

HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

CRMC No.46/2017

Date of Decision:31.10.2018

Mohammad Usman Malik	vs.	State of J&K and ors.
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Coram:

Hon'ble Mr Justice Rashid Ali Dar, Judge.

Appearance:

For the Petitioner(s): Mr. Javid Samad, Adv.

For the Respondent(s): Mr. Shah Aamir, AAG-for R1 to R3.

Mr. Javid Iqbal, Adv-for R4&R5.

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| i) | Whether approved for reporting in
Law journals etc.: | Yes/No |
| ii) | Whether approved for publication
in press: | Yes/No |
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1. By medium of instant petition, order passed by the Judicial Magistrate 1st Class, Pattan, on 16.02.2016 in Criminal complaint titled Abdul Hamid Ganie Vs. Mohd Usman Malik and others, is sought to be set aside while pleading various grounds, including:-

- i) The criminal complaint filed by respondents 4 & 5 per se is vague and has been filed on personal vengeance just to harass and humiliate the petitioner who is a upright officer.
- ii) The respondent No. 2 has rather conducted the inquiry in most casual manner and has recorded statements of some people U/S 161 who have spoken blunt lies just to harass the petitioner. In their statements the

witnesses have admitted that the respondent No. 4 was arrested by the police and kept in the custody of respondent No. 3 for one night. The inquiry is totally not in consonance with the provisions of criminal procedure Code.

- iii) The criminal complaint has been filed by the respondent in the year 2014 about an incident of 2011 which was done by the petitioner in **discharge of his duties in legal manner and after completing all the legal formalities**. More so a full-fledged inquiry was also completed by the office of director education upon the complaint filed by the respondent No. 4 wherein the same incident was inquired by the committee and the committee had found the petitioner not to be guilty and the complaint filed by the respondent No. 4 was found to be baseless.
- iv) The learned trial court has not drawn its satisfaction in the order dated 16.02.2016 while taking cognizance in the matter.
- v) The cognizance has been taken much beyond the period of limitation prescribed by the code.

2. The petitioner herein has given the factual matrix of the matter as follows:-

- i) The petitioner was posted as Principal Government Boys Higher Secondary School, Baramulla, Kashmir, in the year 2011 and in the said school there were some populous trees which were to be felled

down as the Indian Army had offered to construct toilets for school children under Sadbhavna Abhiyan in the year 2009, but the same was not completed due to one reason or the other.

- ii) The respondent No. 4 who is an employee of the Education Department was booked in an FIR No. 52/2008 U/S 354, 376 & 511 and was working under observance in the Government Boys Higher Secondary School Baramulla, Kashmir, and the trial of the same is presently going on in the Court of Additional District Judge, Baramulla.
- iii) The Director Education vide No. DSEK/utilization/Bla/11 dated 22.06.2009 had already conveyed Chief Education Officer, Baramulla to constitute a committee for auctioning the 05 Populous trees but the same was not implemented by the previous Principals posted in the Government Boys Higher Secondary School, Baramulla. The petitioner immediately after assuming the charge as Principal of the said School conveyed a meeting on 17.11.2011 and it was ordered to identify the site for construction of lavatory block.
- iv) The father of respondent No. 4 was running a Saw Mill, hence the purchase committee requested the respondent No. 4 to get some skilled labours to cut down the 05 poplar trees, but on 20.11.2011 the respondent No. 4, after cutting down the 05 poplar trees, without any authority and justification lifted all the timber logs and took the same to his house at Palhallan. Petitioner immediately after receiving an

information about the stealing of timber logs registered an FIR against the respondent No. 4.

