

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL WRIT PETITION NO. 1391 OF 2002

S. S. GaddamwarPetitioner
V/s.
The State of Maharashtra and othersRespondents

WITH
CRIMINAL WRIT PETITION NO. 190 OF 2004

Pratap PatilPetitioner
V/s.
The State of Maharashtra and othersRespondents

Mr. K. J. Hakani Advocate for Petitioners.
Mr. V. B. Konde-Deshmukh APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.
DATED : JUNE 16, 2016.

PC :

Heard.

- 2) Rule. Rule made returnable forthwith, with the consent of the parties.
- 3) Petitioners herein, being aggrieved by the order dated 08/08/2002, passed by Metropolitan Magistrate, 27th Court, Mulund thereby issuing process against the petitioners for offences punishable under section 166, 167, 218 r/w 34 of Indian Penal Code have filed present writ petition. None

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appears for Respondent no. 2.

4) The facts of the case in a nutshell are as follows:

(i) Respondent no. 2 in the present case have filed a complaint before learned Metropolitan Magistrate, 27th Court, Mulund alleging therein that he happens to be member of Hema Park Co-op. Hsg. Soc. Ltd. That he is occupant of flat no. 2/A/103. Petitioner in writ petition no. 190 of 2004 happens to be office bearer of the Co-operative Department whereas accused no. 2 happens to be office bearer of Hema Park Co-operative Housing Society. It is alleged that accused no. 2 had initiated recovery proceedings against complainant under section 101 of Maharashtra Co-operative Societies Act 1960. Said proceedings were initiated before the then Assistant Registrar, Co-operative Society. Accused no. 2 had sent him a notice by registered A.D. which was ante-dated notice. Said notice was received by the complainant on 12/01/2002. The date of posting of the said letter was 09/01/2002. That the accused no. 1 who happens to be Assistant Registrar had called upon the complainant to appear before him on 22/01/2002 and to show cause as to why notice under section 101 of Maharashtra Co-operative Societies Act should not be executed against him. According to the complainant, there is over

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writing in the date “22/01/2002” and it appears that there is interpolation. According to the complainant, accused no. 1 had attempted to create a false record by scoring off the original date and re-writing same as 22/01/2002. The notice was given for a statutory period i.e. of 15 days, however, the complainant could get marginal period of just one week to appear before the authorities.

(ii) Complainant had replied the said notice with letter dated 15/01/2002 which was received by the accused on 18/01/2002. That the accused had not replied the said notice. Thereafter, complainant had received another statutory notice as contemplated under section 78 of the said Act in respect of recovery proceedings.

(iii) According to the complainant, on 22/07/2002, he had received the recovery certificate dated 19/07/2002 issued from the office of accused no. 1. Recovery certificate was allowed to be executed for a sum of Rs. 30,329/-. It was contended in the subsequent notice that several attempts to summon had failed. According to the complainant, even prior to 22/07/2002 he had sent several communications to the accused which were not replied. The crux of the complaint is that accused had conspired and committed an offence against

the complainant.

(iv) The verification statement was recorded on 07/08/2002 and by an order dated 08/08/2002, Metropolitan Magistrate, 27th Court, was pleased to issue process against the accused for offence punishable under sections 166, 167, 218 r/w 34 of Indian Penal Code.

5) Learned counsel for the petitioner submits that the allegations levelled against present petitioners is not only unfounded but is baseless allegation and therefore, no offence is made out. According to learned counsel, continuation of the proceedings on the basis of order dated 08/08/2002 would be an abuse of process of Law and hence, prays that the said order be quashed and set aside.

6) Section 166 & 167 of Indian Penal Code contemplates as follows:

“166. Public Servant disobeying law, with intent to cause injury to any person – Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.”

“167. Public servant framing an incorrect document with intent to cause injury- Whoever, being a public servant, and being as [such public servant, charged with the preparation or translation of any document or electronic record, frames, prepares or translates that

document or electronic record] in a manner which he knows or believes to be incorrect, intending thereby to cause or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

7) In the present case it is pertinent to note that complainant was in dues of certain arrears to be paid to the society. Office bearer of the society had approached office of Assistant Registrar, Co-operative Society and had prayed for recovery certificate under section 101 of the said Act. A notice was issued and the same was replied by the complainant. The whole grievance is that the notice was ante-dated and hence, complainant did not get statutory period of 15 days to reply the said notice. It cannot be said by any stretch of imagination that accused no. 1 who is a public servant had intended to cause or had knowledge that his action of sending notice of recovery certificate would cause injury to the said person. There were legal dues which was demanded from the authorities. It cannot be also said that the accused had prepared a document in a manner which he believed to be incorrect.

8) As a matter of practice and procedure notices are prepared and the date is mentioned only on the day when it is to be posted/dispatched. It cannot be therefore said that the accused had malafide intention. It cannot be either said

that there has been interpolation in the said documents. The date must have been corrected by the authority just before posting and therefore, it cannot be said that it was an act on the part of the accused to cause any loss or injury to the complainant. Learned counsel for the petitioner further submits that order of issuance of process would mean that learned Magistrate had taken cognizance of the complaint. That the accused no. 1 happens to be a public servant.

9) Section 197 of Code of Criminal Procedure, 1973 contemplates as follows:

“197. Prosecution of Judges and public servants.

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013] -

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government: ¹ Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a

State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

(3A)¹ Notwithstanding anything contained in sub-section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magis-

trate or public servant is to be conducted, and may specify the Court before which the trial is to be held”.

10) The Court cannot be oblivious of the fact that the stage of issuance of process, there is no material before the Sanctioning Authority to even apply its mind and therefore, no occasion to accord sanction. That it would be incumbent upon the public servant to appear before the court and make out a case that order of issuance of process would be an abuse of process of Law. That the public servant was acting in discharge of his official duties and therefore, sanction will be required. It is not expected from the Magistrate to assign elaborate reasons for issuing process but in a given case when the bare perusal of the complaint does not *prima facie* make out an offence, the issuance of process would be an abuse of process of Law.

11) In the facts of the present case, it appears that the complainant was aggrieved by the recovery proceeding initiated against him. It was a fit case to call for report under section 202 of Code of Criminal Procedure, 1973, however, upon recording verification statement process was issued against the accused.

12) At this stage, it would not be necessary to go into the said issues. *Prima*

facie it appears that it was not a fit case for taking cognizance and issuance of process as no specific offence was attributed to the accused. Learned Magistrate ought to have perused the recitals of the complaint, applied judicial mind and arrived at a conclusion as to whether offence was committed. In the present case, it appears that contents of the complaint were taken as “Gospel Truth” and learned Magistrate has issued process against the accused. The continuation of the proceedings would be an abuse of process of Law. In any case, due to passage of time, it would not be relevant to decide as to whether offence has been made out. In view of the above discussion petition deserves to be allowed. Hence, following order.

- (i) Writ Petitions are allowed in terms of prayer clause (a).
- (ii) The order dated 08/08/2002 passed by Judicial Magistrate First Class, 27th Court, Mulund thereby issuing process against the accused is hereby quashed and set aside.
- (iii) Rule is made absolute in the above terms.
- (iv) Writ petition stands disposed of in the above terms.

(SMT. SADHANA S. JADHAV, J.)