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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.824 OF 2014

Gautam Hari Singhania

... Applicant

vs.

Thane Municipal Corporation, Thane

& Ors.

... Respondents

Mr. Subodh Desai for the Applicant.

Mr. Ajit Ram Pitale, for the Respondent nos.1 & 2.

Mr. P. H. Gaikwad, APP, for the Respondent-State.

CORAM : A.K. MENON, J.

DATE : 9th JUNE, 2017

P.C.

1. By this application under Section 482 of the Code of Criminal Procedure, 1973, the applicant seeks to challenge issuance of process in S.C.C. No.8887/2011 pending before the Judicial Magistrate First Class, Thane vide order dated 1st July, 2014 passed by the Sessions Judge, Thane, in a Criminal Revision Application.
2. The facts in brief are as follows:- On 20th September, 2011 the Tree Officer issued a notice to the applicant and the Manager of the company that in the premises of the company Raymond Limited ('the company') 586 trees had been cut which cut illegally and that the applicant and the Manager were responsible for the said illegal acts. The notice specified that if the aforesaid persons were not responsible for cutting of trees they

were required to inform the office of the Tree Authority in writing as to the persons responsible along with the documents in support. On 23rd September, 2011 a reply was sent by the company which was signed by the Manager. In the said reply, it was contended that the company was not in violation of provisions of the Trees Act and that they had lush green complex and they preserve trees on their land. It is further contended that during the monsoon season due to heavy and torrential rains accompanied with gusty winds certain small and wild weeds, plants within the campus had been uprooted and destroyed and thereby causing danger to the life and property and that the same had been cleared from the campus. The reply further recorded that the present applicant was not personally involved in the administrative work of the horticulture department of the company and therefore had no knowledge whatsoever of the purported incident and the Tree Authority was requested to remove the name of the applicant from the addressee column of the notice. He also sought a personal hearing in the matter.

3. The respondent no.2 is the Tree Authority of City of Thane is constituted under Section 3 of the Maharashtra (Urban Areas) Preservation of Trees Act, 1975 (in short "The Trees Act"). The respondent no.2 invoked the provisions of Section 8(1) read with Section 21 of the Trees Act and filed a complaint before the Judicial Magistrate First Class, Thane alleging that the present applicant and the manager of the company in which the

applicant is the Chairman and Managing Director have cut down a total number of 586 trees without the permission of the Tree Authority in order to redevelop the property and thereby committed an offence. Particulars of the different types of trees are provided. It is the case of the complainant that on 19th September, 2011 and 20th September, 2011 they had taken an inspection of the spot and prepared a panchanama dated 20th September, 2011 and that thereafter issued a notice to the accused on 20th September, 2011. The complainant has alleged that the accused had cut the trees without taking permission of the Tree Authority. The complaint relied upon the panchanama taken at site and a complaint lodged with the Vartak Nagar Police Station, Thane. The complaint was filed by the Tree Officer on or about 26th September, 2011 seeking action to be taken against the accused under the Trees Act. The Magistrate passed an order which reads as follows:- *“Issue notice to respondents”*.

4. It appears that pursuant to the said order, summons were issued but were not served. In the circumstances, the Advocate for the complainant filed a purshis seeking reissue of the summons to both the accused. On this purshis, on 8th November, 2011 the JMFC reissued summons as prayed and thereafter summons came to be served. Upon service of summons, the applicant who is accused no.1 challenged issuance of summons in Criminal Application no.101 of 2012. On 3rd February, 2012 the applicant therein withdrew the Criminal Application with liberty to file Revision

before the Sessions Court. Accordingly, the Revision Application came to be filed on or about 21st March, 2012. The Revision Application came to be decided on 1st July, 2014.

5. At the hearing of the Revision Application, the applicant contended that the Magistrate had not recorded the statement of respondent under Section 200 of the Cr. P.C. The applicant had further contended before the Sessions Court that if at all the company should have been prosecuted for the offence and issue of process against the applicant was bad in law and unsustainable. It is further submitted that the applicant had no role to play in the alleged offence. It is further contended that the complainant had not relied upon any census report of the number of trees on site and that 586 trees from those listed in such report were felled by the applicant himself or on his direction by his employees. It is further contended that according to Section 10(1) of the Trees Act, it was the duty of the Tree Officer to hold the enquiry and give a reasonable opportunity to the owner or occupier of the land to plant one or more trees of the local species. However, without resorting to the said Section, the applicant is sought to be prosecuted. On behalf of the Tree Authority, the application was opposed by contending that the notice dated 20th September, 2011 had given sufficient opportunity to filing its say and that the panchanama was prepared in the presence of panchas.