- v) The SHO, Police Station, Baramulla, deputed a police team accompanied by the Staff members of the Government Boys Higher Secondary School, Baramulla, recovered the timber logs from the premises of the respondent No. 4 and deposited the same in the said school. The respondent No. 4 was lodged in custody.
- vi) The petitioner vide dated 09.12.2011 formed a charge-sheet against the respondent No. 4 asking him to explain his position before any legal action is initiated against him and respondent No. 4 replied to the charge-sheet, whereby he admitted that he was arrested by the Police Station, Baramulla on 29.11.2011.
- vii) The petitioner vide dated 10.12.2011 requested the construction committee to go through the reply filed by respondent No. 4 and submit their report, the construction committee subsequently filed a report wherein they submitted that respondent No. 4 had lifted the timber logs from the school premises without any valid permission and Gate Pass.

3. The contention on behalf of the petitioner by his Id. counsel is that the acts and omissions referred to in the complaint were related with the discharge of duties by the petitioner herein as a Principal of Boys Higher Secondary School, Baramulla, in the year 2010-2011. The commencement of the proceedings in the form of complaint before learned Judicial

Magistrate, Pattan, in March, 2014, was barred by limitation and actuated with *mala fides*. The respondent No.4 had been arrested in a case FIR No.52/2008 P/S Kreeri related with his conduct, unbecoming of a public servant. He had been working in observance in Government Boys Higher Secondary School, Baramulla, under the orders of higher authorities and had been facing trial in the Court of Additional Sessions Judge, Baramulla. The higher authorities, according to him, had already instructed his predecessor to sever the populous trees in June, 2009 but no action had been taken thereon by the officers at the helm of affairs. A case was requested to be registered against the respondent No.4 under the communication referred in the petition to the concerned Police Station but no proper action was taken though recovery of severed timber was made. A departmental enquiry was also going on against the respondent No.4. The timber referred in the complaint and the petition, according to him, had been properly auctioned and the highest bidder allowed to lift the same for an amount also referred in the petition. A complaint, according to him, had also been filed before the higher authorities by respondent No.4 which was proved to be baseless. Some official communications have been relied upon by the learned counsel for the petitioner to substantiate the argument including the finding recorded by the enquiry officer who figures as accused No.2 in the complaint filed by respondent No.4.

4. Mr. Javid Iqbal, learned counsel, for the respondent Nos. 4 & 5, however, submitted that power U/S 561-A Cr. P. C has to be used sparingly and none of the grounds suggested in the petition can become foundation for the quashment of the proceedings. It is also his contention that the petition

has been drafted in a casual manner and the points raised therein when put to test on the touchstone of section 561-A Cr. P. C as interpreted by the Hon'ble Apex Court, it is to be concluded that there is no substance in the petition.

5. On perusal of the complaint annexed with the petition, it is revealed that the Court of Judicial Magistrate, Pattan, had been approached by the respondents 4 and 5 in the form of a joint complaint against, (I) petitioner herein, (II) Personal Officer of Director School Education, Kashmir, and (III) Incharge Litigation, the later named as Mushtaq Ahmad Simnani and Mohammad Ibrahim. In the complaint the allegations had been levelled against the petitioner herein as:

- (1) That the accused No.1 soon after his joining the institution as Principal in the year 2011 and Vice Principal, namely, Shafat Ahmad Khan, persuaded the complainant No.1 to get the five number of popular trees purchased and skilfully chopped of by his father to overt any causality and damage to the property on the assurance that they have got the permission for cutting these trees from the Deputy Commissioner, Baramulla. In view of the assurance by the accused persons, the complainant No.1 persuaded his father for purchasing the said trees and finally a deal was struck between accused No.1 and his Vice and the complainant No.2 through complainant No.1 in the office of accused No.1 on 29.10.2011 on the terms and conditions that if there will be any damage to the property under the trees, the purchaser will be responsible for that, and, the expenditure on cutting of the trees and

lifting of the logs will be paid by the purchaser which shall be deducted from the total cost of the timber after measurement as earnest money, and, the price of the big size logs having a girth more than 36 inches was fixed Rs.200/ per feet and the logs having a girth less than 36 inches Rs.100/ per feet;

