

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 4847 OF 2015

Varashree Narayan	...	Petitioner
vs.		
The State of Maharashtra & Anr.	...	Respondents

Mr. Abhaykumar Apte, Advocate for the petitioner.
Mr. Niranjan S. Mundargi for respondent No.2.
Ms. A.T.Jhaveri, APP, for the State.

CORAM: RAVINDRA V.GHUGE, J.
DATE : 13th July, 2016.

P.C.

1. Rule. Rule made returnable forthwith and heard finally with the consent of the parties.
2. The litigating sides are parties to the proceedings in C.C./2692/S/99 pending before the 4th A.C.M.M. Court, Girgaum, at Mumbai.
3. These litigating sides were before this Court in Criminal

Writ Petition No.741 of 2015, wherein the petitioner-original complainant had prayed for addition of charges under Sections 420 and 427 of IPC. The said petition was dismissed and by order dated 26.4.2015, the learned Court below was directed to decide the complaint within three months. The said complaint has not been so decided for reasons which I would refer to in the later part of this Judgment. it needs to be noted that this Court has granted extension of six months by order dated 8.7.2016. By order of this Court (Coram: A.V.Nirgude, J.) dated 17.12.2015, the said proceedings in CC/2692/SS/99 have been stayed.

4. The above facts therefore have led to a peculiar situation. By the order of this Court dated 26.4.2015, the proceedings have been expedited and by order of this Court dated 17.12.2015, the proceedings have been stayed. It is in this backdrop, that the learned Advocate for the petitioner has moved this matter.

5. The petitioner-original complainant is before this Court challenging the order dated 21.8.2015 passed by the lower Court by

which the request to examine 10 out of 11 witnesses has been rejected. The petitioner, therefore, prays vide prayer clause (e) that 9 witnesses, including the builder be examined.

6. The contention of the petitioner is that he was occupying a garage in the society at issue for parking a vehicle. If the roof of the garage is to be utilized for parking a vehicle by any other person, the size of the slab should be 155 mm. The existing slab was 75 mm. The sole accused parked his vehicle on the roof of the garage and despite the protest of the petitioner which led to the garage being damaged. The petitioner was required to resort to repairs to undo the damage. It has been alleged that the accused is guilty of an offence of mischief as is defined under Section 425 of IPC, punishable under Section 426 of the IPC.

7. It is undisputed that the charge framed by the learned Magistrate is with regard to the damage caused to the garage and the offence said to be committed by the accused is to be tried under Section 426 of IPC.

8. Shri Apte, learned Advocate for the petitioner, who appears as a complainant in person before the lower Court, draws my attention to the application Exhibit 71 dated 8.8.2015. 11 witnesses were sought to be examined. It is undisputed that one witness namely Varahan Narayan had already stepped into the witness box and was partly examined on 26.10.2015. Thereafter, his evidence was closed which is also the grievance of the petitioner.

9. Shri Apte submits that column No.5 below Exhibit 71 indicates the purpose for which 11 witnesses are to be examined. He further submits that by order dated 21.8.2015, the learned Magistrate partly allowed Exhibit 71 only to the extent permitting the complainant to examine Varahan Narayan.

10. He further submits that the application Exhibit 91 was then filed on 3.11.2015 praying for examination of 9 witnesses. The name of Mr. Varahan Narayan is once again mentioned in the said list. The grievance is that further examination and cross-examination of Mr.

Varahan Narayan has been disallowed by the trial Court on the ground that the petitioner is delaying the matter. He submits that in column 4 of Exhibit 91, the reasons for examining the witnesses are mentioned.

11. He further submits that though the charge under Section 427 and/or under Section 420 of IPC has not been framed, the law will not restrict the complainant to lead evidence so as to make out an offence punishable under these two sections as well. He, therefore, submits that this petition deserves to be allowed and by setting aside the impugned order, application Exhibit 91 be allowed.

12. Shri Mundargi, appearing on behalf of the contesting respondent No.2, submits that the said respondent-accused is about 80 years old. It was considering his age and stage in life that this Court had expedited the proceedings before the learned Metropolitan Magistrate. Time and again, the time period was extended by this Court. However, by the order of this Court dated 17.12.2015, the said proceedings were stayed and on the other hand, the learned trial Court was required to file applications before this Court seeking extension

of time. He therefore submits that this is a deadlock.

13. He further submits that this Court has already dealt with the grievance of the petitioner. By order dated 15.7.2015 passed by this Court in Criminal Revision Application No.295 of 2015 filed by the petitioner herein, the prayer for adding a charge under Section 427 and under Section 420 of the IPC has been specifically rejected and this Court has observed that the proceedings below be restricted to the charge framed under Section 426, IPC.

14. He then submits that witnesses which the petitioner now desires to examine, were never mentioned as witnesses in the list of witnesses when the proceedings were initiated. He further submits that the purpose for examining these 9 witnesses is only aimed at bringing on record the evidence purportedly to support the contention that the offence committed by the respondent-accused could be punished under Sections 420 and 427 of IPC, notwithstanding the fact that no such charge has been framed by the Court. He, therefore, prays that this petition be dismissed with costs.

