Dr. Abdul Gaffar Quadri Vs Munawar Ahmed s/o Naem Ahmed

Criminal Writ Petition No. 932, 1165 Of 2019

Court: Bombay High Court (Aurangabad Bench)

Date of Decision: May 8, 2020

Acts Referred:
Indian Penal Code, 1860 â€" Section 34, 405, 409, 420, 467, 468, 469#Code Of Criminal Procedure, 1973 â€" Section 202, 204#Constitution Of India, 1950 â€" Article 227

Hon'ble Judges: Vibha Kankanwadi, J

Bench: Single Bench

Advocate: S. S. Kazi, N. V. Gaware, P. K. Lakhotiya,

Final Decision: Allowed

Judgement

1 Rule. Rule made returnable forthwith. By consent, heard both the sides for final disposal.

2 Both the writ petitions have been filed by the original accused Nos.2 to 4 invoking the Constitutional powers of this Court under Article 227 of the

Constitution of India to challenge the Judgment and order passed by the learned Sessions Judge, Aurangabad dated 17.04.2019 in Criminal Revision

Application No.82/2016.

3 Present respondent No.1 is the original complainant, who has filed private complaint bearing R.C.C. No.106/2015 before learned Judicial Magistrate

First Class, Khultabad, Dist. Aurangabad. It was filed against five persons contending that they have committed offence punishable under Section 467,

468, 469, 409, 420 read with Section 34 of the Indian Penal Code.

4 Brief facts narrated in the complaint are, that the original accused No.3 is the President of institution by name Anjuman Eshat-e-Taleem and

accused No.4 is the Secretary. The said institution is registered as Trust under the Maharashtra Public Trust Act. It receives 100% grants from the

Government to run college by name Maulana Azad Higher Secondary School at Khultabad. Accused No.1 is serving as Assistant Teacher since 2011

and prior to that he was serving as Shikshan Sevak in the subject of Phychology and Sociology. Accused No.2 is the Headmistress of the said school

since 2008. Original accused No.5 was then Deputy Director of Education. It is contended that when accused No.1 was in service, he has completed

the course of M.A. 1st part in Psychology for the academic year of 2008-09 from Vivekanand College, Aurangabad. His attendance on the Transfer

Certificate of said college is said to be 75%. Thereafter, for the year 2010-11 he has completed the M.A. 2nd part in Psychology as a regular student

of the said college. The college timing is stated to be 4.00 p.m. to 7.00 p.m. and for 2010-11 it is from 12.00 noon to 5.40 p.m.. The Institution record

shows that during the said period, he has taken only 8 days Earned Leave. This shows that accused No. 1, in conspiracy with the accused Nos.1 to 4,

was only signing the attendance register and taking the salary/honorarium of Rs.9,000/- per month, amounting to Rs.2,00,000/- for two years. It is

stated that in the past also there were instances in the said college run by the accused, in respect of payments made towards salary without candidate

putting any work. That amount has been recovered by the Government. All those persons had come to this Court, however, those petitions were

rejected and criminal proceedings are pending against two of them. The complainant had given a complaint application on 18.01.2012 to the Deputy

Director of Education, Aurangabad. He has passed an order on 11.06.2012. It was directed that the accused No.1 should deposit the entire amount,

which he has received towards honorarium with the Government. Further directions were given to take action under Rule 28(5) of Maharashtra

Private Schools (Terms of Service) Rules, 1981. It was also stated in the said order that since the accused No.1 has derelicted from duty, inquiry be

held and after the report is received then only the further action of continuation in his service would be taken. Therefore, the continuation was not

done and as the salary was not given, accused No.1 staged agitation from 09.07.2012 in front of the office of Deputy Director of Education. He was

advised on 12.07.2012 to file an appeal and he was then prevented from continuing the agitation. The appeal was filed by him and stay was granted to

the order passed. In view of the said stay the accused No.1 was given continuation of service. No opportunity was given to the complainant to put

forth his say by the Director of Education when stay was granted. The complainant thereafter filed writ petition before this Court bearing Writ Petition

No.6756 of 2012. In that petition the Director of Education was directed to file affidavit. Accordingly, affidavit was filed on 24.04.2013. It was

specifically stated that on 17.04.2013 further order has been passed that the stay has been vacated and the order passed by Deputy Director of

Education Aurangabad on 11.06.2012 is confirmed. In view of the said contentions in the writ petition, the writ petition came to be rejected. In the

meantime, accused No.5 took charge as Deputy Director of Education, Aurangabad and he gave letter on 24.06.2013, thereby cancelling the

confirmation to the service given to accused No.1. Accused Nos.2 to 4 had not taken any steps for inquiry in view of the order dated 11.06.2012. A

false report was submitted to the Deputy Director of Education. Accused No.1 has not even deposited the amount of Rs.2,00,000/- which he had

taken as honorarium for two years. Yet, after accepting the false report the accused No.5 has continued the services of accused No.1 by letter dated

26.08.2013. It has been submitted that all the accused persons with common intention with each other prepared false report, prepared false attendance

register, pay bills and other documents, thereby all of them have cheated the Government as well as the students, and therefore, he says that offence

has been committed by all the accused persons. He, therefore, prayed for issuing process and punishing the accused persons.

