That he had stood as guarantor to one Irshad Qureshi who is the proprietor of the Citizen Printing Press, for borrowing loan from Bank of Baroda. Mr. Irshad Qureshi had mortgaged the property which is situated at CTS No. 17684/1/P-1, Sanmitra Colony, Aurangabad, as a collateral security. The total area of the mortgaged property which is situated at CTS No. 17684/1/P-1 is 777 sq.mtrs.

Out of which the area of 278.73 sq.mtrs. was mortgaged. The rest of the area is owned by the complainant.

5 According to the complainant, the accused persons (i.e. petitioner) who happens to be the Chief Manager of Bank of Baroda, Aurangabad branch had initiated action against the borrower-Irshad Qureshi under section 13(4) of Securitisation Act, since the installments were not being paid regularly. That the accused had taken police aid for the purpose of attachment of the property to the extent of 278.73 sq.mtrs. According to the complainant, the Petitioner herein had attached entire property of 777 sq.mts. illegally. Panchanama was drawn to that effect. According to the complainant, the complainant ought to have attached only the mortgaged property i.e. area of 278.73 sq.mts. Bank had illegally taken possession of the property of the complainant on 26/8/2010. The complainant has further alleged that the act of attachment by the bank has given him disrepute in the Society.

6 It is alleged that the present petitioner had given public notice in the Dainik Lokmat of 14/2/2009 thereby calling for tenders for auction of the attached property. In the public notice, the area shown for the purpose of auction is 278.73 sq.mts. However, the entire property was thrown open for inspection. The Petitioner has alleged to have issued a possession-cum-sale and auction notice on 6/1/2010 in "Dainik Lokmat". It is alleged that the possession was taken up forcibly.

7 According to the complainant, the act of entering into the property of the complainant and taking forcible possession would be a criminal act within the meaning of Section 442 of the Indian Penal Code. The act of issuing paper proclamation had caused damage to the reputation of the complainant. The accused, according to the complainant, have also committed criminal breach of trust and cheating within the meaning of section 409 and 418 of the Indian Penal Code.

8 The complainant had approached the Debt Recovery Tribunal with prayer to release his property. The Debt Recovery Tribunal has passed an order in favour of the complainant and also ordered the accused to pay compensation and cost in favour of the complainant.

9 The complainant then filed contempt petition before the Debt Recovery Tribunal against the bank as the property was not released despite orders by the Debt Recovery Tribunal in SA. No. 61 of 2010 vide order dated 20/6/2011. During the pendency of the Contempt Petition No. 2 of 2011, the property was released by the bank on 18/7/2011.

10 According to the complainant, by releasing the property in his favour the bank has admitted the fallibility and therefore, they need to be tried under the provisions of the Indian Penal Code. The complainant had prayed that the accused be tried for offence punishable under Section 406, 409, 418, 442 and 500 of the Indian Penal Code. The verification of the complainant was recorded on

9/7/2013. The learned Magistrate vide order dated 22/7/2013 has been pleased to issue process.

11 The learned Counsel for the respondent has challenged the very maintainability of this Petition under Section 482 of the Code of Criminal Procedure, 1973, on the ground that the order of issuance of process is a revisable order.

12 The learned Counsel for the Petitioner submits that although it is a revisable order, the Petitioner has filed the present petition not only challenging the order of issuance of process, but is also praying for quashing of the complaint, as no offence was made out. According to the learned Counsel for the Petitioner, the Petitioner herein was discharging his official duties and in the course of discharging of his official duties, the Petitioner had to take coercive steps. That the Petitioner had no personal malafides against the complainant. It was an error. It is further submitted that the borrower had given a proposal for one time settlement and was

offering meagre amount towards settlement. The Petitioner had refused to accept the proposal on the ground that the money involved is public money and he had no authority to accept an unreasonable offer.

13 It is submitted that the borrower had issued cheques to the bank in lieu of the liability. The cheques were dishonoured. The borrower had requested the bank not to proceed under Section 138 of Negotiable Instruments Act and had sought another opportunity. The bank was constrained to file recovery proceedings before the Debt Recovery Tribunal, Aurangabad, which is still pending.

14 According to the learned Counsel for the Petitioner, the application filed by the complainant was allowed by the Debt Recovery Tribunal and certain observations were made by the Tribunal against the procedure adopted by the bank. The order passed by the Debt Recovery Tribunal has been executed. The possession of the said property has been restored in favour of the

complainant i.e. the present respondent No. 1 and after taking possession, the respondent had filed Contempt Petition. It is further submitted that the action taken by the officer in discharge of official duty in good faith cannot be held liable for any offence whatsoever, much less under Section 406, 409 and 500 of the Indian Penal Code.

15 Upon perusal of the records, the complaints and submissions advanced across the bar, this Court is of the opinion that the Petitioner had in fact, acted in good faith. That there was neither any personal gain nor intention to cheat the complainant. The very fact that the public notice calling for bids for auction had specifically stated the area put up for auction is 278.73 sq.mts., is eloquent by itself. The complainant has stood as a guarantor to the loan amount. The bank, at the end of the proceedings could execute the decree by virtue of joint and several liability.