15. I have considered the submissions of the learned Advocates as above.

16. The contention of the petitioner that she can lead evidence de-hors the charge framed, is a fallacious submission. Once the charge has been framed under Section 426 of IPC, parties are at liberty to lead evidence specifically in connection with the charge framed. I am unable to accept the somewhat unusual submissions of the petitioner that even if the charge is framed only under Section 426, evidence can be led to bring home the guilt under Sections 420 and 427 of IPC.

17. The observations of this Court in paragraph Nos. 3, 4 5, 6 and 7 of the order dated 15.7.2015 are material and read as under :-

“3. The applicant challenges the order of the Magistrate refusing to amend the charge. In fact this revision application should have been filed before the Sessions Court. Initially this court was not inclined to hear the application. However, since the issue arising out of the same complaint was heard by this court

and certain directions were issued to the Magistrate by this court, it was found just and proper to hear the revision application. The applicant is aggrieved by the order of the Magistrate refusing to frame additional charges for the offences punishable under section 420, 477A and other charges in Criminal Case No. 2692/S/99.

4. Respondent no.2 is facing trial for the offence punishable under section 426 of Indian Penal Code in the said criminal case. The allegations against respondent no.2 are that he has caused damage to the garage of the applicant. The applicant claims that the damage was more than Rs.50/- and therefore, charge under section 427 of Indian Penal Code should have been framed. However, she is unable to show from the entire oral evidence that the alleged damage was more than Rs.50/-. Therefore, in my opinion, the contention that the charge under section 427 of Indian Penal Code should have been framed, has properly been rejected.

5. As far as criminal breach of trust is concerned, it is submitted by the applicant that respondent no. 2 has changed the user of the property of the society and has committed breach of trust in respect of the property kept in trust with him. In this regard, it may be noted here that the applicant is not a member of the society in question. She is an occupier of the garage within the premises of the society. She does not know any details of the society affairs. Despite of this, if she feels that there is change of user, she should report to the Planning Authority and the planning authority can take action against respondent no.2 for the offence punishable under section 52 of the M.R.T.P. Act.

6. The applicant also alleges offence punishable under section 420 of Indian Penal Code and wanted the charge to be amended. I do not find any ingredients in the entire evidence to prima facie hold that respondent no.2 had in any manner dishonestly

ad fraudulently induced the applicant to part with some property which amounted to cheating.

7. As far as falsification of accounts is concerned, some vague allegations are made and there is no specific allegation."

18. In the light of the above, it needs to be put to rest, considering the approach of the petitioner, that no evidence beyond the charge framed could be permitted to be recorded by the Court below and the petitioner is, therefore, precluded from leading evidence beyond the charge that is framed under Section 426 of IPC.

19. In the above backdrop, I have considered the submissions of Shri Apte which are based on the application Exhibit 91. Mr. Varahan Narayan has already been permitted to be examined. The record indicates that he stepped into the witness box and was partly examined, when an adjournment was sought. Thereafter, because the matter was being delayed, the trial Court closed the evidence and proceeded to record the statement of the accused under Section 313 of the Cr.P.C. on 31.10.2015. It is not disputed that by the earlier order passed on Exhibit 71, the petitioner was permitted to examine Mr.

Varahan. In this backdrop, only in the interest of justice, I would be permitting the petitioner to examine Mr. Varahan Narayan on the first approaching date before the trial Court on the condition of imposing costs of Rs.5,000/-.

20. Insofar as the other witnesses who are sought to be examined as per Exhibit 91, I find that the welder and fabricator Mr. Jaffar has carried out repairs on the garage. His testimony to prove that the garage had suffered damage and was subsequently repaired would be material. I am, therefore, permitting the petitioner to examine Mr. Jaffar and that too within the time frame. Rest of the witnesses sought to be examined pertain to the allegations of misutilization of the society funds and the contribution paid by the petitioner which is not the subject matter of the proceedings before the trial Court.

21. In that view of the matter, this petition is partly allowed and the impugned order is modified only to the extent of permitting examination of Mr. Varahan Narayan and Mr. Jaffar. Witness Mr.

Varahan Narayan has stepped into the witness box and is the real biological brother of the petitioner. He shall remain present upon instructions from the petitioner on the first approaching date which is said to be 11.8.2016. He would be examined on the said date and thereafter the accused can cross-examine him. In the event Mr. Varahan does not remain present on the said date for any reason whatsoever, the learned magistrate shall close his evidence and proceed to record the evidence of Mr. Jaffar.

22. Since these witnesses are to depose on behalf of the petitioner, it shall be the duty of the petitioner to produce them before the trial Court as witnesses. The learned Magistrate shall be at liberty to reject the application for adjournment if they are found to be based on trivial or unreasonable grounds.

23. The petitioner shall restrict her case to the charge framed. Notwithstanding the same, in the event any portion of evidence has already been brought on record by or on behalf of the complainant which is besides the charge framed, the learned Magistrate shall discard the said evidence and shall decide the proceedings strictly

within the framework of the charge framed and within the time frame as has been ordered by this Court by its order dated 8.7.2016.

24. The petitioner shall deposit costs of Rs.5,000/- (Rupees five thousand only) before the Court below within four weeks from today. Extension of time would not be granted. On depositing the said costs, the accused shall be at liberty to withdraw the said amount without condition.

25. Rule is made partly absolute in the above terms.

(RAVINDRA V.GHUGE, J.)