5 After perusing the complaint and verification statements, the learned Magistrate had come to the conclusion that no prima facie case has been made

out against accused Nos.2 to 5 for the offences punishable under Section 467, 468, 469, 409 read with Section 34 of the Indian Penal Code, and

therefore, process came to be issued only against accused No.1 for the offence punishable under Section 420 of the Indian Penal Code.

6 The original complainant filed revision challenging the said order before the learned Sessions Judge by Criminal Revision Application No.82/2016.

After hearing all the parties the learned Sessions Judge has allowed the revision petition partly. It has been directed that the process should be issued

against accused Nos.1 to 4 for the offence punishable under Section 420, 468 and 409 read with Section 34 of the Indian Penal Code. The learned

Judicial Magistrate First Class was directed to proceed against accused Nos.1 to 4. Revision petition is dismissed as against respondent No.5. Hence,

accused Nos.2 to 4 are before this Court in this writ petition.

7 Heard learned Advocate Mr. S.S. Kazi for petitioners, learned Advocate Mr. N.V. Gaware for respondent No.1 and learned APP Mr. P.K.

Lakhotiya for respondent No.2-State.

8 It has been vehemently submitted on behalf of the petitioners that the learned Sessions Judge failed to consider the facts of the case as well as the

documents, which were intentionally not filed by the complainant on record. The learned Sessions Judge failed to consider that the complainant was

personally not put to any loss and he could not have been in any way said to be aggrieved person or affected person. He was also serving with the

institution run by the respondent Nos.3 and 4. However, he has been dismissed, and therefore, he is finding out some such cases in order to harass the

petitioners. Intentionally he did not file the report of the Committee, which was appointed in view of the directions given. That inquiry was against

accused No.2 herein. The Committee has come to the conclusion that the charges of negligence in duty and misconduct have not been proved against

her. Before the Committee also except the statement, that his attendance was 75%, there was nothing. Accused No.1 had submitted to the

Committee that there was no academic loss to the students. He had then demonstrated the results of the college. In fact, it was found by the

Committee that the Teacher i.e. accused No.1 had completed the M.A. Psychology course without attending the college, though he was a regular

student, and therefore, the Committee recommended that he should not be given the benefit of the qualification of M.A. 2nd Part Psychology and

entry to that effect shall not be taken in his service book. The learned Sessions Judge in a very cryptic manner, without going into the facts, that as to

how prima facie case has been made out by the complainant that too in common intention went on to observe, that accused No.1 would not have done

this act without being backed up by the accused Nos.2 to 4. There was nothing on record to show that anybody had challenged that inquiry report and

a contrary decision was taken. Therefore, as against the present petitioners there was absolutely nothing before the learned Magistrate and it has so

been rightly held by the learned Magistrate. For whatever acts were done by the accused No.1, the accused Nos.2 to 4 were not be responsible.

There was nothing to show that any forgery or misappropriation was committed by the present petitioners. There was no wrongful gain or wrongful

loss to the present petitioners or the Government on account of their action. Therefore, the basic ingredients of the offence were not at all attracted,

and therefore, the said order deserves to be set aside.

9 The learned Advocate for the petitioners placed reliance on GHCL Employees Stock Option Trust vs. India Infoline Limited, (2013) 4 Supreme

Court Cases 505, wherein following observations have been made.

