

CRIMINAL WRIT PETITION NO. 399 OF 2017

- VERSUS

- WITH

CRIMINAL WRIT PETITION NO. 490 OF 2017

- VERSUS

- ## 1. State of Maharashtra

2. Laxman Kondiba Dhoble ..(Informant)
Age: 62 years, Occu.: Civil Service,
R/o Wagholi, Tq. Mahol,
Dist. Solapur ..RESPONDENTS

Mr. G.K. Thigale (Naik), Advocate for petitioners in
CRWP/399/17.

Mr. S.J. Salunke, Advocate for petitioner in CRWP/490/17.

Mr. S.D. Ghayal, A.P.P. for respondent no.1 – State.

Mr. A.S. Kale, Advocate for respondent no.2.

CORAM : SANGITRAO S. PATIL, J.
RESERVED ON : 23rd APRIL, 2018
PRONOUNCED ON : 05th JUNE, 2018

COMMON JUDGMENT :-

Accused nos. 3, 4 and 5 in Criminal Case No. 367 of 2004 have filed Criminal Writ Petition No. 399 of 2017, while accused no.9 in the said case has filed Criminal Writ Petition No. 490 of 2017, challenging the order passed by the learned Chief Judicial Magistrate, Osmanabad which was confirmed by the learned Additional Sessions Judge, Osmanabad in Revision, whereby their claim for discharge of the offences punishable under Sections 420, 465, 468, 469, 470, 471, 499, 500 read with Section 34 of the Indian Penal Code ("I.P.C." for short) came to be rejected.

2. For the sake of convenience, the petitioners are hereinafter referred to as the accused and respondent no.2 as the informant.

3. Accused no.2 – Kalpana Ramesh Narhire contested Lok Sabha election held in April 2004 from Osmanabad constituency no. 36 reserved for Scheduled Caste category. The informant was the rival candidate of accused no.2. Accused no.2 was declared as elected on 13th May, 2004. The informant filed F.I.R. in Police Station Osmanabad City alleging inter-alia that accused nos. 3, 4, 5, 9 and five others, including accused no.2 – Kalpana Narhire, in furtherance of their common intention, at the instance of accused no.2, convened a press conference in Hotel Samarth at Osmanabad on 05th April, 2004 at about 08.30 p.m. and distributed pamphlets titled as “मांग जातीचा तेलगी, धोंगी लक्ष्मण ढोबळे” in which several statements of facts were made which were false and which they believed to be false or did not believe to be true, relating to the personal character of the informant. The accused persons further distributed to the press reporters several copies of caste certificates showing caste of the informant as “Holar

(S.C.11)" bearing serial no. 733/1995, dated 27th March, 1995 allegedly issued by the Tahsildar and Executive Magistrate, Solapur (North). They pretended the said caste certificate to be genuine with a view to cheat the voters so that the voters from the caste of the informant should not vote in his favour, he could be defeated in the election and further he could be defamed in the society. On the basis of that F.I.R. a crime came to be registered in the Police Station Osmanabad City. The investigation followed. The statements of the witnesses were recorded. After completion of the investigation, the present accused and five others came to be charge-sheeted for the above mentioned offences in the Court of the learned Chief Judicial Magistrate at Osmanabad.

4. The informant challenged the election of accused no.2 by filing Election Petition No. 1 of 2004 which was decided by this Court vide judgment and order dated 16th October, 2008, reported as **2009(2) All M.R. 749**, holding that the informant failed to prove beyond reasonable doubt that the caste certificate, that was circulated in the press conference, was false and fabricated one. It was

held that the informant failed to establish that accused no.2 or anybody on her behalf committed any corrupt practice under the provision of Section 99(1)(a)(ii) of the Representation of the People Act, 1951 ("R.P. Act" for short). Accordingly, the said election petition came to be dismissed.

5. In view of the judgment delivered by this Court in Election Petition No. 1 of 2004, some of the accused, including the present petitioners, filed an application before the learned Chief Judicial Magistrate seeking their discharge of the above mentioned offences. The learned Chief Judicial Magistrate rejected the application. Accused no.2 and the present petitioners filed Criminal Revision Application nos. 92 of 2015 and 93 of 2015 before the Additional Sessions Judge, Osmanabad, who, in turn, dismissed the said Revision Applications vide order dated 30th January, 2017. Being aggrieved by the said orders, the present writ petitions have been filed.

