

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1609 OF 2015

Gopalrao Ambadasrao Borikar,
Age. 80 years, Occ. Retired Dy. Collector,
R/o. Shiviji Nagar, P.O. & Dist. Parbhani,
431401.

...Petitioner

Versus

The State of Maharashtra

...Respondent

....
Mr. G.A. Borikar, the petitioner in person
Mr. S.W. Munde, A.P.P. for the respondent-State.
.....

CORAM : V. K. JADHAV, J.
DATED : 16th DECEMBER, 2016

ORAL JUDGMENT:-

1. Rule. Rule returnable forthwith. By consent of parties, heard finally at admission stage.

2. Being aggrieved by the order dated 24.01.2012, passed by learned 6th Judicial Magistrate, First Class, Parbhani below Exh.11 in S.C.C. No. 1403 of 2009, and the judgment and order dated 8.6.2015, passed by learned Sessions Judge, Parbhani in Criminal Revision No. 19 of 2012, confirming thereby the order passed by the learned Magistrate, as stated above, original accused has approached this Court by filing present criminal writ petition.

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

a) On the basis of complaint lodged by one Sartajsingh Chahel, in charge Chief Officer of Municipal Council, Parbhani, dated 22.05.2008, crime No. 113 of 2008, came to be registered at New Mondha police station, Parbhani against the petitioner accused. It has alleged in the complaint that on that day, the complainant alongwith his team had been to the area, known as Shivaji Nagar, situated at Parbhani-Basmat Road, for removal of encroachment. It has further alleged in the said complaint that during the process of removal of encroachment, at about 2.30 p.m. to 3.00 p.m. the present petitioner accused assaulted the complainant and his team, who are public servants, in performance of their official duty, and thus, the petitioner committed the offences punishable under Sections 353 and 323 of I.P.C. It has also alleged in the complaint that during the said process, the petitioner accused has pelted stones, manhandled the staff and further slept in the blade of J.C.B. machine to prevent them from doing their official duties of removal of encroachment.

b) After due investigation, the concerned police has submitted

charge sheet before the Magistrate vide R.C.C. No. 312 of 2008. On receipt of said charge sheet, the learned Magistrate, though it is numbered as Summary Criminal Case No. 1403 of 2009, by passing order below Exh.1, treated the said case as Regular Criminal Case. In response to the summons issued by the court, the petitioner accused appeared in the matter. The petitioner accused had filed an application Exh.11 seeking discharge on the ground that he had instituted a suit bearing R.C.S. No. 90 of 1985 against the Municipal Council, Parbhani and the Maharashtra State Electricity Board for grant of decree of perpetual injunction in respect of plot No. 165 situated at Shivaji Nagar, Parbhani, which is owned and possessed by him. It has also contended in the said application that the said suit was decreed and the appeal against the said judgment also came to be dismissed by the first appellate court. Even this Court has also confirmed the said decree in the second appeal.

c) The learned 6th Judicial Magistrate, First Class, Parbhani, by order dated 24.01.2012, rejected the application Exh.11 and learned Sessions Judge, Parbhani by its impugned judgment and order dated 8.6.2015, in criminal revision No. 19 of 2012, confirmed the said order. Hence, this criminal writ petition.

4. The petitioner, Mr. Borikar, who is appearing in person,

submits that in response to the summons issued by the court, he caused his appearance before the learned Magistrate in the aforesaid S.C.C. No. 1403 of 2009 on 6.5.2011 and on the same day, the learned Magistrate has passed order below Exh.1, and thereby converted the said case into warrant trial and further on the same day itself, framed charge against the petitioner accused. Even on that day, the witness summons were issued and the case is posted to 15.6.2011 for recording of evidence. On 15.6.2011, the petitioner had submitted an application Exh.11 for discharge. The petitioner submits that his application for discharge came to be rejected mainly on the ground that once the charge is framed, the application seeking discharge is not maintainable. The party in person submits that on the day of appearance, he got copy of charge sheet and on that day itself, it was not possible for him to file application for discharge. After going through the entire charge sheet, he found that the allegations made in the complaint are contrary to the decree passed by the Civil Court and no case, at all, is made out against him. Thus, he had filed an application Exh.11 seeking discharge. The party in person submits that his application seeking discharge, therefore, is maintainable and the learned Magistrate as well as learned Sessions Judge, have erroneously rejected application Exh.11, alone on the ground that his application seeking discharge is not maintainable once the charge is framed.