Ã¢â‚¬Å“Summoning of accused in a criminal case is a serious matter. Hence, the criminal law cannot be set into motion as a matter of course. The order

of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The

Magistrate has to record his satisfaction with regard to the existence of a prima facie case on the basis of specific allegations made in the complaint

supported by satisfactory evidence and other material on record.Ã¢â‚¬â€‹

Further it has been observed that -

Ã¢â‚¬Å“There is no dispute with regard to the legal proposition that the case of breach of trust or cheating are both a civil wrong and a criminal offence,

but under certain situations where the act alleged would predominantly be a civil wrong, such an act does not constitute a criminal offence.Ã¢â‚¬â€‹

10 Per contra, the learned Advocate appearing for the respondent No.1-original complainant submitted that the learned Trial Judge had failed to

consider the facts and the events, those had taken place. The criminal complaint can be filed by anybody and, especially when the loss is caused to the

Government exchequer then every citizen will have right to file complaint. Learned Magistrate had failed to consider that inspite of the fact that

certificate of Vivekanand college showed that accused No.1 attended the college for the completion of his course and his attendance is stated to be

75%. The timings of the course had come on record, that timing is overlapping the timing of the school run by the accused Nos.3 and 4. A person

cannot act at two places at the same time. Therefore, when he had not worked in the school, he was not entitled to get any salary. Yet, the salary bills

were prepared and were submitted to the Government. Government released that amount. It is nothing but cheating. Cheating on the basis of false

pay bills, which were prepared in this matter. Definitely this could not have been made without the conspiracy or without the common intention of all

the accused persons. This fact has been correctly grasped by the learned Sessions Judge, and therefore, the learned Sessions Judge was justified in

reversing the order passed by the learned Magistrate.

11 RelianceÃ, hasÃ, beenÃ, placedÃ, byÃ, theÃ, learnedÃ, AdvocateÃ, forÃ, the respondent No.1 on Nagawwa vs. Veeranna Shivalingappa

Konjalgi, AIR 1976 SC 1947, wherein it has been held -

Ã¢â‚¬Å“It is true that in coming to a decision as to whether a process should be issued the Magistrate can taken into consideration inherent improbabilities

appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of

demarcation between a probability of conviction of the accused and established of a prima facie case against him. The Magistrate has been given an

undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for

the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out

whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations, in our opinion, are

totally foreign to the scope and ambit of an inquiry under Section 202 of the Code of Criminal Procedure which culminate into an order under Section

204 of the Code. Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed

or set aside:

(1) where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out

absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are potently absurd and inherently improbable so that no prudent person can ever reach a conclusion

that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on

materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority

and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash

proceedings.Ã¢â‚¬â€‹

Further reliance has been placed on decision of U.P. Pollution Control Board vs. Bhupendra Kumar Modi and another, 2009 (2) SCC 147, wherein it

has been observed that -

Ã¢â‚¬Å“It is settled that at the stage of issuing process, Magistrate is mainly concerned with allegations made in complaint or evidence led in support

thereof or he is only to be prima facie satisfied whether there are sufficient ground for proceeding against the accused. Magistrate cannot enter into

detailed discussion on merits or demerits of the case. But, he can take into consideration improbabilities appearing on the face of complaint or in

evidence led in support of allegations made therein. Order of issuing process can be quashed only on specified grounds, enumerated, which are purely

illustrative, just providing guidelines to indicate contingencies where High Court can quash proceedings.Ã¢â‚¬â€‹

Ã, 12 At the outset, it is to be noted from the Judgments, those have been relied by both the parties, that the HonÃ¢â‚¬â„¢ble Supreme Court in those cases

held that satisfaction of the Magistrate in respect of contents of the complaint and the material produced to support those contents is important. The

impugned Judgment and order passed by the learned Sessions Judge is totally silent on the point, as to which documents, produced along with the

complaint, were perused by him, which according to him, would have led to the satisfaction of the Magistrate. Contents of the complaint would show

that the complainant, who is in fact a third party in a sense- not involved in the transaction between the accused interse or with the Government, raises

objection regarding the withdrawal of the salary of accused No.1, which is definitely prepared on the basis of pay bills submitted under the signature of

the competent authority of the school to the Government. One of the important documents to prepare pay bill was the attendance register. It appears

from the contents of the complaint that accused No.1 had made signatures on the attendance register. Now, according to the complainant, accused

No.1 had attended his M.A. course as a regular student and his attendance is 75%. He presupposes that accused No.1 had attended the course only

and not the school, where he was working. He has not ruled out the possibility of vice versa, that is the accused might have attended the school only

and not attended the course, yet taken the certificate from the said college regarding his attendance showing 75%. The complainant is also

presupposing that whatever has been done in respect of withdrawal of the salary or honorarium of accused No.1 was with knowledge of the accused

persons that the accused No.1 was prosecuting the higher studies. In fact, unless it would have been made known to the institution by the accused

No.1 himself that he is prosecuting the said course, they could not have come to know about it. It appears that after the entire course was over, when

for the first time the complainant himself had made complaint application on 18.01.2012, these facts came on record. There was nothing before the

learned Magistrate to infer that the accused Nos.2 to 4 had the knowledge that in the year 2008-09 as well as 2010-11, the accused No.1 was

prosecuting M.A. course. When knowledge cannot be attributed, unless it is proved in some other way, it will have to be inferred that the basic

ingredients of the offences i.e. mens rea is absent. A very cryptic order has been passed by the learned Sessions Judge without considering the basic

ingredients of the offence. It is also not made clear, as to which offence was then attributable to which accused. It is stated in the order by the learned

