MISC. CRIMINAL APPLICATION

Before the Hon'ble Mr. Justice Jayant Patel

DIPAKBHAI L. PATEL v. FIROJ RUSTAMJI BHADRA & ANR.*

(A) Criminal Procedure Code, 1973 (2 of 1974) — Sec. 482 — Indian Penal Code, 1860 (45 of 1860) — Sec. 341 — Manager of Bank not permitting subordinate employee to resume duties on return from leave without producing medical certificate — No averment in complaint that complainant was physically prevented/obstructed by accused — Held, "physical obstruction" is an essential ingredient of offence under Sec. 341 of I.P.C. — The Court quashing complaint/criminal proceedings.

(એ) ક્રિમિનલ પ્રોસીજર કોડ, ૧૯૭૩ — કલમ ૪૮૨ — ભારતીય દંડ સંહિતા, ૧૮૬૦ — કલમ ૩૪૧ — બૅન્ક મૅનેજરે, રજા ઉપરથી પરત આવેલ હાથ નીચેના કર્મચારીને દાકતરી પ્રમાણપત્ર વિના ફરજ ઉપર લીધા નહિ — ફરિયાદમાં એવું કાંઈપણ ભારપૂર્વક જણાવાયેલું નહિ કે, ફરિયાદીને આરોપીએ શારીરિક રીતે રોકયો હોય/અવરોધ્યો હોય — ઠરાવવામાં આવ્યું કે, ભારતીય દંડ સંહિતાની કલમ ૩૪૧ હેઠળ બનતા ગુના માટે "શારીરિક અવરોધ" એ જરૂરી ઘટક છે — અદાલતે ફરિયાદ/ફોજદારી કાર્યવાહીઓ રદ કરી.

Nowhere in the complaint it has been stated that the complainant was physically prevented from discharging the duties by the accused, which is one of the basic ingredients for the offence under Sec. 341 of I.P.C. (Para 4)

Referring to decision by Supreme Court in *Keki Hormusji Gharda v. Mehervan Rustom Irani,* AIR 2009 SC 2594, the Court observed as under :

As recorded in the complaint, there is no accusation of physical obstruction created or that the accused physically restrained the complainant from discharging the duties. Hence, it can be said that the basic ingredients of the offence under Sec. 341 of I.P.C. were not satisfied. (Para 5)

(B) Criminal Procedure Code, 1973 (2 of 1974) — Sec. 482 — Indian Penal Code, 1860 (45 of 1860) — Secs. 341, 76, 79 & 80 — Manager of Bank not permitting subordinate employee to resume duties on return from leave without producing medical certificate — Held, action of Manager (accused) falls in exceptions under Secs. 76, 79 & 80 of I.P.C. (*See* Para 7)

(બી) ક્રિમિનલ પ્રોસીજર કોડ, ૧૯૭૩ — કલમ ૪૮૨ — ભારતીય દંડ સંહિતા, ૧૮૬૦ — કલમ ૩૪૧, ૭૬, ૭૯ અને ૮૦ — બૅન્ક મૅનેજરે, રજા ઉપરથી પરત આવેલ હાથ નીચેના કર્મચારીને દાકતરી પ્રમાણપત્ર વિના ફરજ ઉપર લીધા નહિ — ઠરાવવામાં આવ્યું કે, મૅનેજરનું આ પગલું ભારતીય દંડ સંહિતાની કલમ ૭૬, ૭૯ અને ૮૦ હેઠળના અપવાદમાં આવે છે.

Cases Relied on :

(1) *Keki Hormusji Gharda v. Mehervan Rustom Irani,* AIR 2009 SC 2594

(2) *A. K. Chaudhary v. State of Gujarat,* 2005 (3) GLH 444

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*Decided on 15-4-2010. Misc. Criminal Application No. 1634 of 2002.

Pranav Mehta, for Nanavati Associates, for the Applicant.
J. B. Pardiwala, for Respondent No. 1.
K. P. Raval, A.P.P., for Respondent No. 2.

