

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1125 OF 2009

B.S.Garg and others .. Petitioners
Versus
The State of Maharashtra & ors .. Respondents

WITH

CRIMINAL WRIT PETITION NO.103 OF 2010

S. Sriram and anr .. Petitioners
Versus
The State of Maharashtra & ors .. Respondents

WITH

CRIMINAL WRIT PETITION NO.2539 OF 2010

Dr.G. Venkatesh Iyengar .. Petitioner
Versus
The State of Maharashtra & ors .. Respondents

Mr.A.M.Saraogi, Advocate for the petitioner in WP No.1125/09 and for respondent nos.5 to 7 in WP No.103/10 and WP 2539/10.

Mr.Vivek Sharma, Advocate for the petitioners in WP No.103/10 and WP no.2539/10.

Mr.Prakash Ayengar, Constituted Attorney of the original complainant.

CORAM : ABHAY M. THIPSAY, J.

DATED : 7th APRIL, 2015

ORAL ORDER :

1 All these petitions can be conveniently disposed of by this common order as the petitioners in all the petitions are the accused in one and the same case that is pending before the Metropolitan Magistrate, 52nd Court at Kurla, Mumbai. The case has been instituted upon a complaint.

2 There are totally seven accused in the said case. The petitioner in WP no.2539/10 is the accused no.1 therein, and the petitioners in WP No.103/10 are the accused nos.3 and 7 in the said case. The petitioners in WP No.1125/09 are the accused nos.4, 5 and 6 in the said case. (No process was issued against the accused no.2 one Mohanlal Gogia, and in any case, he is not before me in any of these petitions.) The respondent no.2 (hereinafter referred to as 'the complainant' for the sake of convenience) in all these petitions is the complainant in the case before the Magistrate. In this Court, he is represented by a duly Constituted Attorney, who is his son.

3 Initially, the Magistrate had dismissed the complaint under section 203 of the Code of Criminal Procedure (for short 'the Code') by holding that there were no sufficient grounds for proceeding against any of the accused persons. The complainant moved the Court of Sessions by filing an application for revision, challenging the order passed by the Magistrate. The learned Addl. Sessions Judge, by an

order dated 9th February 2009, allowed the revision and set aside the order of dismissal of the complaint. However, instead of directing issue of process, the learned Addl. Sessions Judge directed the Magistrate 'to reconsider the complaint' and 'act as per law'.

4 The petitioners in Writ Petition No.1125/09 i.e. the original accused nos.4, 5 and 6 challenged this order passed by the revisional Court by filing the said Writ Petition. This Court by an order dated 24th June 2009 passed in Writ Petition No.1125/09, directed the complaint proceedings before the Magistrate *as against the said petitioners* to remain stayed. The stay granted by the said order continues to remain in force till today.

5 Under these circumstances, the learned Magistrate reconsidered the question of issue of process as per the order passed by the revisional Court only against the other accused i.e. accused no.1 – G.V. Ayengar, accused no.3 – R.K.Ramnathan, accused no.7 – S. Sriram (Petitioners in Writ Petition Nos.103/10 and 2539/10.) After reconsidering the matter, the learned Magistrate concluded that there were sufficient grounds for proceeding against the said accused, and ordered process to be issued against them, requiring them to answer to the charge of offences punishable under section 465 IPC, 467 IPC, 471 IPC read with section 34 of the IPC. The learned Magistrate dismissed the complaint, so far

as it related to original accused no.2 Mohanlal Gogia. Being aggrieved by the order issuing process, the accused no.1 G.V. Ayengar has approached this Court by filing Writ Petition No.2539/10. The accused nos.3 and 7 had already approached this Court by filing Writ Petition No.103/10, but it was before the order issuing process was passed. After the said order was passed, the petitioners have, with the leave of the Court, amended the petition, and are praying that the order issuing process against them, as passed by the Magistrate, be quashed and set aside.

6 I have heard Mr.A.M.Saraogi, learned counsel for the petitioner in WP No.1125/09 and for respondent nos.5 to 7 in WP No.103/10 and WP 2539/10. I have heard Mr.Vivek Sharma, learned counsel for the petitioners in WP No.103/10 and WP no.2539/10. I have heard Mr.Prakash Ayengar, Constituted Attorney of the original complainant.