- (2) After the deal was struck, the complainant No.2 deployed the skilled labourers from Palhalan, namely, Gh. Rasool Shah and Gh. Rasool Ganai besides supervising them personally and also maintained the account of expenditure. After completing of work on 19.11.2011, the accused No.1 assigned the work of measurement of the timber to Gh. Nabi Sumji, the then lecturer in Mathematics, Sheikh Sakib lecturer in Chemistry and Ali Mohammad Narwara, the Physical Education Master. The measurement was made in presence of Vice Principal, Shafat Ahmad Khan, Abdul Hamid Dar, Lecturer Chemistry and Ali Mohammad Shah, Lecturer Statistics. Upon completion of measurement, the Principal asked the complainant No.1 to tell his father to bring the load carrier and lift the logs on the same day (Saturday) as the National Disaster Management is going to conduct the rehearsal programme in the institution of Monday and the ground should be cleared off, thus the complainant transported the timber to Palhalan on 21.11.2011. The accused No.1 handed over a computerized bill prepared on the basis of measurement which was done on 19.11.2011 for 99 No. of logs duly signed by him to the complainant No.1 showing an amount of Rupees sixty seven thousand and sixty seven only. As the bill was not as per the deal because the

price for logs having girth more than 36 inches was shown Rs.260/ instead of Rs.200/ and that of small logs Rs.120/ instead of Rs.100/, further some small logs having girth below 36 inches were treated as big size logs and the amount spend by the complainant No.2 on felling, cutting and lifting was not deducted from the amount of the bill which was brought to the notice of accused No.1 who assigned the job of rectification of the bill to his Vice Principal, who made amendments in the bill and issued another bill duly signed by him mentioning the amount of Rs.64,056/ without deducting the amount already paid by complainant No.2 and on the same day, the complainant No.2 through complainant No.1 send an amount of Rs.20,000/ in cash to the Principal in presence of G. N. Sumji, Lecturer Mathematics, as the second instalment with this assurance that the rest amount will be paid within two or three days but the amount was returned back to him on the premise that the accused No.1 has decided to sell the timber to his cousin Abdul Hamid Malik R/o Soibugh.

- (3) On 28.11.2011, the complainant No.1 was on leave and the Vice Principal, Mr. Shafat Ahmad Khan, telephonically conveyed him the directions of the accused No.1 to stay at home as his cousin Ab. Hamid Malik from Soibugh will come to him residence for lifting the timber from Palhalan, consequent upon which Abdul Hamid Malik accompanied by two staff members, Gh. Nabi Sumji, Lecturer Math and Shaheen Iqbal, Lecturer Zoology, reached to the residence of complainants for lifting the timber but the complainants did not allow them to do so unless the expenses incurred on felling, cutting and

transportation are paid to them and on the next day on 29.11.2011, the Principal instead of sorting the matter with the complainants, manhandled and assaulted the complainant No.1 in his office and managed his arrest in Police Station, Baramulla and thereafter accused No.1 deputed his subordinate staff headed by G. N. Sumji and Shaheen Iqbal, some labourers escorted by police to the residence of the complainants for lifting the timber forcibly back and the timber remained lying in the school compound till the winter vacations and when the school opened after winter vacations in March, 2012, everyone was shocked to notice that only 68 No. of logs were lying on the spot instead of 99. The complainant No.1 brought the matter into the notice of accused No.1 and requested him once again for settlement of the dispute but he continuously suppressed him by one way or the other.