Sessions Judge that process for the offence punishable under Section 420, 468 and 409 read with Section 34 of the Indian Penal Code is issued against

all the accused persons, but definitely taking into consideration the allegations, it cannot be stated that all the accused would have taken part in each of

that offence. Section 409 of Indian Penal Code, runs thus -

Ã¢â‚¬Å“409. Criminal breach of trust by public servant, or by banker, merchant or agent.Ã¢â‚¬"Whoever, being in any manner entrusted with property, or

with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or

agent, commits criminal breach of trust in respect of that property, shall be punished with 1[imprisonment for life], or with imprisonment of either

description for a term which may extend to ten years, and shall also be liable to fine.Ã¢â‚¬â€‹

In order to prove this offence, complainant should prove that the property was entrusted or with any domain of the public servant and then he has

committed criminal breach of trust of such property. We must consider ingredients of Section 405 of the Indian Penal Code also for that purpose.

Ã¢â‚¬Å“405. Criminal breach of trust.Ã¢â‚¬"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly

misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing

the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust,

or wilfully suffers any other person so to do, commits Ã¢â‚¬Å“criminal breach of trust.Ã¢â‚¬â€‹

Now, which property can be said to have been entrusted to the accused Nos.2 to 4, which they would have appropriated to themselves or converted

to their own use is not clear, and therefore, it is hard to believe that Section 409 of the Indian Penal Code would be attracted to accused Nos.2 to 4.

The Judgment of learned Sessions Judge is also silent on the point, as to which documents are stated to be forged documents in order to attract

Section 468 of the Indian Penal Code. He has not gone into each and every of the document, which is alleged to be a fabricated document or false

document. Further, endeavour ought to have been to see in respect of each of that forged document, as to which of the accused is responsible. It

cannot be the collective act, unless all the three persons would have signed it. As regards accused Nos.3 and 4 it is stated that they being responsible

members without application of mind approved the inquiry committee report, which was against the findings recorded by the Deputy Director of

Education by his order dated 08.06.2012. In fact, without there being any further evidence and ensuring the facts, such statement ought to have not

been made by the learned Sessions Judge. It was not brought on record that the said inquiry committee report was in any way challenged by anybody.

Whether to accept the report or not, was definitely within the discretion of the accused Nos.3 and 4 and only the aggrieved party could have taken up

legal course available to him. It has not been brought on record even now, that for such acceptance of report by accused Nos.3 and 4; the Deputy

Director of Education or the Director of Education has taken any action against accused Nos.3 and 4. Therefore, that part was purely civil in nature

and it could not have been in any way interpreted to having criminal intent in that. The learned Sessions Judge appears to have not even considered

the further orders, those were passed by the Director of Education and also the affidavit, that was filed in the writ petition by the complainant. The

observations of this Court in the said writ petition while dismissing it have not been reflected in the Judgment and order passed by learned Sessions

Judge. Further, that appeal was filed by accused No.1 only and it cannot be gathered, as to whether the Director of Education has made any kind of

remarks against accused Nos.2 to 4 in the said order. Under such circumstance, it is to be noted that the Revisional Court even after having

knowledge that the scope of the revision is limited to see either the correctness, legality or propriety of any finding, sentence or order exceeded in his

jurisdiction in issuing process against the accused, has unnecessarily over-reached itself. The proper course could have been after passing a detailed

order, to remit the case back to the Magistrate to pass an appropriate order, in pursuant to the observations in the revision. By any stretch of

imagination from the contents of the complaint and verification as well as documents, those appeared to be filed with the complaint, a case was made

out for issuing process against accused Nos.2 to 4. The learned Sessions Judge exceeded in his jurisdiction, and therefore, the Constitutional powers of

this Court under Article 227 of the Constitution of India are required to be invoked to set aside the said order.

Hence, following order.

ORDER

1 The writ petitions stand allowed.

2 The Judgment and order passed in Criminal Revision Application No.82/2016 passed by the learned Sessions Judge, Aurangabad dated 17.04.2019,

is hereby set aside, as against the present petitioners.

3 The order passed by the learned Magistrate below Exh.1 in Regular Criminal Case No.106/2015 dated 31.03.2016, is hereby restored, as against the

present petitioners.

4 Rule is made absolute in above terms.