7 The allegations leveled against the accused persons, as can be seen from the complaint, are, in brief, as follows :-

8 That, the complainant is the nephew of late Dr.A.R.Gopal-Ayengar who was the owner of a plot of land, together with a bungalow standing thereon, in Mysore Co-operative Co-operative Housing Society Ltd, Mahul Road, Chembur. Late Dr.A.R.Gopal-Ayengar was a member of the

said Mysore Co-operative Housing Society Limited (for short 'the said society'). He was in physical possession and occupation of the said bungalow along with his wife Smt.Rajalakshmi Ayengar. Dr.A.R.Gopal-Ayengar (hereinafter referred to as 'late Dr.Ayengar') passed away on 8th September 1992. The complainant along with his wife and his son Prakash, were residing with late Dr.Ayengar in the said bungalow during the life time of late Dr.Ayengar. According to the complainant, Smt.Rajalakshmi Ayengar, wife of late Dr.Ayengar continued to stay in the said bungalow after the death of Dr.A.V.Gopal-Ayengar, and was being looked after by the complainant and his family members. Smt.Rajalakshmi passed away on 2nd February 2002. The accused no.1 Dr.GV.Ayengar is a distant relation of Smt. Rajalakshmi. According to the complainant, after the death of Smt.Rajalakshmi, he and the other accused persons conspired, to deprive the complainant of the bungalow of late Dr.Ayengar to which, according to him, he had become entitled by virtue of being the heir of late Dr.Ayengar. Late Dr.Ayengar had made a Will and had entrusted the same to the accused no.3 Ramnathan, but the accused no.3, in collusion with the accused no.1, suppressed the said Will, and came out with a story that Smt.Rajalakshmi had made a Will, whereby she had bequeathed the bungalow to the accused no.1. According to the complainant, this Will is a forged document, and has been falsely claimed to have been witnessed by the accused no.3 and the accused no.7.

9 So far as the accused nos.4, 5 and 6 (Petitioners in Writ Petition No.1125/09) are concerned, the grievance of the complainant against them is that they being the administrator and office bearers of the said society, accepted a forged nomination prepared by the accused no.1 in respect of the said bungalow, and refused to recognize the complainant as a member of the Society, or the lawful occupant of the bungalow in question.

10 Considering the nature of the allegations, in my opinion, the case against the petitioners in WP no.103/10 and 2539/10 and the case against the petitioner in WP No.1125/09, cannot be treated on par, and needs to be considered and viewed separately.

11 Mr.Saraogi, the learned counsel for the petitioners in WP No.1125/09 submitted that these petitioners are not concerned with the dispute between the complainant and the accused no.1 and/or the accused nos.3 and 7. The substance of his submission is that the correctness or otherwise of the claim of the complainant that the nomination paper whereby the accused no.1 was shown as 'nominee', is forged, is not within the knowledge of these petitioners. According to him, the petitioners have no interest in the dispute between the complainant on one hand, and the accused no.1 on the other hand, and that they have acted and have been acting in good faith.

12 Mr.Vivek Sharma, the learned counsel for the petitioners in the other two petitions submitted that the dispute between the parties is of a civil nature. He also advanced a number of contentions, the substance of which is that the allegations leveled by the complainant against the said petitioners are false.

13 I have carefully gone through the impugned order whereby process was issued by the learned Magistrate.

14 I have carefully gone through the complaint.

15 In paragraph no.6 of the impugned order, the learned Magistrate has given detailed reasons for coming to the conclusion that there were sufficient grounds for proceeding against the petitioners i.e. original accused nos.1, 3 and 7.

16 After having gone through the reasoning of the Magistrate, I do not find any fault therein. The learned Magistrate has understood the facts alleged in the complaint properly and has viewed the complaint in proper perspective. The learned Magistrate's understanding of the legal position as to when, in a given case, process should be issued, also appears to be proper.

17 Considering the allegations leveled against the accused no.1 Dr.G.V.Ayengar, accused no.3 Ramnathan, and accused no.7 Sriram, it is not possible to hold that there were no sufficient grounds for proceedings against these accused. It is well settled that the test to be applied by the Magistrate, at that stage is not '*whether the accused would ultimately be convicted after the trial*'. What the Magistrate has to see at that stage, is '*whether there is a need to proceed with the trial of the alleged offences*.' Applying the well settled tests and well known para-meters, it is not possible to hold that the order issuing process against the accused nos.1, 3 and 7, calls for any interference in the constitutional jurisdiction of this Court. Surely, there is no excess of jurisdiction or any patent or manifest illegality, in the order issuing process.