JAYANT PATEL, J. The short facts of this case appears to be that the respondent No. 1 filed private complaint before the learned Chief Judicial Magistrate, Navsari against the petitioner, who was at the relevant point of time, the Manager of Bank of India, Vijalpore Branch, and the petitioner was holding the post of Cashier In-charge of the Bank. The accusation in the complaint is that the petitioner had proceeded on leave, and thereafter, he wanted to assume the duty but the same was not permitted by the Manager of the Bank without production of the medical fitness certificate. As per the complainant, production of medical certificate was not required, but the Manager insisted for such certificate and as stated in the complaint, he insisted under the instructions of the higher authority. Therefore, as per the complainant, he was wrongfully restrained, therefore, the offence under Sec. 341 of I.P.C. was committed by the petitioner-accused, hence, the complaint was filed.

2. Learned Magistrate directed for holding the inquiry under Sec. 202 of Cr.P.C. through police, and the report thereafter, was submitted before the learned Magistrate. After considering the report, the learned Magistrate found that *prima facie* offence was not committed, therefore, he dismissed the complaint. The matter was carried in revision by the original complainant - respondent No. 1 hereinbefore the learned Sessions Judge being Criminal Revision Application No. 41 of 1998 and the learned Sessions Judge ultimately, *vide* judgment and order dated 27-12-2001 had set aside the order of the learned Magistrate and directed to take cognizance of the offence. Therefore, the learned Magistrate, has thereafter, issued process upon the complaint to the petitioner as accused. Under this circumstances, the present petition before this Court for quashing of the complaint under Sec. 482 of Cr.P.C.

3. Heard Mr. Pranav Mehta for Nanavati Associates for the petitioner, Mr. J. B. Pardiwala learned Advocate for respondent No. 1 and Mr. K. P. Raval learned A.P.P. for the State.

4. The allegation in the complaint is for the alleged offence under Sec. 341 of I.P.C. Nowhere in the complaint, it has been stated that the complainant was physically prevented from discharging the duties by the accused, which is one of the basic ingredients for the offence under Sec. 341 of I.P.C. In the case of *Keki Hormusji Gharda v. Mehervan Rustom Irani*, reported in AIR 2009 SC 2594, the Apex Court, after considering the provisions of Sec. 339 of the I.P.C. had, *inter alia*, observed in Para 11, relevant of which, reads as under :

"The essential ingredients of the aforementioned provision are : (1) Accused obstructs voluntarily; (2) The victim is prevented from proceeding in any direction; (3) Such victim has every right to proceed in that direction."

Thereafter, at Para 12, it was observed that :

"therefore, the obstructions must be a restriction on the normal movement of a person and it should be a physical one."

5. As recorded hereinabove, in the complaint, there is no accusation of physical obstruction created or that the accused physically restrained the complainant from discharging the duties. Hence, it can be said that the basic ingredients of the offence under Sec. 341 of I.P.C. were not satisfied.

6. The additional aspect in the present case is that it is not a matter where the alleged restraint is to prevent the normal physical movement of the complainant but to restrain him or to create obstruction in permitting him to resume his duties as the Cashier of the Bank. Such obstruction is stated to be created by the Manager of the Bank who is superior. The accusation made in the complaint goes to show that the Manager did not create any obstruction, but insisted for production of medical fitness certificate of the complainant which as per the complainant was not required. Whether the production of medical fitness certificate could be said as required or not as per the bi-partite settlement by the Bank with its employee or not is an essentially matter for pursuing the right as may have occurred or may be available to any employee of the Bank including the complainant under Civil Law for which the concerned employee or the complainant may resort to the proceeding before the appropriate forum or the Court as the case may be. However, if commission of the offence was to be maintained, there must be an element of criminality on the part of the accused. If any superior in any organization in purported exercise of his power, may be under the mistaken belief, had insisted for the production of medical certificate a condition precedent before the concerned employee resumes his duties, such an action can be said as without element of criminality. At this stage, the reference may be made to the decision of this Court in the case of *A. K. Chaudhary v. State of Gujarat*, reported in 2005 (3) GLH 444, more particularly, the observations made in Paras 18 and 19 of the said decision which reads as under :

