Bombay High Court
Raybhan Hanwanta Bhadnge vs The State Of Maharashtra on 1 April, 2009
Bench: R. C. Chavan

IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION NO.668 OF 2006.

1. Raybhan Hanwanta Bhadnge,
aged about 33 years, Occu.: Labour,

2. Dnyaneshwar Gangaram More,
aged about 30 years, Occu.: Labour,

3. Sambha Nagorao Kolam,

aged about 38 years, Occu.: Labour,

4. Purushottam Rangrao Naik,ig
aged about 35 years, Occu.: Cultivator,

The applicants No.1, 2, 4 and 5 are

residents of village Chikhali, Tahsil :
Umarkhed, District : Yavatmal.

The applicant No.3 is resident of
village Darati, Tahsil : Umarkhed,
District : Yavatmal.

.... APPELLANTS.

// VERSUS //

1. The State of Maharashtra

through Police Station Officer,
Darati, Tahsil : Umarkhed,
District : Yavatmal.

2. Kisan Namaji Bhise,
aged about 61 years, Occ.: Retired,

Resident of Umarkhed, District :
Yavatmal.
(Original Complainant)

.... RESPONDENTS.

Shri K.S.Narwade, Advocate for Appellants.
Shri D.B.Patel, A.P.P. for Respondent/State.

CORAM: R.C.CHAVAN, J.

DATED : APRIL 01, 2009.

ORAL JUDGMENT :

1. This is an application under Section 482 of the Code of Criminal Procedure for quashing proceedings bearing Regular Criminal Case No.47 of 2002, which came to be revived because of revisional order passed by learned Additional Sessions Judge, Pusad in Criminal Revision No.7 of

2005.

2. The facts, which led to present proceedings, are as under :

On 02.07.2001 Non-applicant No.2 Kisan Namaji Bhise filed report before Police Station Officer, Darati about theft of a tree worth Rs.One Thousand by the present applicants. The police conducted investigation in the matter and filed "C" Summary before the Magistrate.

Thereafter Non-applicant No.2 Kisan Namaji Bhise filed complaint before learned Judicial Magistrate First Class, Umarkhed praying for cognizance being taken under Section 190 of the Code of Criminal Procedure. He also prayed for rejection of "C" final Summary filed in Criminal Case No.10/2001, by the police. The learned Magistrate examined the complainant and ordered issuance of process for the offence punishable under Section 379 read with Section 34 of the Penal Code.

3. The applicants appeared before the learned Magistrate and filed application at Exh.45 for dismissal of the complaint and discharge of all the applicants. They had not quoted any provision of law under which the application was made. Non-applicant No.2 filed reply to this application, specifically stating that since the Court had taken cognizance, the applicants had no right to file such an application. After considering the contentions of the parties, by its order dated 27th December, 2004 the learned Magistrate accepted "C" final report, submitted by the police and discharged the applicants of the offence punishable under Section 379 read with Section 34 of the Penal Code. He also recalled the process issued against accused No.2. This order was challenged by Non-applicant No.2 before learned Additional Sessions Judge, Pusad by preferring revision, who, by his impugned judgment dated 7th January, 2006, set aside the order of the Magistrate, passed below Exh.45. He held that unless some evidence was produced and considered by the Magistrate, the Magistrate would have no jurisdiction to pass such an order. Aggrieved thereby the applicants are before this Court.

4. I have heard learned counsel for the applicants and learned Additional Public Prosecutor for Non-applicant No.1 and have also considered the written submissions filed on behalf of respondent No.2.

5. The complaint, on the basis of which cognizance was taken, could not be said to be a police case since the police had filed "C"

summary on the basis of which the learned Magistrate had not taken cognizance. In fact, he took cognizance on the complaint of Non-

applicant No.2. Therefore, provisions, which would be applicable, are those contained in Section 242 and 245 of the Code of Criminal Procedure. The learned counsel for the applicants submitted that though Section 244 and 245(1) refer to taking evidence as may be tendered by the complainant, sub-section (2) of Section 245 categorically clarifies that a Magistrate is not prevented from discharging the accused at any previous stage of the case, if for reasons to be recorded by such Magistrate he considers the charge to be groundless. Therefore, according to the learned counsel,

since the charge was groundless, the Magistrate has rightly discharged his clients. The learned counsel placed reliance on several judgments to support his contention that a Magistrate can exercise powers under Section 245(2) without any evidence being recorded.

6. In Chandra Nath Sharma Vs. Mahesh Nath Sharma, reported at 1989 CRI.L.J. 1330, a learned single Judge of the Gauhati High Court was considering the provisions of Section 245(2) in the context of a civil dispute between the parties which was sought to be converted into a criminal case, and in that context held that the powers of discharge under sub-section (2) of Section 245 could be exercised by the learned Magistrate at any stage of the criminal proceedings.

