

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.1240 OF 2013

Mr.Ashok Gopinath Deshpande & Anr. ..Applicants

v/s.

The State of Maharashtra & Ors. ..Respondents

Dr.Arunkumar Burthankar for the Applicants

Mr.Abhijeet Desai for the Respondent Nos.1 and 2.

Mrs.PH.Kanthaira, APP for the Respondent/State.

CORAM : RANJIT MORE &

SMT. ANUJA PRABHUDESSAI,JJ.

ORDER RESERVED ON : 21st APRIL, 2015

DATED : 6th MAY, 2015.

JUDGMENT (PER ANUJA PRABHUDESSAI, J.)

1. The applicants herein have invoked the inherent jurisdiction of this court for quashing criminal case being RCS. No. 404892/2013 pending before the learned JMFC, Court No.13, Pune.

2. The respondents no.2 and 3 are the complainants in RCC No.0401237/2013 and shall be hereinafter referred to as complainants. The complainants had alleged that by order dated 5.11.1979 the Competent Authority had allotted land to Rakshalekha

Co-operative Housing Society. The ULC Order permitted construction of 258 tenaments for the members, the list of which was approved by the ULC Office. The applicants were neither the members nor were they appointed as the Chairman and the Secretary of the society. It is alleged that the applicants were only authorized to carry out certain official work such as to make an application to the Collector for conversion of the user of the land to the society into nonagricultural purpose, to deposit the required amounts, to enroll members for the said Rakshalekha Co-op. Hsg. Society and such other allied work.

3. The complainants had alleged that they had obtained a copy of ULC Order on 26.1.2013, which revealed that the applicants herein had fabricated false documents and in collusion with some officers of Pune Municipal Corporation, violated the ULC Order and without any authority and without informing the society got the plans sanctioned and illegally constructed 84 flats and misappropriated the amount received therefrom. Amongst other allegations, the complainants had also alleged that the members who had taken housing loan had deposited the entire installments with the applicants, however, the said members had received notices from MCHFC Ltd., in respect of

outstanding housing loan. The members subsequently realized that the applicants had not deposited the said money with MCHFC Ltd. the complainant claimed that the applicants had committed breach of trust and had misappropriated the amount which was deposited by the members for payment of NA charges.

4. The learned Magistrate, by order dated 16.3.2013 under Section 156(3) of the Code of Criminal Procedure, directed the officer in charge of Dattawadi Police station to register the FIR and investigate the same. Pursuant to the said order, the Dattawadi Police Station registered FIR No.47 of 2013 against the applicants for offences under Section 405, 406, 463, 464, 465, 467, 468, 471, 441, 447, 420, 506(ii), 120(B) and 34 of IPC.

5. The applicants had challenged the said order by filing a writ petition before this Court being Writ petition No.7487 of 2012. The said writ petition was withdrawn with liberty to file a revision application. The applicants thereafter filed a revision application being Criminal Revision Application No. 421 of 2013, which came to be dismissed vide order dated 12.11.2013. The applicants therefore filed the present application for quashing the order dated 16.3.2013

and the consequent FIR No 47 of 2013 registered by Dattawadi police Station, Pune. During the pendency of the application, the chargesheet was filed. Hence, the applicants amended the application and sought to quash RCS No. 404892/2013 pending before the JMFC, 13th Court, Pune.

6. Shri Burthankar, learned Counsel for the applicants has submitted that there is inordinate delay in lodging the complaint. He has further submitted that the contention of the complainant that the applicants were not the Chairman and Secretary of the society stands falsified by the resolution passed by the General Body Meeting held on 15.9.1979. He has further submitted that the allegations of the complainants that the applicants had constructed 84 additional flats without permission of the Government and that the applicants had collected Rs.130/- pe sq. ft. instead of Rs.90/- per sq.ft. stand falsified by letters dated 11.5.1983 and 3.8.1984 and the other correspondence which has been produced by him in this proceedings. He has further urged that the contention of the complainants that the applicants have used a bogus order dated 17.9.1982 to transfer the land and executed the sale deed in respect of the said land, stands