- (4) The complainants did not left the claim of lifting the timber back or payment of the money they have spend on the same and finding no way out, the accused No.1 brought the matter into the notice of the department and started manipulating **things** and **fabricating** the documents for **auction of remaining 68 logs** and fixed the same on 28.,05.2012. The complainants brought the matter into the notice of the **Vigilance Organization**, Kashmir, upon whose direction a committee was formed which too **submitted a biased report** in the matter due to the influence exercised by accused No.1

6. The complaint appears to have been presented before the Id. Magistrate on 11.03.2014 in which orders have been passed on 11.05.2015 and 24.06.2015 as under:

“11-05-15:

Complainant present. SHO P/S Pattan was ordered to proceed U/S 202 Cr. P. C on 28.03.14. However, SHO has submitted that the dispute is beyond jurisdiction. Since occurrence is at Palhallan in Baramulla, therefore, before taking cognizance, it is better that SSP Baramulla is directed to constitute SIT to enquire u/s 202 Cr. P. C and submit report on or before 24.06.15.

24-06-15:

Complainant present. Since SHO P/S Pattan was unable to enquire as such if it is not possible to constitute a SIT, let a senior officer investigate not less than the rank of Dy. SP to enquire u/s 202 Cr.P. C and report about the veracity of the allegations. List on 10.-07.15.”

7. A report has been submitted under the signatures of Sub Divisional Police Officer wherein he has referred, precisely, to the allegations levelled in the complaint and stated that during enquiry into the matter, the team so constituted recorded the statements of some impartial witnesses who were well versant with the facts of the case and who unanimously supported the allegations levelled by complainant No.1 in the complaint. Some of the witnesses who have been examined are:

- 1) Abdul Hameed Dar, Lecturer,
- 2) Shaheen Iqbal, Lecturer,
- 3) Ali Mohammad Shah, Lecturer,
- 4) Ali Mohammad Waza, Waza,
- 5) Mohammad Ashraf Waza, Waza,
- 6) Fayaz Ahmad Shah, Shopkeeper,
- 7) Javid Ahmad Ganai, Shopkeeper,
- 8) Gulzar Ahmad, Tractor driver,

- 9) Gh. Rasool Ganai, Labourer,
- 10) Gh. Rasool Shah, Labourer

8. Witness No.1 to 3 have, in their statement, stated that the Principal Higher Secondary School had sold for Rs.20,000/ the poplar trees to respondent No.4 but the Principal returned the same being insufficient. The timber had been taken by respondent No.4 which was brought back through police and some other teachers. Witness No.4 to 7 are uttered to have stated that the police and some other persons come to the factory of respondent No.5 and took timber. Witness No.8 is uttered to have stated that the timber was taken from the school to the factory of respondent No.5. Witness No.9 and 10 in a joint statement are uttered to have stated that they had been asked to sever the poplar trees which were located in a dangerous position where cutting of the same was difficult.

9. It has been seen hereinabove that in the complaint, respondents No.4 and 5 have attributed to the petitioner herein the allegation of having persuaded the respondent No.4 to get five number of poplar trees purchased to be skilfully chopped of for which permission had to be obtained which was got by respondent No.4. The respondent No.4 is stated to have persuaded his father i.e. respondent No.5 to purchase the same. There had been an understanding according to the complainants' that the expenditure incurred on cutting and lifting the logs would be paid to them and same will be deducted from the total cost of the timber after measurement. A bill for an amount of Rs.67,067/ was shown to have been prepared. An amount of Rs.20,000/ was intended to be paid to the Principal, according to the complainants, as second instalment. The Principal instead of sorting out the

issue, is said to have decided to lift the timber and managed the arrest of complainant No.1 (respondent No.4 herein) and subordinate staff members were send for lifting the timber.

10. The learned Magistrate has passed a lengthy order, reciting therein the allegation. He has omitted to make even precisely reference to what had been stated by the witnesses examined by the investigating agency. Their names, too have not been recited in the impugned order. He has, however, stated that the report submitted by SIT reveals that accused first authorized the complainants to chop off the trees, fixed the price of timber and after timber was transported to Palhallan, the accused dishonestly changed his mind and managed shifting of timber back with the assistance of police. He has also referred to the report of SHO that no police team was ever deputed to Palhallan in order to have recovery of the property in the form of timber. The assault made on respondent No.4 is opined to have been confirmed and also deceiving the complainants. Opinion is also framed that the complainant's arrest at police station had been managed and thus, prima facie, offences under Section 420, 323 and 341 RPC were made out.