7. Another learned single Judge of the Gauhati High court in Shiv Kumar Daga Vs. State of Assam & anr., reported at II-1990 (1) Crimes 279 also so held, in the context of dispute between the parties arising out of breach of contract when it was alleged that some inferior quality goods were supplied. In that case, the Court observed that sub-section (2) of Section 253 of the old Code of Criminal Procedure authorizes a Magistrate to discharge the accused at any previous stage of the case, if he considers the charge to be groundless. The Court observed that this was exception to the rule that there could be no order of discharge unless evidence of the prosecution witnesses had been taken.

8. Nearer home, in Luis de Piedade Lobo Vs. Mahadev, reported at 1981 CRI.L.J. 513 a learned single Judge of this Court sitting at Panaji observed as under, in paragraph 5 of the judgment :

> "5. ..... In the case of Shah Jethalal Lalji Vs. Khimji M. Bhujpuria, the view taken by the learned Judge was on a slightly different point and the observations made were to the effect that, if process has been issued, then it is incumbent upon the Magistrate to record at least some evidence before discharging the accused under Section 253(2). Not only this view is not contradictory to the view taken by the Supreme Court but also, on the contrary, reiterates and follows it inasmuch as it reaffirms that a Magistrate acting under Section 253(2) of the old Cr. P.C., is not bound to record all the evidence being produced. It only clarifies that, in the event process was issued, such power of the Magistrate, generally as a rule, is not unfettered, since Section 204, Cr. P.C. Prescribes that process may be issued by the Magistrate only if he is of the opinion that there is sufficient ground for proceeding. This, in my view, is generally correct, for if the Magistrate himself was of the opinion that there were grounds for proceeding, it follows that he was satisfied, at the stage of issuing process, that the complaint was not groundless. Consequently, it follows also that some kind of additional evidence would be required to make him change his prior opinion that there were grounds for issuing the process and that the complaint was not groundless. This is, as I already observed, generally correct. But a case may arise where the Magistrate per incuriam issues process and in such a case, the Magistrate undoubtedly can exercise the powers conferred by Section 245(2) Cr.P.C., without recording any evidence. ...."

9. It would be clear from the aforementioned observations that once a Magistrate takes cognizance and directs issuance of process, it would imply that the magistrate was of the opinion that there

were grounds for proceeding further and that it would follow that he was satisfied at the stage of issuing process that the complaint was not groundless. Consequently, unless some material was tendered before him to show that the charge was groundless, it would be impermissible to have him to come to contrary conclusion, merely because an application was made. In this case, it is not shown that any such material was tendered or produced before the Magistrate to enable the Magistrate to come to a contrary conclusion.

10. The learned counsel for the applicants submitted that the order directing issuance of process was mechanically passed and it depicted non-application of mind. Therefore, it cannot be said that the learned Magistrate had formed an opinion that there were grounds for proceeding, after being satisfied that the complaint was not groundless. It is true that the learned Magistrate has not given reasons while directing issuance of process, but it does not follow that the order was mechanically passed or depicted non-application of mind. The order was passed after considering not only the complaint but also the examination of the complainant, conducted by the Magistrate along with final report filed by the police. Therefore, it cannot be held that the learned Additional Sessions Judge was wrong in concluding that the learned Magistrate was not justified in exercising powers under Section 245(2) of the Code of Criminal Procedure without any further material being produced before him.

11. The learned counsel for the applicant lastly submitted that there is absolutely no evidence to show that the applicants had committed theft of any tree. The examination of the complainant shows that the complainant had reported that a tree from his field had been cut by accused Nos. 1 to 3 at the instance of accused Nos. 4 and 5. His report to the police is to the same effect. A copy of panchnama of the spot, which was performed in course of investigation has already been filed on record.

It shows that stump of the tree in question, was seen, in the field of Kisan Namaji Bhise i.e. Non-applicant No.2. The learned counsel states that the tree may have been cut but had not been removed and therefore, there was no theft. This is falsified by the panchnama which further shows that the branches were lying on the spot and the tree, i.e. main trunk, had been kept near a stream. Thus, the moment property is shown to have been moved offence of theft can be alleged. Whether it is proved or not will be a matter for decision by the trial Court, after considering evidence.

12. In view of this, it cannot be said that the learned Additional Sessions Judge erred in setting aside the order passed by the learned Magistrate below Exh.45, recalling his own earlier order, without any additional material having been produced or considered by him.

13. The application is, therefore, rejected.

ig JUDGE

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