

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

CRIMINAL WRIT PETITION NO. 1143 OF 2015

NIVRUTTI S/O GOVIND KOLEKAR
VERSUS
SAHEBRAO S/O HARIBHAU GHADGE AND OTHERS

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Advocate for Petitioner : Mr Z M Pathan
Advocate for Respondent 2 : Mr A P Bhandari
APP for Respondent 3 : Miss R P Gour

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CORAM : V.K. JADHAV, J.

Dated: October 13, 2016

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PER COURT :-

1. Heard finally with the consent of the parties at admission stage.

2. Being aggrieved by the Judgment and order passed by the Additional Sessions Judge, Newasa in Criminal Revision Application No.23/2014 dated 23.7.2015, the original complainant has preferred this writ petition.

3. Brief facts, giving rise to the present writ petition are as under :-

The petitioner-original complainant has filed a private complaint bearing RTC No.259/2010 against the

present respondents no.1 and 2 for having committed an offence punishable under sections 444, 445, 447, 448, 452, 454, 34 of Indian Penal Code. The learned Magistrate on perusal of the complaint and verification statement filed on record found that prima facie case is made out to proceed against respondents accused and accordingly by order dated 17.9.2010 issued process against respondents-original accused for the offence punishable under sections 447, 448, 452, 454, read with 34 of the Indian Penal Code. Being aggrieved by the same, the respondent-original accused preferred Criminal Revision Petition No.23/2014 and the learned Additional Sessions Judge, Newasa by the judgment and order dated 23.7.2015 allowed the Revision and thereby quashed and set aside the process issued against respondents-original accused and further directed the Judicial Magistrate First Class, Newasa to pass proper order on the complaint in view of the observations made in the Revision. Aggrieved by the same, the petitioner-original complainant has preferred this writ petition.

4. The learned counsel for the petitioner submits that, the scope of the inquiry under section 202 of the Criminal Procedure Code is extremely limited and it is only to ascertainment of the truth or falsehood of the allegations made in the complaint. It is not appropriate on the part of the Court to consider as to what defences are open to the accused. The learned counsel submits that, in the instant case, the learned Additional Sessions Judge, Newasa has considered the documents produced by the respondent-accused for the first time before the revisional Court and after considering those documents observed that the allegations made in the complaint are baseless. Same is impermissible. The learned counsel submits that, admittedly, Civil dispute is pending between the parties. The son of the complainant as well as complainant himself instituted civil suit against the respondent-accused and some other persons and those suits are still pending. It is a matter of record that, son of the complainant had instituted a suit for decree of perpetual injunction. It is quite needless to say that, the evidence in the said civil suit is not required to be pleaded. Even though, those

civil suits are still pending, the learned Additional Sessions Judge, Newasa has observed that there was no structure on the land (the land which is the subject matter of those civil suits) and thus, there is no question of any house tress pass or causing damage to the structure which is not in existence. Learned counsel submits that, entire approach of the Additional Sessions Judge, Newasa is erroneous and against the settled provisions of law.

5. The learned counsel for the petitioner in order to substantiate his contentions placed his reliance on the following judgments :-

- i] Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and others reported in AIR 1976 Supreme Court, 1947.
- ii] Anil Saran Vs. State of Bihar and another reported in AIR 1996 Supreme Court 204.
- iii] Nupur Talwar Vs. Central Bureau of Investigation and another reported in AIR 2012 Supreme Court 1921.
- iv] Sonu Gupta Vs. Deepak Gupta and others reported in 2015 ALL MR (Cri) 1192 (S.C.).
- v] Vinod Raghuvanshi Vs. Ajay Arora and others reported in AIR 2014 S.C. (Supp) 1516.

vi] Shridhar Vinayak Modgi Vs. Ravindra Khanderao Hajare and another reported in 2003 ALL MR (Cri) 2210.

