Bhogale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1171 OF 2020

Santosh A. Pathak
Aged about 46 years, adult,
Indian inhabitant, Occ : Business
residing at A/302, Oberoi Park View
Thakur Village, Kandivali (East)
Mumbai – 400101 .. Petitioner

Versus

1. State of Maharashtra
Thru Principle Secretary Home
Department-Served to govt pleader

2. Senior Inspector of Police,
Navghar Police Station,
Navghar Road, Bhayandar (E)
Navghar Naka, Thane-401105

3. Anita Devi Santosh Tiwari
Aged about 45 years, adult,
Indian Inhabitant, Occ : unknown
residing at Flat No.:B-1604,
Indraprastha Tower., near Jain
Bungalow, Bhayander east,
Thane 401105 .. Respondents

Mr. Mohit Bhardwaj for the Petitioner.
Mr. Ashok Yadav for the Respondent No.3.
Ms. Sangeeta D. Shinde, APP for the State.

CORAM : S.S.SHINDE, J. &
M.S.KARNIK, J.

DATE : OCTOBER 16, 2020

JUDGMENT : (PER M.S. KARNIK, J.)

Rule. Rule made returnable forthwith. Heard finally with the consent of the learned counsel appearing for the parties.

2. We have heard learned counsel for the Petitioner, learned APP for the State and Mr. Ashok Yadav for Respondent No.3.

3. The Petitioner by this Petition filed under Article 226 of the Constitution of India prays for quashing of FIR No.39 of 2020 registered with the Respondent No.2- Navghar Police Station, Bhayandar (E), Thane against the Petitioner for alleged offences under Sections 494 and 498A of the Indian Penal Code (hereinafter referred to as 'IPC' for short).

4. The allegations in the FIR in brief are as under :-

The first informant-Respondent No.3 is allegedly staying with Anil Tiwari who is the real brother of the Petitioner since about one and half years. The first informant-Respondent No.3 allegedly married the Petitioner in the year 1987. The Respondent No.3 stayed at the native village. Between the period from 1987 to 1992, the Petitioner visited the first informant 2 to 3 times in a year. During the period from 1992 to 1998 the Petitioner alongwith Respondent No.3 and his parents started residing in Bhayandar. It is alleged that the Petitioner has been assaulting the first informant for last 10 to 15 years. This assault was a result of the Petitioner's anger against his father which he vented out on the first informant. The first informant stayed with the Petitioner till 2010 whereafter he sent her back to the village as according to the Petitioner the conditions were not suitable for the Respondent No.3 to continue residing in Mumbai as the lenders were threatening him for the repayment of the loans that he had taken from them. The Petitioner promised to bring her back to Mumbai when conditions improve but he never brought her back. Two years prior to the filing of the Petition, the first informant came to know through her relatives that the Petitioner allegedly has another wife.

5. Learned counsel for the Petitioner submitted that false and bogus FIR has been filed against him by the Respondent No.3-first informant. Learned counsel submitted that

the first informant is a permanent resident of Uttar Pradesh and was brought to Mumbai in the month of January 2020 by his real brother Mr. Anil Tiwari with the intention to pressurise the Petitioner and his wife Mrs. Shaila Pathak (Pandey) to prevent them from helping Mr. Awdhesh Mishra and Mr. Upendra Soni who made complaint against Mr. Anil Tiwari and his companies. According to the learned counsel for Petitioner, the Respondent No.3-first informant is the second wife of Petitioner's father and she has been coerced/used to make the present complaint at the behest of Mr. Anil Tiwari and other family members. In his submission, as Mr. Anil Tiwari is the real brother of the Petitioner, he was upset with the Petitioner for having helped his rivals Mr. Awdhesh Mishra and Mr. Upendra Soni and hence the FIR is nothing but a malicious prosecution initiated against the Petitioner. In the submission of learned counsel for the Petitioner, the Petitioner was born on 25th June 1973 and accordingly he was around 14 years at the time of alleged marriage with Respondent No.3. He would submit that the said marriage is void in view of the Prohibition contained in the Child Marriage Act.

6. He further urged that the first informant has always been known to the Petitioner as his father's second wife. The Petitioner was treated cruelly by his father and he was regularly

beaten for no reason. The first informant was always staying with his father. The Petitioner married Ms. Shaila Pandey on 7th December 1996 in Mumbai and the said marriage was registered in the month of January 2004. Learned counsel would submit that there is gross delay in lodging the FIR in as much as the first informant always had knowledge of the Petitioner's marriage with Ms. Shaila Pandey. It is further contended that the Petitioner's father was a Government employee and therefore, he couldn't disclose the fact of his second marriage. In order to avoid the consequences of the loss of government job, his father introduced the first informant as his daughter in law. The Petitioner was too young to understand all this.