5. The petitioner-party in person submits that in the year 1985, he had instituted a Regular Civil Suit No. 90 of 1985, for decree of perpetual injunction against Municipal Council, Parbhani and others. The petitioner approached the court with a plea that he is in possession of suit property, plot No. 165, together with open space, surrounded by wire fencing since 5.4.1967 and his possession is continuous, open and peaceful. It has also brought to the notice of the Civil Court that the defendant Municipal Council, Parbhani wanted to construct east-west drain from southern side through the court-yard of the petitioner's house, which is surrounded by wire fencing. The defendant Municipal Council in the said suit has denied all the allegations. The learned Illrd Joint Civil Judge, Junior Division, Parbhani, by judgment and decree dated 2.7.2003 has recorded a finding to issue No. 1-b in affirmative and thereby held that the plaintiff (present petitioner) proved that he owned and possessed the court-yard, (as alleged in the complaint). The learned Civil Judge, Junior Division, thereby restrained the defendant Municipal Council, Parbhani permanently from constructing a drain through the court-yard of the petitioner and is thus restrained from connecting the eastern and western ends of existing drain through the petitioner's court-yard. The petitioner submits that the said judgment and decree is confirmed up to this Court.

6. In the backdrop of these facts, the complainant, who happened to be the in charge of Chief Officer, Parbhani Municipal Council, without serving any personal notice on the petitioner-accused, had tried to remove the encroachment and even though the petitioner original accused had shown him the decree passed by the Civil Court, which is confirmed up to this Court, started removing the wire fencing around the court-yard. The petitioner submits that there are allegations in the complaint about pelting of stones and manhandling the complainant and his staff. The petitioner submits that, at present, he is 80 years old and it is not possible for him to assault or to use criminal force against staff members of the Municipal Council. The petitioner had simply tried to protect his property and also tried his level best to stop the process of removal of encroachment peacefully by showing the authorities the documents in respect of his lawful possession over the said portion of plot, where the process of removal of encroachment was being carried out. The petitioner submits that there was no intention at all to deter or prevent the public servants from discharging their official duties and as such, ingredients of Section 353 of I.P.C. are not attracted in this case. The petitioner submits that he neither caused hurt nor attempted to cause harm to anybody and thus charge under Section 323 of I.P.C. does not stand.

7. The learned A.P.P. appearing for the respondent State submits that the petitioner has submitted certain documents alongwith his application Exh.11, seeking discharge under the provisions of Section 239 of Cr.P.C. In the light of provisions of section 239 of Cr.P.C., the Magistrate is required to consider the police report, the documents sent with it under Section 173 of Cr.P.C. and on making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing. The learned A.P.P. submits that thus the documents produced by the petitioner accused alongwith his application Exh.11, seeking discharge cannot be considered at all. Both the courts below have rightly placed their reliance on the judgment of the Supreme Court in the case of ***Ratilal Bhanji Mithani Vs. State of Maharashtra and others, reported in AIR 1979 SC 94***, wherein the Supreme Court has observed that once the charge is framed by the Magistrate, the Magistrate cannot cancel it or discharge the accused and the order of discharge passed after framing of charge is illegal.

8. The learned A.P.P. for the respondent State submits that the

Municipal Council, Parbhani has undertaken to remove the encroachments on Parbhani-Wasmat road and the complainant alongwith his team was discharging his official duty at the time of incident. Learned A.P.P. submits that there is prima facie evidence in the charge sheet to point out the involvement of the petitioner accused in the crime. Both the courts below therefore, have rightly rejected application Exh.11. No interference is required. There is no substance in the writ petition.

