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Court : Mumbai

Decided On : Mar-26-1987

Reported in : 1988(1)BomCR219

Judge : M.S. Ratnaparkhi, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 323 and 504; Code of Criminal Procedure (CrPC) , 1973 - Sections 46, 161, 163, 197, 197(1), 202, 313, 397, 397(3) and 482

Appeal No. : Criminal Appln. Nos. 152 and 160 of 1986

Appellant : Ashok

Respondent : Pralhad and Another

Judgement :
ORDER

1. A common order passed by the Additional Sessions Judge, Khamgaon, disposing of the Criminal Revision Nos. 77 and 76 of 1983 rejecting both of these revisions has been challenged in these applications invoking the inherent jurisdiction of the Court under S. 482 of the Cr.P.C.

2. Facts giving rise to these special applications may be briefly stated as follows; The complainant Pralhad Namdeo Yekade is a resident of Nandura in Malkapur tahsil of the Buldana district. Vithal Kharat (petitioner in Criminal Application No.

160 of 1986) and Ashok B. Pawar (petitioner in Criminal Application No. 152 of 1986) were serving in the Constabulary attached to the Nandura Police Station in or about the year 1982. On 30th August, 1982 which happened to be a Ganesh Chaturthi day, the policemen attached to the Nandura Police Station were on their usual rounds. They were in their official uniform. In the afternoon at about 6 p.m. the complainant Pralhad was on the Ota of his house. Adjacent to the Ota was one tailoring shop and that tailor was the tenant of the complainant. Some talk was going on between the complainant on one hand and the tailor (his tenant) on the other regarding the payment of rent. Both the petitioners were passing by the road along with two other persons who were also the policemen. It is the case of the complainant that all these four persons (including the petitioners) dragged him from the Ota to the police station. It is also his contention that he was assaulted by both the petitioners throughout the way. As soon as he reached the police station, he lodged his complaint. He was also examined by the Medical Officer. The police, however, did not take any cognizance of the matter nor did they take any steps. He, therefore, filed the present complaint before the Judicial Magistrate, First Class, Malkapur on 20-10-1982. It is interesting to note that the complaint was filed against four persons including the present two petitioners. The learned Magistrate called for the report of the police under S. 202 of the Cr.P.C. In pursuance of the report, the process was issued under sections 323 and 504 of the I.P.C. against three persons only. During the pendency of the proceedings, the third accused also claimed to be discharged. That prosecution went on only against the present petitioners. The petitioner in Criminal Application No. 152 of 1986 was accused 2, whereas the petitioner in Criminal Application No. 160 of 1986 was the accused No. 1.

3. The learned Magistrate on trial found that both the accused did assault the complainant and voluntarily caused injuries to him. He therefore, held both the accused guilty of the offence punishable under S. 323 of the I.P.C. Both of them came to be convicted of the offences and sentenced to the fine of Rs. 100/- each.

4. Feeling aggrieved with the order of conviction and sentence, the accused 1 Vithal Kharat (petitioner in Criminal Revision No. 76 of 1983) and accused 2 Ashok Pawar (petitioner in Criminal Revision No. 77 of 1983) preferred separate revision

application. Both these revisions were heard by the learned Additional Sessions Judge, Khamgaon and they were disposed of by common judgment delivered on 27-11-1983. He dismissed both the revisions and confirmed the order of conviction and sentences recorded by the trial Court.

5. Feeling aggrieved with this common order, the accused 2 filed separate Criminal Application No. 152 of 1986 under S. 482 read with S. 397 of the Cr.P.C. and/or for invoking the said jurisdiction under S. 482 of the Cr.P.C. The accused No. 1 had filed similar separate application registered as Criminal Application No. 160 of 1986. As both of these applications arise out of the common judgment which requires the revision of the same judgment, it would be proper to dispose of both these applications by this common judgment.

6. It was urged by the learned counsel for the respondents that the criminal applications cannot be maintainable in view of a positive bar created by S. 397(3) of the Code of Criminal Procedure. Admittedly the order passed by the trial Court was challenged by both the accused before the Sessions Court at Khamgaon on revision. That was the first revision challenging the order passed by the trial Court. The petitioners could not be successful in that Court. They have now taken resort to this second attempt by filing the present criminal applications before this court. Sub-section (3) of S. 397 of the Cr.P.C. creates a bar in entertaining second application. The sub-section (3) reads as follows :

'If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.'