"18. Further, in any Governmental or semi-Governmental organization the administration has to be as per the provisions of law, rules and regulations made for such purpose. It is an admitted position that L.I.C. is a statutory Corporation of Government of India. The service conditions of staff, its employees are governed by the staff regulations, including the manner and method of working by the concerned employee, may be lowest in the rank or the top-most officer. If any person who is affected by functioning of

any officer of L.I.C., such person can file complaint against such officer and may also pray for taking action against erring officer or against officer who allegedly has committed misconduct. As per the law, rules and regulations wherever the departmental action is required to be taken, the same must be taken keeping in view the peculiar facts and circumstances of the case, and the substance of the allegations made against the officer concerned. The departmental action from the stage of preliminary inquiry till the final outcome of departmental proceedings and also appeal therein, which are contemplated in the rules and regulations are expected to be taken if the case is made out to the satisfaction of the Special Officer for such purpose. While taking action, the satisfaction of the officer who is authorized for such purpose is to be seen and not the satisfaction of the officer against whom the action is to be taken. It is all possible that any departmental action taken may not be liked or accepted by the delinquent officer. However, the specified officer who is authorized for such purpose has to act in the manner provided in the relevant rules and regulations and he cannot be expected to function or discharge his duty as per the liking or disliking of the delinquent officer and such Specified Officer who is authorized is to be guided by the law, rules and regulations only to the best of his ability and nothing else. If the actions are not taken against the delinquent officer it may some times result into creating a situation where the specified officer himself may be charged with the dereliction of duty but in addition that to, the important aspects which deserves to be recorded is that it may result into damaging the maintenance of the discipline in any organization, may be statutory Governmental or semi Governmental. If the departmental action is not liked by the delinquent officer it is difficult to visualize the situation which may be conceived on account of displeasure by such delinquent officer. It is all possible that such departmental action may be opposed by the delinquent officer and consequentially he may resort to making representations for withdrawal of the departmental action against him and if such efforts are not materialized either he may face the departmental proceedings or he may challenge the departmental action against him in a Court of law or before appropriate forum, whose decision is to bind both the parties to the proceedings. Resorting to the modes provided for ventilating the grievance, including for approaching before the appropriate higher forum or Court of law are on the contrary subserving to the maintenance of the discipline. But any other method or mode which is not provided under the law, if resorted to and are entertained, may not only substantially damage the maintenance of the discipline, but it may sometimes ruin the discipline. The action of suicide itself is prohibited by law and that is the reason why its abetment is also punishable in law. If the departmental action or the implementation of law, rules and regulations is to only depend upon the sentimental reaction of the delinquent officer in the event such action is taken, then in that case the enforcement of law, rules and regulations would be impossible. Any delinquent officer against whom the departmental action is to be taken may create such impossibility of enforcing the law, rules and regulations by giving

threat of putting end to his life or may actually put an end to his life sometimes, but if in such circumstances the specified officer, who has taken departmental action, is to face with serious charge of abetment to suicide, it may result into developing a mentality amongst the specified officers not to discharge duty or to discharge duty as per the sentiments of such delinquent officer, and the consequences, of both would be not only to damage and spoil the position in any institution, but may frustrate the enforcement of law, rules and regulations and all such things would be against the interest of the society as a whole which is to be ruled by law. Therefore, it is reasonable to hold that between the duty and the sentiments, only duty should be allowed to prevail, which may consequently create the maintenance of the discipline and the rule of law.

19. Even as per the Indian Penal Code (hereinafter referred to as "the Code" for short), more particularly Secs. 76, 79 and 80, which are reproduced hereinafter, provide that nothing is offence, if done by any person who has committed any action by mistake of fact or by mistake of law in good faith, believing that he is bound by law to do it.