18 The Writ Petition nos.103/10 and 2539/10 have no merit.

19 As regards the petitioners in WP No.1125/09 i.e. accused nos.4, 5, and 6, the position is somewhat different. Undoubtedly, the complainant has a grievance against them also, and the complaint does allege that they had conspired with the other accused to commit the alleged offences. However, when the matter was reconsidered by the Magistrate in accordance with the order passed by the court of Sessions in revision, he did not – rather could not – consider whether there was a case for proceeding against

these accused in view of the *stay* granted by this court. Thus, there is no finding of the Magistrate about the sufficiency or otherwise of the grounds for proceeding against these accused. If the Magistrate is now required to consider this aspect of the matter, then, it would result in further delay which is avoidable. The Constituted Attorney of the complainant has pointed out that the matter is pending before the Court since 2010, and that the original complainant is an old person. In the circumstances, I am not inclined to remand the matter back to the Magistrate for deciding whether or not there are sufficient grounds for proceeding against these accused. This is particularly so because even Mr.Saraogi submits that this aspect may be decided by this Court only instead of remanding the matter to the Magistrate.

20 I have carefully considered the matter.

21 It is not very clear *at this stage* as to whether there are sufficient grounds for proceeding against these accused.

22 I have, therefore, in the course of arguments, asked the Constituted Attorney of the complainant as to his precise grievance against the accused nos.4, 5 and 6. The Constituted Attorney of the complainant, in reply, submitted that they had been helping the other accused; and as an instance of the help done by them to the accused accused, he submitted that *these accused had refused to produce the*

original nomination form that is available with them before the police, or the Court. On this, Mr.Saraogi submitted that a copy of the nomination form had been handed over to the police when investigation under section 202 of the Code was carried out as per the orders passed by the Magistrate. Mr.Saraogi submits that, any way, the petitioners in Writ Petition No.1125/09 are ready to hand over the original nomination form to the learned Magistrate, as and when called upon, or required by the learned Magistrate.

23 After hearing Mr.Saraogi and the Constituted Attorney of the complainant, it appears proper to dispose of the Writ Petition No.1125/09 by giving appropriate directions to the learned Magistrate.

24 In the result, all the three petitions are disposed of as follows :

Common Operative Order in
Writ Petition Nos.103 of 2010 and 2539 of 2010

25 The Writ Petitions are dismissed.

26 Interim stay stands vacated.

27 Rule is discharged.

28 The learned Magistrate shall proceed with the inquiry/trial expeditiously and endeavour to complete the

same as early as possible.

29 However, in the event of the petitioners making an application before the Magistrate seeking exemption from personal appearance before the Magistrate, the learned Magistrate shall be liberal in granting such permission unless the presence of any of the petitioners would be necessary on a given date to make further progress in the inquiry/trial.

Operative Order in Writ Petition No.1125 of 2009

30 The petition is partly allowed.

31 The learned Magistrate shall not consider the question of issuance of process against the present petitioners, at this stage, as directed by the order dated 9th February 2009 passed by the Addl. Sessions Judge in Revision Application No.273/08.

32 However, on an application made by the complainant to the Magistrate, the learned Magistrate shall call upon the petitioners i.e. accused nos.4, 5 and 6 to produce the original nomination in respect of the bungalow on plot no.73 in the said society, *who have agreed before this court, to produce the same before the Magistrate.* The learned Magistrate shall also consider the prayer, if any, made by the complainant for further inquiry/investigation into the matter

on merits, and in accordance with law, and may, if he thinks fit, call for further documents which may be necessary for the purpose of such inquiry/investigation in accordance with law.

33 It is also clarified that in the event of the Magistrate coming to a conclusion, or forming an opinion in the course of inquiry, and/or trial that is expected to proceed against the accused nos.1, 3 and 7, that the petitioner in WP No.1125/09 i.e. original accused nos.4, 5, and 6 have also committed an offence, or offences, for which they can be tried along with accused nos.1, 3 and 7, the learned Magistrate shall take appropriate action in the matter, in accordance with the provisions of section 319 of the Code of Criminal Procedure.

34 Petition is disposed of accordingly.

35 Rule is made absolute in the aforesaid terms.

(ABHAY M.THIPSAY, J)