It would, therefore, not be possible for this Court to entertain the application as a revision application as it is mentioned. However, as both the petitioners want to invoke inherent jurisdiction of this Court, the petition can be entertained under S. 482 of the Cr.P.C.

7. Mr. Kamlakar, learned advocate for the petitioner in Criminal Application No. 152 of 1986 and Mr. Sirpurkar, learned Advocate for the petitioner in Criminal Application No. 160 of 1986 strenuously argued before me that the findings of the

trial Court regarding the assault are wrong and unsustainable. They wanted this Court to reappreciate the oral evidence. In fact, even the Sessions Court was not entitled to reappraisal the oral evidence, as he was sitting for exercising his revisional jurisdiction and not appellate jurisdiction. This Court cannot be called upon to reappreciate the oral evidence. In fact there is no necessity for reappraisal of the oral evidence, particularly when the trial Court has appreciated the evidence and believed the same. The complainant has given a vivid picture as to what happened on that fateful day and he has been corroborated by two independent witnesses (PW 2) Bashir and (PW 3) Rangnath on all material particulars. The evidence uniformly shows that the complainant was virtually dragged from his Ota to the police station and while on way he was fisted and kicked by both the accused and their other colleagues throughout the way. Mr. Sirpurkar did complain before me that the negative evidence of the Medical Officer who had treated and examined Vithal within the hours of the incident falsifies the story of assault. I am not much impressed with this argument, particularly when the complainant is not coming before the Court with a case that he was assaulted by any weapon. It is possible that the fists and kicks may not result in any physical injury. What the complainant has stated in his evidence is that there was pain throughout the whole body after the beating. This is the injury which he has deposed to and it is possible that this injury may not be visible clinically to the doctor. The findings of fact arrived at by the learned Magistrate that the accused 1 and 2 did assault the complainant on that fateful day is quite positive and equally correct and it needs no interference at the hands of this Court.

8. Mr. Kamlakar, the learned Advocate for the petitioner Ashok Pawar invited my attention to the defence available to his client under S. 159 of the Bombay Police Act. He also urged before me that his client, and this is true (sic), including the accused 1 were in their official uniform and they were on patrolling duty as it was Ganesh Chaturthi. He contended that the police officers were on their official duty and if anything has been done during the discharge of the official duty, the officer concerned is entitled to the protection under the law.

9. I was taken through S. 159 of the Bombay Police Act, which reads as under :

'No Revenue Commissioner, Magistrate or Police Officer shall be liable to any penalty or to payment of damages on account of an act done in good faith, in pursuance or intended pursuance of any duty imposed or any authority conferred on him by any provision of this Act or any other law for the time being in force or any rule, order or direction made or given therein.'

It was sought to be urged relying upon this section that the accused were on patrolling duty and it was one of their duties to arrest a person committing any crime before their eyes and take him to the police station. It was also urged that arresting an accused and taking him to the police station is an act done in pursuance of the duty prescribed by law and as such it is protected under S. 159 of the Bombay Police Act. The argument on the very face of it suffers from the inherent weaknesses. Neither in the cross-examination of the prosecution witnesses, nor in their examination under S. 313 of the Cr.P.C. have the accused suggested that they were arresting the complainant and taking him to the police station. I asked Mr. Kamlakar as well as Mr. Sirpurkar to show me even a single suggestion put to either of the witnesses examined by the prosecution, but they could show none. Perhaps they wanted to take advantage of the fact that the accused were in their official uniform and on patrolling duty which itself leads to a presumption that they were performing the official duties and this act must have been committed during that performance. I do not think that this is a plausible defence. We have to look to the case that is impeached. We may assume for the time being that both the accused (who were the policemen) were on patrolling duties and they were discharging their duties as above. What is impeached in this litigation is the act of assault alleged to have been made by both the accused against the complainant. This assault cannot, by any stretch of imagination, be called as a part of the duty which the accused were expected to do. What S. 159 of the Bombay Police Act contemplates is the 'duty' contemplated under S. 159 of the Bombay Police Act which is attached to the 'act done in good faith' and that too in pursuance or intended pursuance of any duty. It would be interesting to find out whether the assault which is complained of in the present case can be called as in good faith and secondly, in pursuance or intended pursuance of the duty imposed on the accused.