falsified by letter dt.17.9.1984 issued by the District Collector Pune to the Addl. Collector and Competent Authority informing him that the Competent Authority had granted permission to Shri Bhakre to transfer the land in favour of Raksha Lekha Co-op. Hsg. Society, and further by letter dated 29.11.1984 issued by the Addl. Collector and Competent Authority to the District Collector, Pune confirming that the Competent Authority had granted permission to Bhakre to transfer the land in favour of the society. Learned Counsel had further urged that the order dated 22.2.1995 stipulates that consequent to the division of the original society, the liability to repay the loan was that of individual beneficiary members and as such the accused as a Chairman and Secretary of the dissolved original society was not in any way responsible for repayment of the balance loan.

7. Learned Counsel has further urged that the complainants have no cause of action to complaint as regards constructions of 84 additional flats. It is submitted that apart from bald allegation of cheating, there is no material on record to indicate that the accused had induced the complainant to part with the money or property and that the ingredients of cheating are not made out. It is also urged

that the complaint is also barred under Section 148(3) of Maharashtra Co-operative Societies Act, 1960, and in terms of Section 83 of Bombay Public Trusts Act, 1950. It is submitted that the present complaint is nothing but a counter blast to the serious civil disputes between the complainant and the accused in respect of the redevelopment of the societies property and hence the same are liable to be quashed.

8. Learned APP Mrs. Kantharia has submitted that the chargesheet is already filed and there is sufficient material to proceed against the accused. She has further submitted that the applicants have not produced the complete record of the chargesheet and that most of the documents relied upon by the applicants do not form part of the chargesheet and that these documents not being of sterling quality cannot be looked into at this stage.

9. Shri Desai, Learned Counsel for the respondent nos.2 and 3 submitted that there is no delay in filing the complaint as the respondent had learnt about the same only in the year 2013 upon obtaining information under the Right to Information Act. He submitted that there is no justification in respect of the construction

of additional 84 flats which were constructed in contravention of the permission of the ULC on 5.11.1979 and there is no justification for violating the said order. He has further submitted that the applicants had mis-represented to the society members that the rates of the flats were revised from Rs.90/- to Rs.145/-. He has argued that the applicants had siphoned off the additional amount which was extracted by mis-representation and fraud. He has further argued that the applicants had also siphoned off the loan amount which was handed over to them by the society members towards repayment of the earlier loan and this fact came to the notice of the society members only on receipt of the notice from the bank. He has submitted that the FIR prima facie discloses commission of offence. The material collected in the course of investigation is sufficient to prove the involvement of the accused and hence the application is not maintainable.

10. We have perused the records and considered the submissions of the respective parties. At the outset it may be mentioned that it is not necessary to refer to all the judgments relied upon by the applicants as the Apex Court has considered the said judgments in

the case of *Umeshkumar vs. State of Andhrapradesh [2013 (10)*

SCC 591] and has reiterated the principles as under:

“12.The scope of Section 482 Cr.P.C. is well defined and inherent powers could be exercised by the High Court to give effect to an order under the Cr.P.C.; to prevent abuse of the process of court; and to otherwise secure the ends of justice. This extraordinary power is to be exercised *ex debito justitiae*. However, in exercise of such powers, it is not permissible for the High Court to appreciate the evidence as it can only evaluate material documents on record to the extent of its *prima facie* satisfaction about the existence of sufficient ground for proceedings against the accused and the court cannot look into materials, the acceptability of which is essentially a matter for trial. Any document filed alongwith the petition labelled as evidence without being tested and proved, cannot be examined. Law does not prohibit entertaining the petition under Section 482 Cr.P.C. for quashing the charge sheet even before the charges are framed or before the application of discharge is filed or even during its pendency of such application before the court concerned. The High Court cannot reject the application merely on the ground that the accused can argue legal and factual issues at the time of the framing of the charge. However, the inherent power of the court should not be exercised to stifle the legitimate prosecution but can be exercised to save the accused to undergo the agony of a criminal trial.