6. The learned Counsel for the petitioners pointed out to paragraph no. 27 of the judgment delivered by this

Court in Election Petition No. 1 of 2004, wherein this Court observed as under :-

"P (Petitioner) has not proved beyond reasonable doubt that the caste certificate was fabricated and false one. In fact, it can be said that till 25.4.2004, he himself was not certain about falsity of the caste certificate. As such, it is difficult to arrive at a conclusion that N1 and N2 (Noticees) knew the statements to be false or at least they believed the statements to be not true. Such a knowledge/belief cannot be attributed to them, or to R1 (Respondent no.1), by relying upon Order VIII Rule 5 of the Code of Civil Procedure. Taking into consideration the reported judgments relied upon by learned counsel for P on the point, **it will have to be said that the alleged statements are relating to personal character of P** and not about his public/political character, since the statements allege him to have deceived the society by false caste claim." (emphasis supplied)

7. According to the learned Counsel for the accused, when there is a judicial pronouncement made by the High Court on the issue that Respondent no.2 failed to establish that the caste certificate was false and fabricated one, the offence of cheating and forgery would

not survive. Consequently, the accused persons are liable to be discharged of the said offences. The learned Counsel further contend that in respect of prosecution for the offence of defamation under Section 500 of the I.P.C., as per the mandatory provisions of Section 199 of the Code of Criminal Procedure ("the Code" for short), no Court shall take cognizance of the said offence except upon a complaint made by the person aggrieved by the offence. They submit that in the present case no complaint as contemplated under Section 199 of the I.P.C. has been filed by the aggrieved person. The learned Chief Judicial Magistrate had no jurisdiction to take cognizance of the offence punishable under Section 500 of the I.P.C. on the basis of the police report. Therefore, the accused persons are liable to be discharged of the offence punishable under Section 500 of the I.P.C. In support of their contention, the learned Counsel for the petitioners cited certain judgments which would be considered a little later.

8. The learned Counsel for the informant fairly concedes that the prosecution for the offence under

Section 500 of the I.P.C. is not maintainable in the absence of a complaint by the aggrieved person. However, so far as other offences are concerned, he strongly opposed the petitions. He submits that the judgment in Election Petition No. 1 of 2004 by itself would not be sufficient to discharge the accused persons of the said offences. He submits that the judgment delivered in Election Petition No. 1 of 2004 does not fall under Sections 40 to 43 of the Evidence Act and, therefore, would not be relevant for trial in respect of the said offences. He submits that at the time of framing of charges, the trial Court was required to consider only the police report and the documents annexed thereto. It was not permissible for the trial Court to look into the findings recorded in Election Petition No. 1 of 2004, because the findings of the Civil Court would not supersede the findings of the Criminal Court. Accordingly, the learned Chief Judicial Magistrate has rightly kept the judgment in Election Petition No. 1 of 2004 out of consideration and has rightly rejected the application filed by the accused persons for discharge. He submits that the learned Additional Sessions Judge has

rightly considered the facts of the case as well as the legal position and has rightly confirmed the order passed by the learned Chief Judicial Magistrate. He, therefore, prays that the claim of the accused for their discharge of the offences punishable under Sections 420, 465, 468, 469, 470 and 471 read with Section 34 of the I.P.C. may be rejected. In support of his contention, the learned Counsel for Respondent no.2 also cited certain judgments.

Maintainability of prosecution for the offence of defamation.

9. Chapter XIV (Sections 190 to 199) of the Code enumerates conditions requisite for initiation of proceedings. Section 199 pertains to prosecution for the offence of defamation. As per sub-section (1) of Section 199, no Court shall take cognizance of an offence punishable under Chapter XXI (Section 499 to 502), except upon a complaint made by some person aggrieved by the offence. As per Section 2(d) of the Code, "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has

committed an offence, but does not include a police report. As defined under Section 2(r) of the Code, "police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the I.P.C. In the present case, the informant is an aggrieved person. If he wanted to prosecute the accused for the offence of defamation punishable under Section 500 of the I.P.C., it was necessary for him to file a complaint as defined in Section 2(d) of the Code before the Magistrate as contemplated under Section 199. As held in the case of **Abdul Rehman Mahomed Yusuff Vs. Mahomed Haji Ahmad Agbotwala and Anr. AIR 1960 SC 82**, cited by the learned Counsel for the accused, the provision of Section 198 (old) (S.199 new) of the Code is mandatory. In the present case, admittedly, no complaint was filed by the informant before the learned Magistrate for the offence of defamation punishable under Section 500 of the I.P.C. Therefore, there was a legal bar under Section 199 of the Code for the learned Chief Judicial Magistrate for taking cognizance of the offence punishable under Section 500 of the I.P.C. The learned Chief Judicial Magistrate wrongly took cognizance of the said

offence against the accused ignoring the bar under Section 199 of the Code. He had no jurisdiction to take cognizance of the said offence. As such, the prosecution against the accused for the offence under Section 499 punishable under Section 500 of the I.P.C., being not maintainable, is liable to be vitiated. They are entitled to get discharge of the said offence.