10. The argument advanced by Mr. Kamlakar was further augmented by Mr. Sirpurkar, the learned advocate for the petitioner in Criminal Application No. 160 of 1986. According to him, the petitioners are entitled to the protection not only of S. 159 of the Bombay Police Act, but also under S. 197 of the Cr.P.C. It was urged that both the petitioners were in their official uniforms and they were taking their usual patrolling round when this offence is alleged to have occurred. It was his contention that seeing that the complainant was making a row at the public place (to which public has access), the petitioners thought that it was an offence under S. 110 read with S. 117 of the Bombay Police Act and hence the complainant was asked to accompany them to the police station. Whatever occurred on way to the police station, he urged, was during the performance of the duties of the petitioners who were obliged to take the complainant to the police station. Mr. Sirpurkar urged that the petitioners were under obligation to arrest the complainant and whatever was necessary for their arrest was done and it must necessarily be attributed to the act done during the discharge of their duties. He invited my attention to S. 46 of the Cr.P.C. which describes as to how the arrest is to be made. According to him, the arrest includes actual touching or confining the body of the person to be arrested. Sub-section (2) of S. 46 of the Code empowers the police officer to use all necessary means to effect the arrest in case the accused attempts to evade the arrest. The necessary steps excludes the right to cause death of a person who is not accused of an offence punishable with death or with imprisonment for life. In short, his argument shows that in case of attempts to evade the arrest, the police were justified in using such criminal force against the person which would be necessary for that person being taken to the police station. This force must necessarily include even the criminal assault as has been done in the present case. This is what Mr. Sirpurkar put before the Court during the course of his arguments.

11. This argument suffers from more than one infirmity. Firstly, there is no basis to be found from the record that the police wanted to arrest the complainant and take him to the police station. Secondly, there is absolutely no basis to infer that the complainant evaded or made attempts to evade his arrest. There is not even a suggestion that the complainant put any resistance to the so-called arrest. In fact the record shows that even the story of the assault as unfolded by the complainant

and his witnesses has been denied. The accused made a clean sweep in their examination under S. 313 of the Cr.P.C. inasmuch as they completely denied the material brought against them in so far as it was connected with the said assault. The cross-examination of the witnesses does not even smell that there was any attempt on the part of the complainant to evade the so-called arrest. At one stage, the complainant stated that it took about an hour for them to reach the police station and relying upon this solitary statement, which in face needs to be read under all the constraints and limitations, it is urged that this very statement is a pointer to what must have happened during that short period. The only evidence that has come on record is that the complainant was actually dragged by both the accused. To say that it took about an hour to reach the police station is a statement containing hundred per cent truth is also not possible because much depends upon the sense of time that the witness has. That is an omnibus statement and no definite inference can be drawn from his sole statement. In any case, it would be too risky to jump to the conclusion that the complainant offered resistance and, therefore, an hour was required to take him to the police station. In fact, the accused were the persons who were connected with this incident and much more was expected from them in explaining this anomalous situation, but surprisingly enough they kept silent at least in their examination under S. 313 of the Cr.P.C.

12. Thus when there is absolutely no material before the Court to come to the conclusion that the accused wanted to arrest the complainant and take him to the police station and during that course the incident occurred, it would be more than risky to hold that this assault must have been made while the complainant resisted the arrest. Reading the evidence, as it stands, it clearly shows that there was a positive assault on the complainant at the hands of both the accused. There is nothing to show that any resistance was offered. There is nothing to justify any force to ward off the said resistance. The evidence standing as it is, is a pointer which shows that the complainant was dragged from his Ota and he was assaulted on the way.

13. It is these circumstances that the Court is now called upon the decide whether the case would fall under the four corners of S. 159 of the Bombay Police Act and

S. 197 of the Cr.P.C. As far as the case under S. 159 of the Bombay Police Act is concerned, arguments were advanced before the Sessions Court and the Sessions Court has dealt with this aspect of the defence. The Sessions Court has observed, and in my opinion rightly, that the act lacked in bona fides. Once this finding which is based on material available to the Court is recorded, then the case may not fall within the four corners of the defence availed under S. 159 of the Bombay Police Act.