6. The Sessions Court found that issuance of process was valid and dismissed the Revision. It held that the prosecution was launched and the panchanama was prepared on 20th September, 2011. After issuance of notice, a reply had been received and the notice along with the photographs of the cut trees was relied upon by the complainant before the Magistrate who had issued process by considering the above documents. However, the order is a cryptic order as aforesaid. The Sessions Court proceeded on the basis that Magistrate Courts are overburdened and are suffering from a “docket explosion” and under the circumstances the cryptic order was justified and that no prejudice was caused to the applicant. The Sessions Court therefore did not find any fault with the issuance of process and further observed that the applicant had not disclosed the name(s) of any person(s) who were responsible for the cutting of the trees. Even the head of the horticulture department was not identified and that the reply to the notice was evasive. Thus, Section 10(1) had no application in the matter. The Court further held that the photographs and the panchanama falsified the case of the revision petitioner.

7. Mr. Desai, the learned counsel appearing on behalf of the applicant contended that the present applicant cannot be faulted and held vicariously liable since company itself has not been named in the complaint. He submitted that in the reply dated 23rd September, 2011 itself

the company had pointed that they had a horticulture department and that some small wild weeds, plants have been uprooted during the monsoon season. He submitted that even otherwise the vicarious liability of Directors cannot arise in the instant case. Mr. Desai further submitted that in *Mehmood Ul Rehman v/s. Khazir Mohamad Tunda and others*¹ the Supreme Court had dealt with the prerequisites and duties on the part of the Magistrate concerned while passing an order issuing process and to the effect application of mind to the relevant issues must be sufficient to indicate though no formal or speaking or reasoned orders are required. Mr. Desai further submitted that in the instant case it was absolutely no material on record to establish that the Magistrate had applied its mind while issuing process. The order of issuing process is simply by requiring notice to be issued to the respondents. He therefore submitted that the present case is a fit case for setting aside the order issuing process.

8. On behalf of the respondent, Mr. Pitale relied upon a compilation of documents. The original FIR dated 19th September, 2011 and notice from the Municipal Corporation of City of Thane along with the charge-sheet reportedly containing census recording that out of a total of 4610 trees 586 trees had been cut. Mr. Pitale also relied upon a panchanama dated 20th September, 2011 which was apparently recording

1 (2015) 12 SCC 420

the number of trees cut as 586. The panchas names and signatures are also obtained. The panchas are reportedly respectable persons viz. Sudam Devdas Rathod and Ganesh Nagesh Borude. Mr. Pitale also relied upon certain photographs of cut portions of trees which have been cut. He submitted that in view of this evidence, Magistrate was perfectly justified in issuing process.

9. Mr. Pitale also relied upon a decision of this Court in ***Tushar Vajubhai Gaglani v/s. Jagdeesh J. Vaswani and others***² wherein the Single Judge of this Court held that the accused is not entitled to be heard on the issue of process. He submitted that what has been issued in a show cause notice and in that case, the Magistrate recorded a verification statement of the complainant and after going through the verification statement, the Magistrate was of the view that it was necessary to issue show cause notice to the accused as to why process should not be issued against them and that the impugned order was passed to issue show cause notice. In the said case reliance was placed upon the case of ***Smt. Nagawwa v/s. Veeranna Shivalingappa Konjalgi and others***³ in which the Court held that the scope of inquiry under Section 202 of the Code of Criminal Procedure is extremely limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint on the

2 2001(1)Mh.L.J. 463

3 (1976)3 SCC 736

material placed by the complainant before the Court, for the limited purpose of finding out whether a prima facie case for issue of process has been made out and for deciding the question purely from the point of view of the complainant without at all adverting to the defence and that the proceedings under Section 202 the accused has absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not. Thus, it is Mr. Pitale's submission that the use of the expression "issue notice" did not contemplate issuance of show cause notice and it was not open that the Magistrate had come to a conclusion on the strength of the material before him and that the prima facie case had been made. Mr. Pitale conceded that, save and except, the panchanama of the photographs and other documents in the compilation were not before the Courts below and therefore ought not to be considered.

10. What must therefore be considered is whether based on the material on record before the Magistrate, the issuance of process resulted from application of mind to the material and whether his order reflects prima facie satisfaction that the offences had been committed in justifying issuance of process. The order passed by the Magistrate in my view does not demonstrate any application of mind. The order is a handwritten endorsement appearing on the first page of the complaint and the order appears to have been issued in a routine manner. The endorsement is made without any remark as to prima facie satisfaction of the Magistrate. It

makes no reference to whether the complainants case based on the documents produced were considered. The company which is admittedly the owner of the property upon which the trees existed was not an accused. The panchanama dated 21st September, 2011 make reference to “Raymond Company” presumably referring to “Raymond Limited”. The complainant has relied upon a letter dated 20th September, 2011 which is also served upon the company addressed to the two accused. Thus, the intention to hold the present applicant personally responsible is only by reason that the present respondent was believed to be the “owner” of the company.