16 The panchnama of the attachment of the property would show that there was no cooperation by the borrower despite notice being

issued to cooperate with the attachment. The Court Commissioner was appointed for the purpose of attachment. The Court Commissioner had intimated the parties about his proposed visit at 4.30 p.m. on 28/3/2012. Since there was no cooperation, the bank had to prepare duplicate keys on the given date. The original borrower had also given equitable mortgage. The Court Commissioner had been to the site of the property given as equitable mortgage in Sanmitra Colony. The Court Commissioner had given the report alongwith photographs.

17 The learned Counsel for the respondent submits that it would be unjustifiable to quash the proceedings, since the said provisions have been invoked by the complainant as a deterrent factor and to see that the public servant or the officers in a position like the present one i.e. the Petitioner shall not abuse their powers and bring disrepute to innocent individuals and therefore, has prayed that this petition be dismissed.

18 As against this, the learned Counsel for the Petitioner has submitted that the complaint has been filed with malafide intention to stall the recovery proceedings against the original borrower, which are pending before the Debt Recovery Tribunal.

19 The rival contentions have been considered in the context of the facts and circumstances of this case. In the present case, the Petitioner herein had acted in discharge of his official duties and therefore, is presumed to have acted in good faith, unless, there is any prima facie evidence to show that he had acted with a malafide intention. In fact, it was an error apparent on the face of the record that the entire Survey No. 17684/1/P-1 was mentioned in the public notification. What was intended to be put to auction is only the property which was given as equitable mortgage. Moreover, this Court cannot be oblivious of the fact that the respondent herein i.e. the original complainant had stood as a guarantor to the borrower. Recklessness, disregard of consequences, and malafide stand equally

where the actual state of mind of the actor is relevant. This could be a case of an honest blunder and carelessness.

20 It prima facie appears on the face of the record that the Petitioner herein had acted in good faith. “Good faith” as defined under Section 52 of the Indian Penal Code reads thus :

> “Nothing is said to be done or believed in “good faith” which is done or believed without due care and attention.”

In the present case, the Petitioner had taken due care that the property put to auction was only the portion of the land, which was an equitable mortgage.

21 Good faith according to the definition in General Clauses Act means a thing which is in fact done honestly, whether it is done negligently or not. In the case of **Brijendera Singh Vs. State of U.P. & ors. rep**act**orted in AIR 1981 SC 636.** The Hon'ble Apex Court has held that -

> "Although the meaning of "good faith" may vary in the context of different statutes, subjects and situations, honest intent free from taint of fraud or fraudulent design, is a constant element of its connotation. Even so, the quality and quantity of the honesty requisite for constituting 'good faith' is conditioned by the context and object of the statute in which this term is employed. It is a cardinal canon of construction that an expression which has no uniform, precisely fixed meaning, takes its colour, light and content from the context."

22 The act of the Petitioner has to be considered in context with the interest of the bank where public money was involved. It is only on the basis of observations made by the Debt Recovery Tribunal that the complainant has initiated criminal prosecution against the present petitioner. By no stretch of imagination, it can be said that the petitioner had acted in his own interest, or that he had benefited from the act or that he wanted to cause harm or bring disrepute to the complainant. The Petitioner cannot be said to have any animus against the complainant. The continuation of the present proceedings

would be nothing less than an abuse of process of law and therefore, the proceedings, as prayed for deserves to be quashed.

23 In the case of **Abasaheb Yadav Honmane v/s. State of Maharashtra and Ashwini Abasaheb Honmane reported in 2008(2) Mh. L.J. 856**, the Hon'ble Full Bench of this Court has held -

> "Inherent powers under Section 482 include powers to quash FIR, investigation or any criminal proceedings pending before the High Court or any Courts subordinate to it and are of wide magnitude and ramification. Such powers can be exercised to secure ends of justice, prevent abuse of the process of any court and to make such orders as may be necessary to give effect to any order under this Code, depending upon the facts of a given case."

24 Power under Section 482 of the Code of Criminal Procedure, 1973 can be exercised in a fit case to prevent abuse of process of any court or otherwise to secure the ends of justice. In the present case, this Court is subjectively and objectively satisfied that the

continuation of the proceedings in Complaint No. 1059/2013 would amount to abuse of process of law and therefore, the Petition deserves to be allowed.

25 The Writ Petition is allowed. Rule is made absolute in terms of prayer clause (C), which reads thus :

> "The order passed by the ld. Chief Judicial Magistrate at Aurangabad dtd. 22-7-2013 in Criminal Complaint 1059/2013 may kindly be quashed as well as the Complaint filed by respondent no. 1 i.e. Criminal Complaint No. 1059/2013 may kindly be quashed and set aside."

(SMT. SADHANA S. JADHAV,J)