Maintainability of prosecution for the offences under Sections 420, 465, 468, 469, 470 and 471 of the I.P.C.

10. The learned Counsel for the accused contend that in view of the above referred paragraph no. 27 of the judgment in Election Petition no. 1 of 2004, the accused cannot be said to have fabricated false caste certificate of the informant. Therefore, they are liable to be discharged of the offences punishable under Sections 420, 465, 468, 469, 470 and 471 read with Section 34 of the I.P.C.

11. The learned Counsel for the accused relying on the judgment in the case of **Pradip Buragohain Vs. Pranati**

Phukan (2010) 11 SCC 108 submit that the charge of corrupt practice, like criminal charge, must be proved beyond reasonable doubt on the basis of credible evidence. They submit that when the High Court, in Election Petition no. 1 of 2004 between the same parties, has recorded the finding that Respondent no.2 has not proved beyond reasonable doubt that the caste certificate is false and fabricated one, the prosecution against the accused for the offences punishable under Sections 420, 465, 468, 469, 470 and 471 read with Section 34 of the I.P.C. would not be maintainable.

12. As against this, the learned Counsel for the informant submits that the judgment in Election Petition no. 1 of 2004 cannot be taken into consideration by the Criminal Court since it does not fall under either of Sections 40 to 43 of the Evidence Act. On the basis of the judgments in the cases of **State Anti Corruption Bureau, Hyderabad and Anr. Vs. P. Suryaprakasham 1999 SCC (Cri.) 373**, **State of Orissa Vs. Debendranath Padhi AIR 2005 SC 359** and **Amit Kapoor Vs. Ramesh Chander and Another**

(2012) 9 SCC 460, the learned Counsel for the informant submits that at the time of framing of charges, the Chief Judicial Magistrate was required to consider only the police report and the documents annexed thereto. The trial Court can consider only the material produced by the prosecution to find out whether sufficient grounds exist or not for the purpose of proceeding with the trial and no meticulous examination of the evidence is needed for considering whether the case would end in conviction or not. He further submits that the High Court cannot examine the facts, evidence and material on the basis of which, it would end in conviction. He submits that the learned Chief Judicial Magistrate and the learned Additional Sessions Judge have rightly rejected the claim of the accused for discharge of the offences punishable under Sections 420, 465, 468, 469, 470 and 471 read with Section 34 of the I.P.C.

13. Here, a reference may be made to an unreported judgment of this Court in the case of **Amit Bhanudas Ujgare and Anr. Vs. State of Maharashtra and Anr. Criminal Application No. 1990 of 2007** decided on 07th October, 2016,

wherein the original accused nos. 1 and 2 had filed the application for quashing of the order passed by the learned Chief Judicial Magistrate issuing process against them for the offences punishable under Sections 171-G, 193, 196, 197 read with Section 34 of the I.P.C. In that case, the complainant and accused no.1 contested the elections of Zilla Parishad, Beed from Wadwani constituency which was reserved for Scheduled Caste (male) candidate. Accused no.1 got elected by defeating the complainant. The complainant filed a complaint before the Judicial Magistrate First Class against the elected candidate and three others, alleging therein that the elected candidate was disqualified for the said election, however, by submitting false information and affidavits, he contested the election and as such committed the above mentioned offences. The Judicial Magistrate issued process against the elected candidate and three others for the said offences. The said order was challenged by the elected candidate and one of the accused. It was submitted on behalf of the elected candidate that the complainant had challenged the election result by filing Election Petition no. 4 of 2007 before the learned District Judge,

Majalgaon and the said election petition was dismissed by the learned District Judge – 1 with a finding that the complainant failed to prove that the elected candidate made false declaration and as such, was disqualified to contest the election. In view of these observations and the findings it was contended that the prosecution against the elected candidate and three others for the above mentioned offences was liable to be quashed and set aside since the findings of the Civil Court would get precedence over the criminal proceedings.

14. By referring the case of **K.G. Premshankar Vs. Inspector of Police and Anr. 2002 Cri. L.J. 4343 (S.C.)**, this Court held that if the criminal case and the civil proceedings are for the same cause, the judgment of Civil Court would be relevant, if the conditions of Sections 40 to 43 of the Evidence Act are satisfied. It was observed that it cannot be said that the judgment rendered by the Civil Court would be conclusive and would terminate the criminal proceedings. Ultimately, the application to the extent of the claim of the elected candidate for quashing and setting aside the order of issuance of process passed

against him for the above mentioned offences came to be rejected and the order passed by the Judicial Magistrate came to be confirmed to that extent.