6. The learned counsel for respondents/original accused nos. 2 submits that, the RCS No.477/2009 and RCS No.330/2006 came to be instituted in respect of the landed property where the incident alleged to have taken place. It has alleged in the complaint that the respondent-accused no.1 had threatened the complainant on the point of revolver to vacate the house and shed immediately and thereafter both the respondents-accused brought a JCB, demolished the structure (house of the complainant) and also taken away all the articles. The counsel submits that in civil suit No. RCS No.477/2009 filed by the son of the complainant namely Suresh there is absolutely no reference of any standing structure in the land and there is no reference to the incident as shown in the complaint dated 10.5.2008 even though cause of action in the said suit shown to have occurred on 6.8.2009. Learned counsel submits that, the Additional Sessions

Judge, has, therefore, rightly observed that in absence of averments in respect of the standing structure in the suit land in those civil suits, the existence of the said structure of the house in the land where the incident alleged to have taken place itself is doubtful and thus there is no prima facie material which can be said to be sufficient for criminal court to take cognizance and proceed against accused. Learned counsel further submits that, even though accepting the allegations made in the complaint as it is, prima facie no offence is made out against the respondent-accused. The complainant has not examined witnesses who are cited as witnesses in the complaint. Furthermore, as rightly observed by the learned Additional Sessions Judge, Newasa that even though it has alleged in the complaint that after the said incident, the complainant has approached the concerned police station and filed the complaint, copy of the said complaint is not produced on record. Learned counsel submits that, though defence of the accused or probable defence of the accused is not required to be considered at the time of issuance of the process, however, the material relied

upon by the accused which is in the nature of public documents or materials which are beyond suspicion or doubt, can be looked into by the Court while exercising the revisional jurisdiction under section 397 of the code. On considering those documents, if the complaint does not make out any case against the accused, then, the accused need not undergo agony of the criminal trial. The learned Additional Sessions Judge, Newasa has considered the same and accordingly allowed the revision by setting aside the order passed by the Magistrate issuing process against respondent-original accused. No interference is required and writ petition is liable to be dismissed.

7. Learned counsel for respondent in order to substantiate his contention places his reliance on the following judgments :-

- I] Harshendra Kumar D. Vs. Rebatilata Koley Etc. reported in 2011 Cri.L.J. 1626.
- ii] M/s Pepsi Foods Limited and another Vs. Special Judicial Magistrate and others reported in AIR 1998 SC 128.

8. I have also heard the learned APP for the Respondent State.

9. On careful perusal of the judgment and order passed by the Additional Sessions Judge, Newasa in Criminal Revision Application No.23/2014, it appears that the learned Judge has mainly allowed the revision on the ground that, in the civil suits filed by the complainant and his son respectively, there is no reference of any structure standing on the land or that of the residence of the complainant party. It is not disputed that son of the complainant namely Suresh had instituted a RCS No.477/2009 for a decree of perpetual injunction and said suit is still pending before the Civil Court. Needless to say that in a suit for a relief of perpetual injunction, inevitably possession is asserted over the suit land. The complainant has also instituted a RCS No.330/2006 for a partition and separate possession of certain properties including the land which is subject matter of the suit instituted by his son. It is a rule of pleading that evidence is not required to be pleaded. It is thus, premature on the part of the

learned Additional Sessions Judge, Newasa to make any observations in the judgment by referring those pleadings. Further, the copies of the plaint of the suit came to be produced before the revisional court first time by the respondent-accused.

10. In a case Smt Nagawwa Vs. Veeranna Shivalingappa Konjalgi and others (supra), relied upon by the learned counsel for the petitioner, in paragraph No.5 of the Judgment, the Supreme Court has made following observations :-

5. Mr. Bhandare laid great stress on the words “the truth or falsehood of the complaint” and contended that in determining whether the complaint is false the Court can go into the question of the broad probabilities of the case or intrinsic infirmities appearing in the evidence. It is true that in coming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case against him. 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. These considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under Section 202 of the Code of Criminal Procedure which culminate into an order under Section 204 of the Code. Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:

- (1) where the allegations made in complaint or the statement 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 complaint by legally competent authority and the like. The case mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings.

11. In a case of Anil Saran Vs. State of Bihar (supra), relied upon by the learned counsel for the petitioner, the Supreme Court in paragraph No.9 of the Judgment has made following observations :-

“9. Under these circumstances, we do not think that the imputations alleged against the appellant have been done in his capacity as a

partner of the firm. Whether the offence has been made out, whether he is liable and what are the defences open to him are not matters at this stage for consideration. It is for the learned Magistrate to proceed with the trial and to deal with according to law.”