11. It may not be out of place to mention here that the respondent No.4 has admitted in the complaint being a teacher in the Education Department and posted on deputation in the School at Baramulla. Reference to petitioner herein is also made as the Principal of Govt. Boys Higher Secondary School, Baramulla and thereafter posted at Higher Secondary School, Rajbagh. It is also stated therein that the property in the form of poplar trees belong to the school. The incident too is stated to be of couple of years before filing of

complaint. The grievance is also referred about the bills prepared and the amount send to the petitioner herein as price of the timber. The outcome of enquiry by the Education Department and VOK have been found to be distasteful.

12. The learned Magistrate, on presentation of the complaint, appears to have not been satisfied for taking cognizance and, as such, issue of process has been decided to be postponed. At one point of time, the SIT has been asked to investigate the matter and later some higher officer to examine the veracity of the allegations. The SDPO concerned instead of framing an opinion as to the truth or otherwise of the allegations has observed that during enquiry statements of witnesses were recorded who supported the allegations levelled by the complainants. The assignment has been attended by him in a casual manner. Same has been done at the cost of sacred duty of extracting truth and collecting evidence in a fair manner. He has not bothered to give even a little thought to general outline of the averments of complaint. The respondent No. 4 had made a candid avowal therein that the mater on its probe by department and VOK did not yield the outcome as was desired by him. None of the officers who had examined the matter at the departmental level or VOK has been examined or access to documents collected therein sought. How the respondent No. 4 who had even roped in as accused the officer/official who had enquired into the matter, as accused does not find an answer in the report. Even mind has not been applied to what he states was tendered by witness before him. No effort has been made to go through the school records regarding the permission given for severing the trees and other allied aspects. Considerable gap between the alleged

occurrence and filing of complaint was not to be treated as an insignificant façade of case. There has been omission on his part to record any reason whether any offence under penal code or any other provision of law was made out. Even the investigating officer has not made a brief reference of what the witnesses recorded by him stated and what was corroborated by them. How the joint statement of two witnesses could be recorded by IO is difficult to understand.

13. Their Lordships of Hon'ble Apex Court in “*Karan Singh v. State of Haryana and anr*”, (AIR 2013 SC 2348), enunciated that the Investigating Officer is not merely expected to strengthen the case of the prosecution with evidence that will enable the Court to record a conviction but to bring out the real unvarnished version of the truth. Ethical conduct on the part of the investigating agency is absolutely essential and there must be no scope for any allegation of mala fides or bias. As observed by their Lordships, further duty has been stated to be cast upon the Investigating Officer to ensure that an innocent person should not suffer from unnecessarily harassment of false implication though at the same time accused person must not be given undue leverage. There has to be fairness in the investigation as laid down by their Lordship, further, as the tainted investigation is likely to lead to miscarriage of justice.

14. In “*Jamuna Chaudhary and others v. State of Bihar*”, AIR 1974 SC 1822, their Lordships have held that duty of the Investigating Officer is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but bring out the real unvarnished truth.

15. On a plain reading of Section 202 Cr. P. C, it comes to fore that the Magistrate can postpone the issue of process if he thinks it fit for reasons to be recorded in writing to do so. The police officer to whom the investigation is assigned for ascertaining the “truth or falsehood” of the complaint is accordingly to go ahead with this aim in mind. The process can be issued in terms of Section 204 Cr. P. C only if there are sufficient grounds for proceeding in the matter. Both Magistrate as well as investigating agency have to act in a fair and just manner. None of them are expected to act mechanically without application of mind.