(Vide: *Pepsi Food Ltd. & Anr. v. Special Judicial Magistrate & Ors.*, AIR 1998 SC 128; *Ashok Chaturvedi & Ors. v. Shitulh Chanchani & Anr.* AIR 1998 SC 2796; *G. Sagar Suri & Anr. v. State of U.P. & Ors.*, AIR 2000 SC 754; and *Padal Venkata Rama Reddy @ Ramu v. Kovvuri Satyanarayana Reddy & Ors.*, (2011) 12 SCC 437)

13. In *Rajiv Thapar v Madan Lal Kapoor*, 2013 (3) SCC 330, this Court while dealing with the issue held as follows:

“ Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Code of Criminal Procedure:

(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

(iv) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?”

14. In *State of Bihar v. P.P. Sharma & Anr.*, AIR 1991 SC 1260, this Court dealt with an issue of whether an

application under Section 482 Cr.P.C. for quashing the charge sheet should be entertained before cognizance is taken by a criminal court and held as under:-

“Quashing the charge-sheet even before cognizance is taken by a criminal Court amounts to killing a still born child. Till the criminal Court takes cognizance of the offence there is no criminal proceedings pending. I am not allowing the appeals on the ground alternative remedies provided by the Code as a bar. It may be relevant in an appropriate case. My view is that entertaining the writ petitions against charge-sheet and considering the matter on merit on the guise of prima facie evidence to stand on accused for trial amounts to pre-trial of a criminal trial.... It is not to suggest that under no circumstances a writ petition should be entertained.....The charge-sheet and the evidence placed in support thereof form the base to take or refuse to take cognizance by the competent Court. It is not the case that no offence has been made out in the chargesheets and the First Information Report.”
(Emphasis added)

15. The issue of malafides loses its significance if there is a substance in the allegation made in complaint moved with malice.

In Sheo Nandan Paswan v. State of Bihar & Ors., AIR 1987 SC 877, this Court held as under:

“It is a well-established proposition of law that a criminal prosecution, if otherwise justifiable and based upon adequate evidence does not become vitiated on account of malafides or political vendetta of the first informant or complainant.”

16. In Parkash Singh Badal v. State of Punjab & Ors., AIR 2007 SC 1274, this Court held as under:

“The ultimate test, therefore, is whether the allegations have any substance. An investigation should not be shut out at the threshold because a political opponent or a person with political difference raises an allegation of commission of offence. Therefore, the plea of malafides as raised cannot be maintained.”

17. In State of A.P. v. Goloconda Linga Swamy & Anr., AIR 2004 SC 3967, this Court held as under:

“It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of malafides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceeding.”

(See also: K. Karunakaran v. State of Kerala, (2007) 1 SCC 59).

18. Thus, in view of the above, it becomes evident that in case there is some substance in the allegations and material exists to substantiate the complicity of the applicant, the case is to be examined in its full conspectus and the proceedings should not be quashed only on the ground that the same had been initiated with mala fides to wreak vengeance or to achieve an ulterior goal.

19. Scheme for inquiry/trial provided under the Cr.P.C. is quite clear. After investigation, report under Section 173(2) Cr.P.C. is to be submitted before the competent court i.e. magistrate having jurisdiction in the matter and the magistrate may take cognizance under Section 190 Cr.P.C. However, it is still open to the magistrate to direct further investigation under the provisions of Section 173(8) Cr.P.C. If the case is triable by the Court of Sessions, the magistrate would commit the case to the said court under Section 209 Cr.P.C. It is for the court to

examine whether there is sufficient material collected during investigation and filed alongwith the charge sheet that a *prima facie* view can be taken to proceed against the accused and in view thereof, frame charges under Section 228 Cr.P.C. At this stage the remedy available to the accused is to ask for discharge under Section 227 Cr.P.C. In case charges are framed the accused has to face the trial, charges can be added/altered at any stage of the trial, before the pronouncement of the judgment to suit the evidence adduced before the court, under the provisions of Section 216 Cr.P.C. The only legal requirement is that a witness has to be recalled as provided under Section 217 Cr.P.C. when a charge is altered or added by the court.”