12. In a case Nupur Talwar (supra) wherein the Supreme Court has observed that, the consideration at the time of issuance of process are well settled and defences available to the accused need not be considered, the defences based on factual inferences ought not to be considered. It has further observed by the Supreme Court that in a revision against the order of issuance of process the revisional Court cannot go into question whether reasoned order by the Magistrate were good or bad.

13. In a case of Harshendra Kumar (supra) relied upon by the learned counsel for respondent, in paragraph no.25 and 26 of the Judgment, the Supreme Court has made following observations :-

“25. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is

yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under [Section 482](#) or for that matter in exercise of revisional jurisdiction under [Section 397](#) of the Code. It is fairly settled now that while exercising inherent jurisdiction under [Section 482](#) or revisional jurisdiction under [Section 397](#) of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if, on the face of the documents - which are beyond suspicion or doubt - placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

26. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to appellant's resignation from the post of Director of the Company.”

14. In the case cited above, appellant resigned from the post of Director on March 2, 2004 and dishonoured cheques were issued by the Company on April 30, 2004 i.e. much after the appellant resigned from the post of Director. It is a matter of record that, on the date of offence alleged to have been committed by the company, the appellant was not the director and in that way, he had nothing to do with the affairs of the company. In the backdrop of these facts, the Supreme Court has made observations as referred in paragraph no.25 and 26 of the Judgment.

15. In the instant case, the said civil suits are still pending and as far as rule of pleadings are concerned, evidence is certainly not required to be pleaded. It is not appropriate on the part of the learned Additional Sessions Judge to draw inference that there is no reference in the civil suits about the standing structure on the suit land and thus, there is no question of any criminal tress-pass in respect of the said property nor can there be a question of causing damage to the said

property which is not at all in existence. Thus, the facts of the aforesaid case relied upon by the learned counsel for respondent/original accused are altogether different and cannot be made applicable to the facts and circumstances of the case. The ratio laid down in the cases cited and relied upon by the learned counsel for the petitioner squarely applies to the facts and circumstances of the present case. The learned Additional Sessions Judge has exceeded his limits in considering the defences available to the accused. Even, the learned Additional Sessions Judge has gone to the extent of considering the defences based on factual inferences.

16. On perusal of the complaint, it appears that the complainant has cited the P.S.O. of Police Station, Newasa as a witness and further requested the Court in the complaint itself that at the time of trial, said Police Constable be called in the Court alongwith relevant record of date 11.5.2008, the date on which the complainant had lodged the complaint in the police

station. According to the complainant, on the basis of his complaint lodged in the police station, no cognizance was taken and therefore, he was constrained to approach the Court. The learned Additional Sessions Judge, Newasa has given unnecessary weightage to the said facts and observed that neither the complaint application nor the copy of the complaint filed in the police station is filed on record. According to learned Additional Sessions Judge, this is a major discrepancy which can be noted at the very outset. In my considered opinion, the approach of the learned Additional Sessions Judge, Newasa is erroneous and not in accordance with the well settled principles.

17. On perusal of the complaint, it appears that, the complainant has made serious allegations against respondent-accused. It has alleged in the complaint that, the complainant was threatened on the point of revolver and thereafter with the help of JCB respondent-accused not only demolished the entire structure standing in the land, but thereafter took away articles

after demolition to cause disappearance of the evidence. Thus, the approach of the learned magistrate is proper, correct and legal. The Judgment and Order passed by the Additional Sessions Judge, Newasa dated 23.7.2015 in Criminal Revision Application No.23/2014 is not sustainable in the eyes of law. Hence, order.

O R D E R

- I. Criminal Writ Petition is hereby allowed in terms of prayer Clause '**B**'.
- II. Criminal Writ Petition accordingly disposed of.

18. At this stage, the learned counsel for respondent-accused requested for staying the effect of this order. Request stands refused.

sd/-

(V.K. JADHAV, J.)

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