11. Perusal of the notice dated 29th February, 2011 indicates that the Tree Authority had not concluded with certainty that the present applicant was personally responsible for illegal act of cutting/felling trees since the notice itself grants opportunity to the addressee to inform the office of the Tree Authority of those responsible along with documentary evidence. No doubt, the response from the company dated 23rd September, 2011 which is signed by the accused no.2 in the complaint is not very revealing. The company responded stating that they would give detailed replies upon the respondents furnishing all details and information available. This was a guarded response and ought to have alerted the Tree Authority to do proper ground work before filing the complaint.

12. Mr. Pitale had relied upon the panchanama and the photographs which were admittedly before the Courts below. However, the data pertaining to the total number of trees under the caption "Raymond Data" now sought to be relied upon did not form part of the record before the Magistrate at a material time. The photographs prima facie reveal that some trees have been uprooted and several logs of wood presumably chopped from the trees which have apparently been felled. The photographs also indicate that several logs of wood are stacked up on the part of the property. However, these are matters to be gone into a stage of trial which is proceeding against the second accused who is described as a Manager of the company. No doubt as the trial proceeds the complainant will be entitled to adduce appropriate evidence in support of the complaint. The question which falls for consideration is whether the process issued against present applicant can be justified in the facts of the present case especially when the company is not a party.

13. The issuance of notice before issuing process is not a contemplated under the Code of Criminal Procedure before issuing process under option before the Magistrate under Chapter XV of the Code does not include issuance of any show cause notice and as correctly canvassed by Mr. Pitale on behalf of the respondents. The Sessions Court has sought to support the order of issuing process by concluding that due to large pendency and the resultant "docket explosion" the issuance of process is not probably

adequately elaborated and therefore a cryptic order has been passed. According to the Sessions Court it indicates application of mind since the documents and the photographs were before the Magistrate at the time of process being issued. Although the complaint discloses the names of witnesses that the complainant proposes to examine, this Court does not have the benefit of ascertaining which of all relevant documents before the Magistrate filed along with the complaint. The point in issue is whether the order of Magistrate discloses application of mind as pointed out by the learned counsel for the applicant in *Mehmood Ul Rehman (supra)*. The Supreme Court quoted its own decision in *Pepsi Foods Ltd. v/s. Judicial Magistrate* while holding that the exercise of power Section 204 of Cr.P.C. of summoning an accused in a criminal case is a serious matter and the process of criminal law cannot be set into motion in a mechanical manner. It quoted paragraph 28 of the said judgment and that Magistrate has to carefully scrutinize the evidence on record and even put questions to the witnesses to answers to find out the truth about the allegations or otherwise and then examine if any offence is prima facie committed. The Supreme Court further held that the order of the Magistrate summoning the accused must reflect that he has applied his mind and he has to examine the nature of the allegations and the evidence both oral and documentary and would that be sufficient to bring home the charge to the accused. It observed that the Magistrate is not a silent spectator and he must carefully scrutinize the evidence brought before

him. The Supreme Court held that the process must not be issued in a mechanical manner or there is a matter of course and the question whether the Magistrate while taking cognizance of offence on the complaint indicates his satisfaction regarding the ground for proceeding against the accused.

14. The issuance of process by the endorsement in the facts of the present case does not indicate that the Magistrate had occasion to consider the evidence sought to be produced by way of documents. Had that been clarified, it could have different matter altogether. The company is not a party and the issuing of process does not appear justified in the facts of the present case. If the intention was to hold the company responsible, the company would have been a party. However, this is not to suggest that the felling of trees should be ignored or trivialized if in fact so many trees have been felled. It is indeed a serious matter to taken to its logical conclusion and in accordance with law. There is a need to ensure the Tree Authority is mandated to follow foolproof checks and balances before proceeding to file complaints.

15. In the circumstances, the issuance of process against the present applicant does not appear justified in the facts of the present case but the felling of each tree would constitute a separate offence. This is a matter considered at the trial and it is for the respondents to adduce such

evidence against those responsible for felling the trees. In the circumstances, I pass the following order:-

- (i) The impugned order dated 1st July, 2014 passed by the Additional Sessions Judge, Thane, in Criminal Revision Application no.54 of 2012 is hereby set aside.
- (ii) The issuance of process in S.C.C. No.8887/2011 against the present applicant is quashed and set aside.
- (iii) The complaint shall proceed against the other accused without being influenced by any of the observations in this order.
- (iv) The Respondent-original complainant shall be at liberty to lead such evidence against the offenders in accordance with law.
- (v) No order as to costs.

(A. K. MENON, J.)