14. It will now be proper to see at this stage whether S. 197 of the Cr.P.C. can assist the petitioners. Section 197 of the Code renders a protection to the public officer accused of any offences alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. This protection is not absolute but it is qualified. Mr. Bobde, learned Advocate for the complainant did urge before me that the present petitioners were not entitled to this protection because they did not belong to that category of the public servants, namely, a Judge or a Magistrate or a public servant not removable from his office save by or with the sanction of the Government. Admittedly the petitioners are the Constable and Head Constable, who are removable from the service by the District superintendent of Police and not by the Government. However, the State Government is empowered to include other categories also in these species so that they can be entitled to claim a similar protection. Accordingly the Government of Maharashtra by its Notification No. CRP-0178/9845-Pol, dt. 2nd of June, 1979 have included (1) All Police Officers as defined in the Bombay Police Act, 1951 other than the Special or Additional Police Officers appointed under S. 21 or 22 of the Act, (2) All Reserve Police Officers as defined in Bombay State Reserve Police Force Act, 1951, whenever they are charged with the maintenance of public order. Mr. Bobde urged before me that there is nothing on record to show that the present petitioners were at that particular moment charged with the maintenance of public order. Prima facie the material shows that it was a Ganesh Chaturthi day; that they were in their official uniforms. These circumstances may justify the conclusion that they were charged with the maintenance of public order at that particular moment. We may assume for the present that they were the persons charged with the maintenance of public order. The question still remains whether they are entitled to the protection available under S. 197 of the Cr.P.C.

15. To repeat it once again, the protection is available to the public servant accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. Mr. Sirpurkar strenuously urged before me that these two policemen were on their usual round on the Ganesh Festival day in their official uniforms and when they found that the complainant on his Ota adjoining the road was creating a row, they arrested him and commanded him to come to the police station. What he means thereby is that his client had an authority to arrest a person and take him to the police station and, therefore, his case fits in within the four corners of the protection contemplated under the statute. What is apparent from the face of the record, it is not the arrest that is impugned or challenged. It is the assault which the complainant suffered at the hands of the policemen that has been agitated before the Criminal Court. Had the complainant come to the Court with a case that he was wrongfully arrested and paraded throughout the streets and had he sought the help of the Court in convicting the accused of that offence, the matter would have been altogether different. He is not challenging that act. He is not even saying that such an act was done. He comes before the Court with a simple case that he was dragged from his terrace (Ota) and was assaulted by both the accused. The act complained of is the assault and nothing more. What we have to find out at this stage is whether this act is connected with the official duty that the accused were performing at that particular moment or at least whether this act has any nexus or correlation with the official duties that the petitioners were performing at that particular moment. Here again, an argument was surreptitiously geared up that there was an attempt to evade the arrest and for warding off that attempt the police were entitled to use a criminal force. I have already discussed this point in detail in the foregoing paragraphs and have pointed out that there is no defence, no suggestion or any cross-examination which can be the basis for such defence. The material which has been brought on record shows only thing and that is, the accused assaulted the complainant. This is thus a clean and clear case of an assault and nothing more. The question is whether such an assault by the police officer has any nexus with his duty of arresting a person and taking him to the police station.

16. In Desiraju Subba Rao v. M. V. Venkata Reddi, (Andh Pra) a similar point arose and it was observed :

'The question whether an act complained of is one purporting to be dome in execution of his duty is substantially one of fact to be determined with reference to the act complained and the attending circumstances. The test is whether the public servant, if questioned can reasonably claim that the act complained of has been done by virtue of the office he holds.'

After considering the number of rulings cited before the Court, it was observed :

'In all these decisions it was held that the offence alleged to have been committed must have something to do or must be related in some manner with the discharge or official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on merits. What the Court must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation.'