7. Learned counsel would further submit that there is no allegation that the assault was for demanding any dowry and therefore, the Section 498A of the IPC is not applicable at all. Learned counsel for the Petitioner reiterated his submission that the Petitioner's brother in law Mr. Awdhesh Mishra has made complaints against his brother Mr. Anil Tiwari due to which Mr. Anil Tiwari has suffered huge loss in business. He would submit that as Mr. Anil Tiwari is aware that Mr. Awdhesh Mishra is being helped by the Petitioner, therefore, in order to get even with the Petitioner and Mr. Awdesh Mishra, the Petitioner's father and

brothers are using the first informant to file false complaint against the Petitioner. The animosity which the Petitioner's father and brothers have towards the Petitioner has led to the filing of the complaint.

8. Before we consider the question whether the FIR should be quashed as prayed by the Petitioner, it would be apposite to appreciate the principles of law enunciated by the Apex Court relating to the exercise of extraordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.' for short). The Apex Court had an occasion to consider the series of the decisions relating to the exercise of this power in the case of **State of Haryana and Others vs. Bhajan Lal and Others**[1]. The Apex Court enlisted cases by way of illustration wherein the extraordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482 of Cr.P.C. could be exercised by the High Court either to prevent abuse of the process of any court or otherwise to secure the ends of justice. Their Lordships observed that it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to

1 1992 Supp (1) SCC 335

give an exhaustive list of myriad kinds of cases wherein such power should be exercised. Following are the category of the cases wherein such power could be exercised :-

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

9. The Apex Court also added a note to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases. The extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice.

10. In the facts of the present case and in the light of what has been observed by Their Lordships, we will have to examine whether the allegations made in the FIR, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. Learned counsel for the Petitioner would submit that the FIR is registered manifestly with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to a personal grudge and hence the Petitioner's case is covered by Clause 7 of the decision in the case of **Bhajan Lal.**

11. The allegations made in the complaint, in our considered opinion, do clearly constitute a cognizable offence justifying the registration of a case and an investigation thereon and this case does not fall under any one of the categories of cases formulated above calling for the exercise of extraordinary or inherent power to quash the FIR itself. A reading of the FIR would reveal that the first informant-Respondent No.3 has alleged that she is the wife of the Petitioner. There are allegations against the Petitioner of having assaulted the first informant. Furthermore, the first informant categorically states that as the Petitioner had borrowed money from various people which he was unable to repay and as the lenders were harassing him the Petitioner had asked the first informant to stay in the village and after things normalise, he would bring her back. It is further the allegation that around two years ago the first informant came to know that the Petitioner had married a second time without obtaining a divorce from Respondent No.3.

12. In the light of the law laid down by the Apex Court in the case of **State of Haryana and Others vs. Bhajan Lal and Others** (*supra*) it is not open for us, at this juncture to embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR. The legal position is well

settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence.

13. Even in the Petition, in para 7(c), the Petitioner has averred that “It appears to the Petitioner that his father in fear that someone may complain to the Government about his 2nd marriage, the Petitioner’s father may have introduced the first informant as his daughter in law when Petitioner was too young to understand the same. The Petitioner states that when he objected to such a reference about the first informant, the Petitioner was thrown out of the house every such time”. These averments made by the Petitioner is another reason why the allegations made in the FIR cannot be said to be patently false or malicious to quash the FIR at this juncture.

14. To arrive at a finding that the Respondent No.3 is not the Petitioner’s wife but is the second wife of the Petitioner’s as contended by the Petitioner, would necessarily entail an enquiry, a finding which is not possible to arrive at in this Petition. This course is not permissible in the exercise of the extraordinary or inherent powers under Article 226 of the Constitution of India or Section 482 of the Cr.P.C.

15. It is, therefore, not possible for us to accept the contention of the Petitioner that the allegations made in the FIR, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. Unless an enquiry is held, it is not possible for us to arrive at a finding that the first informant has been set up by the Petitioner's real brother who was upset as the Petitioner helped his brother in law to register false cases against the Petitioner's brother thereby causing huge losses to him. Such enquiry is not permissible in the exercise of extraordinary or inherent powers at the initial stage. Suffice it to observe that the allegations made in the FIR discloses the commission of a cognizable offence and make out a case against the accused.

16. The Petition is therefore, devoid of any merit and the same stands rejected.

17. Rule is discharged with no order as to costs.

18. This judgment will be digitally signed by the Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this judgment.

(M.S.KARNIK, J.) **(S.S.SHINDE, J.)**

Diksha Rane Digitally signed by Diksha Rane Date: 2020.10.21 10:56:44 +0530