

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 3375 OF 2015

Anil Govindram Jadhav ... Petitioner
Vs.
Vithoba R. Kondvilkar & Anr. ... Respondents

Mr. Kuldeep S. Patil, Advocate for the petitioner.
Mr. Balvant A. Parmar i/b. Ms. Divya Parmar i/b. Ms. Divya Parmar,
Advocate for respondent no. 1.
Mrs. Anamika Malhotra, APP for the respondent/State.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **1st December, 2016**

P.C.:

Rule. By consent, rule is made returnable forthwith.

2. This Writ Petition is directed against the order dated 4th August, 2014 passed by learned Metropolitan Magistrate issuing process under section 418 of Indian Penal Code on 9th September, 2014 against the petitioner, who is the original accused. The said order was confirmed by the learned Sessions Judge in Criminal Revision Application No. 112 of 2014 by order dated 8th July, 2015. Hence, this Writ Petition.

3. The process is issued simplicitor under section 418 of Indian Penal Code. The complainant/respondent no. 1 is the ex-Secretary of one Cooperative Housing Society and the petitioner was the returning officer who had conducted the elections of the Cooperative Society in the year

2008. It is contended by the complainant that while furnishing the final list of the members eligible for voting, the petitioner has included these names intentionally of the person who were unknown and thus the entire process of election is hereby vitiated. Therefore, wrongful loss is caused to the complainant/Society.

4. The learned counsel Mr. Patil for the petitioner has submitted that these six persons were not unknown but they were shareholders of the Society and no offence is made out under section 418 of Indian Penal Code.

5. The written submissions are given by the learned counsel for respondent no. 1. While opposing this Writ Petition, he submitted that there are sufficient contentions raised and averments made in the complaint constituting the offence under section 418 of Indian Penal Code. The learned counsel relied on following judgments:

- (i) The Division Bench judgment of this Court in the case of Jacob Harold Aranha & Anr. vs. Mrs. Vera Aranha & Anr., reported in 1979 Cri. L.J. 974.
- (ii) Judgment of Supreme Court in the case of Smt. Nagawwa vs. Veeranna Shivalingappa Kenjalgi & Ors., reported in AIR 1976 SC 1947.

- (iii) Judgment of Supreme Court in the case of Debendra Nath Bhattacharya and Ors. vs. The State of West Bengal & Anr., reported in AIR 1972 SC 1607.
- (iv) Judgment of the Supreme Court in the case of Bhushan Kumar & Anr. vs. State (NCT of Delhi) & Anr., reported in AIR 2012 SC 1747.

6. I have heard the submissions of both the parties. Section 418 of Indian Penal Code reads as follows:

“418. Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.—Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

(emphasis placed)

7. In order to constitute the offence under section 418, a wrongful loss should be caused to a person who is having interest in the transaction. For understanding the word “wrongful loss”, section 23 of Indian Penal Code is to be read, which is as follows:

“23. “Wrongful gain”.—“Wrongful gain” is gain by unlawful means of property to which the person gaining is not legally entitled. Wrongful loss”.—“Wrongful loss” is the loss by unlawful means of property to which the person losing it is legally entitled. Gaining wrongfully, losing wrongfully.—A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to

lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.”
(emphasis placed)

8. In the case of **Jacob Harold Aranha** (*supra*), the Division Bench of Bombay High Court has discussed the duty of Magistrate while issuance of process.

9. In the case of **Smt. Nagawwa** (*supra*), the Supreme Court has discussed the scope of enquiry under sections 202 and 204.

10. In the case of **Debendra Nath Bhattacharya** (*supra*), the Supreme Court has discussed the scope and purpose of the power to dismiss a complaint under section 203 wherein it is held that while issuance of process, the Magistrate has to determine not the correctness or the probability or improbability of individual items of evidence on disputable grounds but only to consider the existence of this evidence prima facie.

11. In the case of **Bhushan Kumar** (*supra*), while explaining the meaning of word “cognizance” under section 190, the Supreme Court has held that it is not necessary for the Magistrate to give reasons while issuing process under section 204.

12. All these rulings are in respect of the scope of Sections 202 and 204

of the Criminal Procedure Code. In the present case, I put a pertinent query to the learned counsel for respondent no. 1 whether the offence under section 418 is constituted or not, which is the first question the Magistrate needed to ask to herself or himself. If the offence is not made out as per the ingredients of a particular section in the Indian Penal Code, then no process can be issued. So while issuing process under particular section, there should be prima facie case or it is a basic requirement of that particular complaint to bring on record the ingredients of the Section. All these rulings are distinguishable from the present case.

13. Considering the facts of the case, I am of the view that there is no propriety loss as defined under section 23 of Indian Penal Code and hence, the offence under section 418 is not constituted.

14. Rule is made absolute in terms of prayer clause 10(a) of the petition.

15. Writ Petition is allowed.

(MRIDULA BHATKAR, J.)