17. In Bhagwan Prasad v. N. P. Mishra, : 1970 CriLJ1401 it was observed :

'This section (S. 197 Cr.P.C.) is designed to facilitate effective and unhampered performance of their official duty by public servant by providing for scrutiny into the allegations of commission of offence by them by their superior authorities and prior sanction for their prosecution as a condition precedent to the cognizance of the cases against them by the Court ... In our view it is not the 'duty' which requires examination so much as the 'act' because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. One must also guard against too wide construction because in our constitutional set up the idea of legal equality or of universal subjection of all citizens to one law administered by the ordinary Courts has been pushed to its utmost limits by enshrining equality before the law in our fundamental principles.'

It was further observed :

'It is not every offence committed by a public servant that requires sanction for prosecution under S. 197(1) of the Cr.P.C. nor even every act done by him while

he is actually engaged in the performance of his official duty; but if the act complained of is directly concerned with his official duties so that if questioned, it would be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective whether it was, in fact, a proper discharge of his duties because that would really be a matter of defence on the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction which must precede the institution of the prosecution.'

18. The Supreme Court in State of Maharashtra v. Atma Ram AIR 1966 SC 1786 : 1966 Cri LJ 1498 While interpreting the scope of S. 161 of the Bombay Police Act, which is more or less, similar to the Protection available under S. 197 of the Cr.P.C. observed :

'In the State of Maharashtra v. Narharrao, Criminal Appeal No. 214 of 1966 : : 1966 CriLJ1495 the judgment in which has been pronounced just now we have to consider the true legal effect of S. 161(1) of the Bombay Police Act. We have expressed the view in that case that there must be a reasonable connection or nexus between the alleged act and the duty or authority imposed upon the officer under the Bombay Police Act or any other enactment conferring powers on the police under the colour of which the act may be said to have been done. Unless there is a reasonable connection between the act complained of and the powers and duties of the office, it is difficult to say that the act was done under the colour of the office.'

The Supreme Court further observed :

'The provisions of Sections 161 and 163 of the Code of Criminal Procedure emphasise the fact that a police officer is prohibited from beating or confining persons with a view to induce them to make statements. In view of the statutory prohibition it cannot possibly be said that the acts complained of in this case, are acts done by the respondents under the colour of their duty or authority. In our opinion, there is no connection in this case between the acts complained of and the office of the respondents and the duties and obligations imposed on them by law. On the other hand, the alleged acts fall completely outside the scope of he

duties of the respondents and they are not entitled, therefore, to the mantle of protection conferred by S. 161(1) of the Bombay Police Act.'

19. It is on this background that the Court is to consider the protection available under S. 197 of the Cr.P.C. A correlation between that act 'complained of' and the 'duties' that are to be performed under law has to be established. If the act and the duties are correlated or if there is any nexus between the act and the duties, the case would fall under S. 197 of the Cr.P.C. The question whether the act was in excess would not be very relevant when it is found that the act has some correlation with the duty. Even in the case or case the protection may be legitimately available, but when there is absolutely no correlation between the act complained of and the duties, performance whereof is enjoined by law, then the protection could not be available.

20. Coming to the present case the evidence, as it stands, discloses that the complainant was dragged from his terrace and taken to the police station and during that course he was fisted and kicked. There is nothing to show whether the petitioners wanted to arrest him. There is absolutely nothing to show that he ever resisted the so called arrest. There was no question, therefore, to use any force, not to speak of the assault, which has been established in the present case.

21. Thus the arguments advanced before me, though ingenious, lack in factual support. There being no correlation or nexus between the act complained of and the duties enjoined by law to be performed, the protection under S. 197 of the Cr.P.C. is not available. The act not being bona fide the protection contemplated under S. 159 of the Bombay Police Act is not available. The fact remains that both the petitioners who were accused before the trial Court assaulted the complainant and hence they were rightly convicted for the offences punishable under S. 323 of the I.P.C.

22. Thus on merits, there is very little to be said in support of the petition. The inherent jurisdiction of this Court is invoked on the ground that an imaginary defence which ought to have been considered, has not been considered. I do not think that this Court can justifiably accept this position under the garb of its inherent jurisdiction. The arguments, as they stand, in this Court have no factual

basis and there is thus no question of exercising inherent jurisdiction. The applications have no merit and they are dismissed.

23. Applications dismissed.

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