

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1356 OF 2015

1. Shivshankar Ramshrinagar Shukla,
Age 61 years,
2. Bipin Shivshankar Shukla, Age 41 years,
R/o.Flat Nos.2105-06, Tower-3,
Challenger Complex, Thakur Village,
Kandivali (E), Mumbai-400 101. Petitioners
versus
1. The State of Maharashtra.
2. Ms.Aarti Ravindra Khamkar, Age 54 years,
R/o.Flat No.401, Tower-3,
Challenger Complex, Thakur Village,
Kandivali (E), Mumbai-400 101. Respondents

WITH
INTERIM APPLICATION NO.508 OF 2020

Ms.Aarti Ravindra Khamkar Applicant
versus
Shivshankar Ramshrinagar Shukla and others Respondents

Mr.Sathyanarayanan, Advocate for Petitioners.
Ms.Aarti R. Khamkar, Respondent no.2 in person in Writ Petition and
Applicant in Interim Appliation.
Mr.Arfa Sait, APP, for Respondent State.
Mr.Vilas Laxman Kalekar, PSI, Samata Nagar Police Station, present.

CORAM : PRAKASH D. NAIK, J.

DATE : 3rd August 2022

PC :

1. Petitioners have challenged the order issuing process dated
27th November 2014 passed by learned Metropolitan Magistrate, 17th
Court, Borivali in C.C No.498/SS/2011.

2. The grievance of the complainant is that Accused nos.1 and 2 are her neighbours. On 6th September 2009 the complainant was passing through reception area of ground floor and at that time accused no.1 had took up quarrel, with her. She was assaulted by accused nos.1 and 2. The complainant gave a call to police. Accused were taken to police station and N.C complaint was registered. Police refused to register FIR. The accused had committed offences u/s.338, 504, 506, 509 read with 34 of IPC.

3. Learned Magistrate issued process vide order dated 27th November 2013 against accused nos.1 and 2 u/s.338, 504, 506, 509 r/w 34 of IPC.

4. Heard learned counsel for Petitioners and Respondent no.2 in person.

5. Learned advocate for Petitioners submitted as follows :-

(a) The allegations in the complaint did not constitute offence u/s.338 of IPC;

(b) Learned Magistrate has mechanically issued process without application of mind;

(c) Although complaint does not specify the ingredients to constitute the offence mentioned in the complaint, learned Magistrate has issued process with cryptic order;

(d) Respondent no.2 alleged that accused were arrested immediately and taken to police station and other than it is alleged that police did not register FIR and only recorded N.C complaint on 6th September 2009;

- (e) Assuming that averments in the complaint to be true, no prima facie case is made out for issuing process;
- (f) Requisite ingredients to constitute the offence u/s.338, 504, 506, 509 are absent in the complaint;
- (g) Petitioner no.1 had lodged the complaint with police against respondent no.2 for taking action against her on 16th October 2007. Petitioner no.1 addressed another letter dated 31st October 2007 to the authorities requesting them to take action in the matter by referring to the letters written by respondent no.2;
- (h) The complaint of harassment was also filed by another member of society against respondent no.2. Society had sought explanation from respondent no.2;
- (i) Petitioner no.1 had addressed complaint to the Senior Inspector of Police, Samata Nagar Police Station on 31st July 2009 for initiating action against respondent no.2 and also requested the co-operative society vide letter dated 3rd August 2009 to look into the matter seriously and take action against respondent no.2. Petitioner no.1 also addressed letter dated 20th August 2009 to Samata Nagar Police Station pointing out harassment meted out to his family;
- (j) Petitioner no.1 had lodged complaint with Samata Nagar Police Station which was recorded as N.C.Complaint No.3936 of 2009. After recording the N.C complaint of Petitioner no.1, as a counter, Respondent no.2 made her complaint, which was recorded subsequently and numbered as N.C. Complaint No.3937 of 2009. Due to assault by Respondent no2, Petitioner had suffered minor injuries which was treated in Municipal Hospital, at Borivali on 16th September 2009;
- (k) The members of society had forwarded common complaint on 16th January 2012 to the society about behaviour of respondent no.2.

Petitioner no.1 lodged his complaint dated 27th December 2012 to the society regarding threats and behaviour of respondent no.2. Respondent no.2 filed a complaint with Social Security Branch against some of the persons which included two senior citizens aged around 70 and 75 years who are the neighbours of respondent no.2.