> 76. Act done by a person bound, or by mistake of fact believing himself bound, by law - Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.
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> 79. Act done by a person justified, or by mistake of fact believing himself justified, by law - Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doping it.
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> 80. Accident in doing a lawful act, - Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution."

7. The examination of the facts of the present case goes to show that the action of the Manager of the Bank-petitioner herein would fall in exception as provided under Secs. 76, 79 and 80 of I.P.C. and such being situation, Sec. 341 of I.P.C. would be protected.

8. The contention of the learned Counsel for respondent No. 1 that it would be a case of defence to be considered at the time of trial as to whether the act was done by mistake of facts or in lawful exercise of power or by belief that he was bound by law to create a obstruction, would be a matter of defence and such may not be considered by this Court in a petition while exercising the powers under Sec. 482 of Cr.P.C., has been considered at Para 41 of the aforesaid decision in the case of *A. K. Chaudhary* (supra), and it was observed that if the allegation made in the F.I.R. do not constitute

the offence, it can be said that the police itself could not proceed with the investigation without there being any order of Magistrate. Even for exercise of powers under Sec. 482 of Cr.P.C., it is by now well settled that if the accusation made in the complaint do not constitute the offence, it would be a case for exercise of powers under Sec. 482 of Cr.P.C. As observed earlier, the action taken appears to be falling under Secs. 76, 79 and 80 of I.P.C.

9. Apart from above, it appears that the complainant by way of short circuiting the remedy under civil law, has filed the present complaint, therefore, such complaint can be termed as an abuse of process of law.

10. Hence, present complaint being No. 228 of 2002 of the Court of Chief Judicial Magistrate, is hereby quashed and set aside. Consequently, the order passed by the learned Magistrate below the said complaint shall also not survive. The petition allowed to the aforesaid extent. Rule is made absolute accordingly.

(NRP) *Petition partly allowed.*

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SPECIAL CIVIL APPLICATION

Before the Hon'ble Mr. Justice M. R. Shah

KISHANBHAI HARGOVANDAS PATEL & ANR. v.
STATE OF GUJARAT & ORS.*

Gujarat Town Planning and Urban Development Act, 1976 (27 of 1976) — Sec. 65 — Held, opportunity of hearing is required to be given to parties/persons affected by proposed modification where State Government proposes to sanction Preliminary Town Planning Scheme with modification — Even if statutory provision is silent as to opportunity of hearing, principles of natural justice can be read into it where decision entails adverse consequences to affected parties even if it is an administrative order — The Court quashing modification in T. P. Scheme and directing to decide after giving opportunity of hearing to affected parties — Petitions allowed.

ગુજરાત નગર આયોજન અને શહેરી વિકાસ અધિનિયમ, ૧૯૭૬ — કલમ ૬૫ — ઠરાવવામાં આવ્યું કે, રાજ્ય સરકાર પ્રારંભિક નગર આયોજન યોજના સુધારા સાથે મંજૂર કરવા માગતી હોય ત્યારે યોજનાના સુધારાથી અસર પામેલ વ્યક્તિઓ/પક્ષોને સાંભળવાની તક આપવી જોઈએ — જોકે, સાંભળવાની તક આપવા બાબતમાં ધારાકીય જોગવાઈ ન હોય ત્યારે કુદરતી ન્યાયના સિદ્ધાંતો, જોકે તે વહીવટી હુકમ હોય તોપણ પ્રતિકૂળ અસર પામતા પક્ષોને પ્રતિકૂળ અસર માટે અપનાવવા જોઈએ — અદાલતે નગર આયોજન યોજનાના સુધારાઓને રદ કર્યા અને પ્રતિકૂળ અસર પામતા પક્ષોને સાંભળી નિર્ણય લેવાનો આદેશ આપ્યો — અરજી માન્ય રાખવામાં આવી.

*Decided on 10-2-2010. Special Civil Application No. 26785 of 2007.