11. It is thus well settled that law does not prohibit either entertaining the petition under Section 482 for quashing the chargesheet or considering the material relied upon by the accused provided such material is of sterling and impacable quality. It is equally well settled that in exercise of these extra ordinary powers, the court can only evaluate the material documents on record to the extent of its *prima facie* satisfaction about existence of sufficient ground for proceeding against the accused. It therefore follows that the Court cannot appreciate the evidence and further cannot consider the documents, genuineness of which is to be decided and proved in

the course of the trial. In the light of these well settled principles, the question which falls for our consideration is whether the record of the case and the documents submitted therewith prima facie discloses the involvement of the accused in the alleged crime.

12. It is an undisputed fact that vide order dated 5.11.1979, under the ULC Act, the Government had granted land to the housing society by name Rakshalekha Griha Nirman Society, Pune for the purpose of construction of flats to the weaker sections of Central Defence Accounts Department, Pune. It is also not in dispute that the ULC Order permitted construction of only 258 tenaments for members, the list of which was approved by the ULC Office. The FIR contains allegations that the petitioners had fabricated false documents in collusion with officers of Pune Municipal Corporation, constructed 84 additional flats in violation of ULC order. There are also allegations of misappropriation of the amount in respect of the said flats.

13. The FIR also contains the allegations that the applicants herein were authorized by the society to collect the instalments from the members for repayment of the loan sanctioned by Maharashtra Co-operative Housing Finance Society Ltd. It is alleged that the

members had deposited the entire instalments of the housing loan with the accused/applicant nos.1 and 2. However, on receiving the notice dated 21.3.2011 from the Maharashtra Co-operative Housing Finance Society Ltd., in respect of the outstanding housing loans, the members realized that the applicants had not deposited the money with the Maharashtra Co-operative Housing Finance Society Ltd., and had thereby committed breach of trust and further misappropriated the loan instalments.

14. The FIR also contains the allegations that the applicants had established Gajendra Nagar Vyayam Mandal which was registered with Charity Commissioner and had obtained grant of Rs.80,000/- from the Government for the said Vyayam Mandal, but had purchased material only worth Rupees 5000-10,000/- and had cheated the Government in respect of the balance amount.

15. The FIR therefore prima facie discloses the involvement of the applicant in committing a cognizable offence. The criminal proceedings are not barred by limitation and the delay per say is not a ground for quashing the proceedings, more particularly when the delay is always explicable. The subsequent repeal of ULC Act also is

of no consequence as the alleged breach was committed prior to the repeal.

16. The petitioner has sought to refute the charges by producing the audit report and some correspondence in the form of letters dated 11.5.1983 addressed by the petitioner no.1 to the Deputy Chief Minister and Urban Development Minister to permit construction of as many tenaments as permissible under the DCR, noting dated 12.5.1983 of the Deputy CE (BC) and the letter dated 11.2.1986 addressed by the accused to the Addl. Collector and Competent Authority, Pune informing that as per the prevailing DCR there was possibility of the society getting additional FSI. These documents, do not prima facie reveal that the ULC condition was modified and the petitioners were permitted to construct additional 84 flats and/or to revise the rate from Rs.90/- to Rs.140/- per sq. ft. as contemplated in the ULC Order. Hence documents relied upon by the accused do not rule out the assertions contained in the FIR. Besides these documents, the admissibility of which is essentially a matter of trial are not indubitable and do not satisfy the requirements stipulated in the case of Rajiv Thapar (Supra). Furthermore, these documents do

not prima facie reveal that the ULC Order was modified. Be that as it may, the applicants herein have not produced the complete records on the ground that the records are voluminous and has produced selected records of the charge-sheet, in addition to the documents which do not form part of the chargesheet. We are therefore unable to evaluate the entire records which form part of the charge-sheet. In the absence of the complete records, we are unable to adjudicate the issue in its true perspective. This however will not preclude the applicant from agitating the issue before the Magistrate who is seized of the matter.

17. Under the circumstances the application is dismissed with liberty to the applicants to file discharge application.

(ANUJA PRABHUDESSAI, J.)

(RANJIT MORE, J.)