9. It is a part of record that on the date of appearance of the accused i.e. on 6.5.2011 itself, learned Magistrate, by passing an order below Exh.1 directed that the case be tried as warrant trial and accordingly below Exh.9 framed charge against the petitioner accused. After recording a plea of not guilty, learned Magistrate even has issued summons to the witnesses and accordingly posted the case to 15.6.2011, for recording evidence of prosecution witnesses. On 15.6.2011, the petitioner accused has filed an application Exh.11 seeking discharge. On the date of appearance, the petitioner accused received a copy of charge sheet. It is thus, not proper, legal and correct to expect from the petitioner accused to file an application for discharge without going through the contents of charge sheet and the documents submitted alongwith the same. On the day of appearance itself, if the Magistrate has framed charge,

then there was no opportunity for the petitioner accused to file an application seeking discharge, before framing of charge. In the case of ***Ratilal Bhanji Mithani Vs. State of Maharashtra and others (supra)***, relied upon by learned A.P.P. for the respondent State, the Supreme Court has observed that the order of discharge in warrant case can be made only after process has been issued and before the charge is framed. However, this contingency did not arise while considering the said case and the Supreme Court has observed that once the charge is framed, the Magistrate has no power to cancel the charge and reverse the proceeding to the stage of Section 253 of Cr.P.C. and discharge the accused. Both the courts below have not considered this material aspect and rejected application Exh.11 seeking discharge mainly on the basis of ratio laid down by the Supreme Court in the case of ***Ratilal Bhanji Mithani Vs. State of Maharashtra and others (supra)***.

10. The learned A.P.P. has vehemently submitted that the only charge sheet and the documents submitted alongwith the charge sheet can be considered while deciding application seeking discharge under the provisions of Section 239 of Cr.P.C. In the case of ***Rukmini Narvekar v. Vijaya Satardekar and others, reported in AIR 2009 SC 1013***, in para 29 of the judgment, the Supreme Court has made the following observations:-

“29. In our opinion, therefore, it cannot be said as an absolute proposition that under no circumstances can the Court look into the material produced by the defence at the time of framing of the charges, though this should be done in very rare cases, i.e. where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted. We agree with Shri Lalit that in some very rare cases the Court is justified in looking into the material produced by the defence at the time of framing of the charges, if such material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted.”

11. The Supreme Court ruled that there cannot be an absolute proposition that under no circumstances can the Court look into the material produced by the defence at the time of framing of the charge, though this should be done in very rare cases i.e. where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted and then the court is justified in looking into the material produced by the defence at the time of framing of charge.

12. In the instant case, on perusal of copy of the judgment and decree passed by the Civil Court in Regular Civil Suit No. 90 of 1985, it appears that the petitioner has approached the Civil Court with a plea that he is owner of plot No. 165/House No. 888, situated at

Parbani-Wasmat Road in Ward No.15, together with open space admeasuring 50 ft. East-West and 10 ft. South-North. It is an admitted position that Parbhani-Wasmat Road is in front of the house of the petitioner-original accused. The Municipal Council, Parbhani (defendant in the said suit) has denied the allegations with the contention that the petitioner (plaintiff in the said suit) has encroached over the municipal land and he obstructed the drainage work through the said encroached land. Both the parties had led oral and documentary evidence in the said suit in support of their rival contentions. The learned Civil Judge, Junior Division, has recorded the finding in affirmative on issue No. 1-b, wherein the petitioner (plaintiff in the said suit) proved that he owned and possessed the court-yard, as contended in the plaint. By way of issue No. 2-b, the burden is cast on the petitioner to prove that the defendant Municipal Council Parbhani wants to construct East-West drain through the court yard of the petitioner and learned Civil Judge has also recorded a finding in affirmative on the same. The learned Civil Judge, Parbhani by its judgment and decree dated 2.7.2003, decreed the suit as against the defendant No.1 (Municipal Council, Parbhani) and thereby restrained the Municipal Council Parbhani from constructing the drain through the court-yard of the plaintiff and further restrained the Municipal Council, Parbhani from connecting the eastern and western ends of existing drain through the plaintiff's court yard. It is

not disputed that the said judgment and decree is confirmed up to this court.