6. Learned advocate for Petitioners has relied upon following decisions :

- (a) Harish Khushalchand Chandak Vs. The State of Maharashtra and another – W.P.No.2264/2008, dated 28th April 2009;
- (b) Harshad Valia Vs. State of Maharashtra and another APL No.719/2019, dated 11th December 2019;
- (c) Vasant Waman Pradhan Vs. Datatraya Vithal Salbi and another 2003 (Suppl.2)-Bom.Gr.-262;
- (d) Rajendra Chandrakant Dhuru and another Vs. The State of Maharashtra and others – 2003-BCI-208;
- (e) Mehmood Ul Rahman Vs. Khazir Mohammad Tunda and others – (2015)12-SCC-420;
- (f) State of Haryana and others Vs. Ch.Bhajan Lal and others 1992-Cri.L.J.-527.

7. Respondent no.2 submitted that averments in the complaint are sufficient to issue process. The incident in question had occurred which is evident from registration of N.C.complaint. Since police did not take cognizance, she filed private complaint. The submissions of petitioners cannot be considered at this stage. The complainant must be given an opportunity to lead evidence and prosecute the accused. Accused were taken to police station which fortifies the occurrence of

incident. Series of incidents had occurred which are reflected in the complaint. Learned Magistrate was satisfied that prima facie case is made out for issuance of process. She was assaulted by accused. Complaint prima facie makes out offences against accused.

8. Having heard both the sides, I have also perused documents on record. The impugned complaint alleges offence u/s.319 to 338, 349 to 458, 504, 507, 509 r/w 34 of IPC. The complaint relates to alleged incident dated 6th September 2009. It is alleged that complainant was assaulted by accused. She was taken to hospital for treatment. The accused were arrested and take to police station. The FIR was not registered by police. N.C complaint was lodged. Learned Magistrate, however, issued process for offences under Sections 338, 504, 506, 509 r/w 34 of IPC. The N.C complaint was also registered at the instance of Petitioner no.1. The complainant and accused are neighbours. The documents annexed to this petition shows that complaints were filed against respondent no.2 by Petitioners and other persons.

9. From the averments in the petition it appears that Petitioner no.2 is the son of Petitioner no.1. Both are advocates. Respondent no.2 is also advocate by profession.

10. Section 338 of IPC contemplates causing grievous hurt by endangering life or personal safety of others. Grievous hurt is defined u/s.320 of IPC. Perusal of complaint would indicate that there is nothing to deduce from complaint that Petitioners had caused grievous hurt to respondent no.2. Apparently learned Magistrate has not applied its mind to the fact whether complaint

refers to any ingredients to constitute offence u/s.338 of IPC. Learned Magistrate had, however, observed that complainant has made out prima facie case. The order reflects non application of mind.

11. Section 504 of IPC refers to intentional insult with intent to provoke breach of the peace. The complaint lacks requisite averments to constitute offence u/s.504 of IPC. Section 506 of IPC relates to criminal intimidation. To constitute said offence there should be an intention to cause alarm to that person or to cause that person to do any act which he is not legally bound to do. The complaint does not spell out any factors to constitute said offence. Section 509 of IPC has been invoked without any reason. There is nothing in the complaint to show that accused had uttered any word or sound or gesture which injures upon privacy of the complainant.

12. Apparently material on record indicate that there is animosity between the complainant and petitioners. Other members of the society had also made representations to the co-operative society against complainant. Petitioners have pointed out that on the date of lodging the N.C complaint, petitioner no.1 had lodged complaint prior to the N.C complaint of Respondent no.2. The Supreme Court in the case of State of Haryana and others Vs. Ch.Bhajan Lal and others (supra) had laid down guidelines for exercising powers of quashing the proceedings. One of the category referred to in the said decision for quashing the proceeding is that allegation made in the FIR or the complaint are 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 and

other category refers to the situation where criminal proceedings 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.

13. In view of the aforesaid circumstances, the proceedings are required to be quashed in exercise of powers u/s.482 of Cr.P.C. Hence, I pass following order :

ORDER

- (i) Criminal Writ Petition No.1356 of 2015 is allowed;
- (ii) Order issuing process dated 27th November 2014 passed by Metropolitan Magistrate, 17th Court, Borivali,, Mumbai and proceedings in C.C.No.498/SS/2011 are quashed and set aside;
- (iii) Criminal Writ Petition No.1356 of 2015 and Interim Application No.508 of 2020 are disposed off.

(PRAKASH D. NAIK, J.)

MST