15. It would be worthwhile to reproduce here the observations of the Hon'ble Apex Court made in paragraph 30 of the judgment in the case of **K.G. Premshankar (supra)** :-

"30. What emerges from the aforesaid discussion is - (1) the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of res judicata may apply; (3) in a criminal case, Section 300, Cr.P.C. makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil Court would be relevant if conditions of any of the Sections 40 to 43 are satisfied, but it can not be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein."

16. In the present case, the judgment delivered by this court in Election Petition no. 1 of 2004 does not fall under either of Sections 40 to 43 of the Evidence Act. Therefore, the findings recorded in the said judgment would not be relevant at the stage of framing of charges. Consequently, on the basis of the observations made in paragraph no. 27 of the said judgment, the accused cannot claim discharge of the offences punishable under Sections 420, 465, 468, 469, 470 and 471 read with Section 34 of the I.P.C.

17. The learned Counsel for the accused have cited the judgment in the case of **Videocon Industries Ltd. And Anr. Vs. State of Maharashtra and Ors. (2016) 12 SCC 315**, which pertains to the offence punishable under Section 56(1)(i) of the Foreign Exchange Regulation Act, 1973 ("FERA" for short) for contravention of provisions of Sections 18(2) and 18(3) of the said Act. The appellants therein were prosecuted both under civil and criminal law. The appellants were exonerated by the Tribunal by dislodging the findings recorded by the adjudicating authority. The Tribunal concluded that the appellants

cannot be held guilty for Section 18(2) read with Section 18(3) of FERA. On the basis of the findings recorded by the Tribunal, the prosecution for the offence under Section 56(1)(i) of the Act was sought to be quashed. It was held that if the allegation in the adjudicating proceeding as well as the proceeding for the prosecution is identical and the exoneration of the person concerned in the adjudication proceeding is on merits, the trial of the person concerned would be an abuse of process of law. It would be unjust to permit the Enforcement Directorate to continue with the criminal prosecution. In my view, the said judgment would have no application to the facts of the present case. In the present case, the judgment delivered in Election Petition no. 1 of 2004 itself would not be relevant at this stage of framing of charges since it is not covered under either of Section 40 to 43 of the Evidence Act. In paragraph 27 of the judgment in Election Petition no. 1 of 2004 referred to above at para 5, it is observed that the alleged statements are relating to personal character of the informant and not about his public/political character, since the statements allege him to have deceived the society by false caste claim. In

view of these observations, it was held that no corrupt practice was committed within the meaning of Section 123(4) of the R.P. Act. The evidence required to prove corrupt practice as contemplated under Section 123(4) of the R.P. Act certainly would be different than that would be required to be produced for proving the offences under Sections 420, 465, 468, 469, 470 and 471 of the I.P.C. The informant will have to be extended an opportunity to adduce evidence to prove the said offences. The judgment cited by the learned Counsel for the accused in respect of the special statute would not be helpful for the petitioners to claim discharge of the offences under Sections 420, 465, 468, 469, 470 and 471 read with Section 34 of the I.P.C.

18. In view of the above facts and circumstances of the case, I hold that the writ petitions are liable to be allowed partly. The petitioners are liable to be discharged of the offence under Section 499 punishable under Section 500 of the I.P.C. They cannot claim discharge in respect of the offences punishable under Sections 420, 465, 468, 469, 470 and 471 read with Section

34 of the I.P.C. The impugned orders are liable to be quashed and set aside partly. In the result, I pass the following order :-

ORDER

- (I) Both the Criminal Writ Petitions are allowed partly.
- (II) The impugned orders are partly quashed and set aside.
- (III) The petitioners are discharged of the offence under Section 499 punishable under Section 500 of the I.P.C.
- (IV) The prosecution shall continue against the petitioners for the rest of the offences.
- (V) Both the Criminal Writ Petitions are disposed of accordingly.

19. At this stage, the learned counsel for the petitioners Shri. G.K. Thigale (Naik) submits that the

petitioners wish to challenge this order before the Hon'ble Apex Court. He submits that the interim relief has been granted by this Court in favour of the petitioners restraining the trial Court from framing charges. He prays that the said relief may be continued for a period of six weeks, so as to enable the petitioners to approach the Hon'ble Apex Court. The learned counsel for respondent no.2 strongly opposed this prayer.

20. The petitioners wish to challenge this order before the Hon'ble Apex Court. They will have to be given necessary opportunity to challenge it. The interim relief granted in their favour, therefore, will have to be continued, otherwise the very purpose of approaching the Hon'ble Apex Court would be frustrated. The interim relief granted in favour of the petitioners shall continue for a period of six weeks from today.

[SANGITRAO S. PATIL]
JUDGE