16. In the exercise initiated by the investigating agency as noted above, it has been quite apathetic. It has already been noted hereinabove, the witnesses, the memo of whose statements have been recorded, have not narrated any incident taking place at any point of time whereby either of the complainants had been wrongfully restrained by the petitioner herein or any attack was made on them which caused any injury to them. The witnesses have also not stated anything where from a criminal intent on the part of petitioner herein can be inferred in the transaction of which reference is found in the complaint. The learned Magistrate too has acted without proper application of mind. He does not appear to have gone through the memos of the statements and what was the version of the witnesses regarding the incident. There has been no word either from the investigating agency or the learned Magistrate about the involvement of accused No.2, Personal Officer and the Incharge Litigation. Although it requires to be underlined that the Magistrate was not required to weigh material at the relevant time in the golden scales but still he could not give a go bye to the objective behind the

provisions of relevant sections of the Code i.e. Section 202 and 204 Cr.P.C. At the very inception, he had not found any sufficient ground for proceeding in the matter and had, thus, decided to get the matter investigated under Section 202 Cr. P. C but on receipt of the report from the concerned agency, the material put forth had to be carefully considered and it had to be seen whether there were prima facie grounds to hold the accused including the petitioners guilty under Section 420, 323 and 341 RPC.

17. Under Section 561-A Cr. P. C, High Court has the power to pass appropriate orders in case exercise of same was required to prevent abuse of process of any Court or otherwise to secure the ends of justice.

18. In “*State of Haryana and others v. Ch. Bhajan Lal and others*” reported in **1992 (1) SCC (Supp) 335**, the Hon’ble Apex Court has enunciated that if allegations made in the complaint and the evidence in support of the same do not disclose the commission of any offence or does not make out a case against the accused, same furnishes a ground for its quashment. It is also laid down in the said judgment that where the allegations in the 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, it would also be a ground for quashing the complaint. Similarly, where mala fides on the part of complainant can be deduced or it inferred that same were maliciously instituted with ulterior motive for wreaking vengeance due to personal grudge, it may also become a ground for quashment of the complaint.

19. On the basis of material which was available before the Magistrate at the time of taking cognizance and which, if may go uncontroverted, there was no sufficient ground to assume the petitioner herein had resorted to cheating and thus committed an offence under Section 420 RPC.

20. In “*Jaswantrai Mani Lal v. State of Bombay*” reported in **AIR 1956 SC 575**, it has been laid down by their Lordships of Hon’ble Apex Court that if there is no *mens rea* on the part of accused or if the essential ingredients of an offence are lacking, same may not sustain a criminal prosecution, though it may entail a civil action.

21. In “*Mahadeo Prasad v. State of West Bengal*”, (**AIR 1954 SC 724**), their Lordships observed that the charge against the accused that he induced the complainant to part with his goods on the understanding that the price will be paid for the same but on delivery he did not pay, would not sustain. If the accused at the time he promised to pay cash against delivery had intention to do so. The fact he did not pay would not convert transaction into one of cheating but if on the other hand he had no intention whatsoever to pay but merely said he would do so in order to induce the complainant to part with the goods, only then a case of cheating would be established.

22. In “*Hari Prasad Chamaria v. Bishun Kumar Surekha and ors.*” (**AIR 1974 SC 301**), their Lordships of Hon’ble Apex Court observed that unless complainant showed that the accused had dishonest intention at the time of complaint, it would not amount to an offence under Section 420 as it may only amount to breach of contract.

23. I, as such, in the light of what is stated above, am of the opinion that the learned Magistrate has exercised the power of issuance of process arbitrarily and without application of mind necessitating the same to be quashed. The material available did not point out even tentatively that the petitioner has committed an offence under Section 420, 341 and 323 RPC. The impugned order is, accordingly, quashed. The learned Magistrate would be, however, free to examine the scope for fresh/further investigation into the matter and pass appropriate orders under law, on receipt of report of same investigation, if any initiated.

(Rashid Ali Dar)
Judge

Srinagar
31.10.2018
"Bhat Altaf, PS"