13. As per the contents of the complaint and evidence collected during the course of investigation, it appears that the Chief Officer alongwith his team, had been to the house of the petitioner accused for removal of wire fencing erected around the court-yard of the petitioner accused. The same is also evident from the letter given by the Engineer of Municipal Council, Parbhani to the Police Inspector of Police Station, New Mondha, Parbhani, wherein it is stated that the petitioner accused has made encroachment over the open space, measuring 50 ft. East-West and 10 ft. South-North and the said encroachment has been removed on the alleged date of incident. In the light of said judgment and decree, passed by the Civil Court, which is confirmed up to this Court, the Municipal Council was permanently restrained from interfering into the possession of the petitioner accused over the said portion of plot and even open space, measuring 50x10 ft., as stated above.

14. The petitioner-party in person is present before this court. He is 80 years of age at present. It has alleged in the complaint and the statements of witnesses, who are staff members of the Municipal Council, Parbhani, that this 80 years old guy manhandled the staff

members of Municipal Council and further pelted stones on the said staff members. It has specifically contended in the application Exh.11 that the petitioner accused had tried his level best to show the documents in respect of decree passed by the Court, which is confirmed up to this Court, to the complainant, however, the complainant threw the papers stating that the decree is not binding upon him and started removing the wire fencing and excavating the drainage with the help of J.C.B. machine. Even the petitioner accused on the same day, at about 16.45 hours, had tried to lodge the complaint in the police station, New Mondha, Parbhani against the Municipal Council and its staff members, for having committed criminal trespass on his property, however, the said complaint was not accepted and on the same day, at about 18.20 hours, the in-charge Chief Officer of Municipal Council, has filed the present complaint.

15. On careful perusal of the complaint and investigation papers, I do not think that the ingredients of Sections 353 and 323 of I.P.C. stand attracted in this case. The Engineer of Municipal Council, Parbhani, by letter dated 7.8.2008, had informed the Police Inspector of Police Station, New Mondha, Parbhani that a public notice was published in the newspaper about proposed removal of encroachment. It is thus clear that no personal notice was served on

the petitioner original accused before removal of alleged encroachment. In the light of the allegations made in the complaint, it appears that the petitioner original accused, who is 80 years of age, had tried to stop the process of removal of encroachment, by showing the judgment and decree passed by the Civil Court and even within his powers, had tried his level best to stop the J.C.B. machine, however, it appears from the contents of complaint and the evidence collected during the course of investigation that, the complainant alongwith his team had not only removed the wire fencing but also connected the drainage, despite the decree of the civil court restraining the Municipal Council, Parbhani, permanently, from connecting the drainage from the said portion, of which the petitioner accused is owner.

16. In the light of above discussion, I do not find any intention on the part of the petitioner accused to prevent or deter the complainant and his team from discharging their official duties so as to attract the penal provisions of Sections 353 and 323 of I.P.C. Both the courts below have not considered, at all, the decree passed by the Civil Court and consequences of the said decree. The petitioner accused has convincingly demonstrated on the basis of these papers that the prosecution case is totally absurd.

17. Further, even if it is assumed that the petitioner accused has pelted one stone and slept in the blade of J.C.B. machine as a matter of protest, as provided under Section 95 of I.P.C., the act causing slight harm is not an offence and thus, the law will not take notice of such trifles.

18. In the light of above discussion, I proceed to pass the following order:-

O R D E R

- I. Criminal writ petition is hereby allowed.
- II. The order dated 24.01.2012, passed by the learned 6th Judicial Magistrate, First Class, Parbhani, below Exh.11 in S.C.C. No. 1403 of 2009 and the judgment and order dated 08.06.2015, passed by the learned Sessions Judge, Parbhani, in criminal revision No. 19 of 2012, confirming thereby the order passed by the Magistrate, are hereby quashed and set aside.
- III. Application Exh.11 in S.C.C. No. 1403 of 2009, is hereby allowed and the petitioner is discharged from the charges

under sections 353 and 323 of I.P.C. in S.C.C. No.1403 of 2009.

IV. Rule is made absolute in the above terms.

V. Criminal writ petition is accordingly disposed.

(V. K. JADHAV, J.)

rlj/