

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

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CRIMINAL WRIT PETITION NO.4259 OF 2013

Ravikant Shantaram Sao	.. Petitioner
Vs.	
The State of Maharashtra & Anr.	.. Respondents

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Mr.Madhukar P. Dalvi i/b. Ms.Poonam Ankleshwaria, Advocate for the Petitioner.
Mr.Chandrakant S. Sao, Respondent No.2, in person present.
Ms.Anamika Malhotra, A.P.P. for Respondent – State.

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CORAM : ABHAY M. THIPSAY, J.

DATED : JANUARY 14, 2015.

P.C. :

Heard Mr.Dalvi, the learned counsel for the petitioner.

Heard Mr.Chandrakant Sao, respondent no.2 who appears in person.

Heard Ms.Malhotra, the learned A.P.P. for respondent – State of Maharashtra.

2 In this petition under Article 227 of the Constitution of India, Rule was issued by an order dated 27th June, 2014. At the instance of the respondent no.2 herein the petition was placed on board for final hearing.

3 The petitioner is the accused in CC No.48/SW/2014, pending before the Metropolitan Magistrate 45th Court Kurla, Mumbai. The case arises on a complaint filed by the respondent no.2 herein. The complaint was filed alleging commission of offences punishable under Sections 420 IPC, 452 IPC, 465 IPC, 467 IPC, 471 IPC and 448 IPC but the learned Magistrate after examining the respondent no.2 on oath, as contemplated under Section 200 of the Code of Criminal Procedure, and after considering the report submitted by the police under the provisions of Section 202 of the Code of Criminal Procedure, the Magistrate formed an opinion that the offences mentioned in the complaint were not made out, but that a case for proceeding against the petitioner herein with respect to the offence punishable under Section 453 of the IPC was made out. The Magistrate therefore directed process to be issued only with respect to the offence punishable under Section 453 of the IPC against the petitioner herein. Being aggrieved by the order issuing process, the petitioner has approached this Court by filing the present petition and is also invoking the inherent powers of this Court praying that the order issuing process be quashed and set aside.

4 For the sake of convenience and clarity the petitioner

shall hereinafter be referred to as 'the accused' and the respondent no.2 as 'the complainant'.

5 I have heard the complainant who appears in person at length. I have also carefully gone through the complaint and the order passed by the Magistrate directing process to be issued with respect to the offence punishable under Section 453 of the IPC.

6 The complainant and the accused are real brothers. The accused is the younger brother of the complainant. The complainant's case in brief is that the accused has forcibly taken possession of flat nos.702 and 802 in Ridhi Sidhi Apartment at Chunabhatti Sion by breaking open the locks put thereupon by the complainant.

7 The complainant's case is that the accused had been residing in United States of America and is an American citizen. That, the accused has lost his right, title and interest in the property left by the father of the complainant and accused, in view of the provisions of the Limitation Act, and other Indian Acts. That on 31st May, 2012, the accused came along with some anti-social elements, forcibly broke open the locks put on the flat nos.702 and 802 by the complainant, and took forcible possession thereof.

8 A number of contentions have been advanced on behalf of the accused. It is submitted that actually the flats in question belong to the accused himself. It is submitted that the complainant had attempted to grab these flats by taking advantage of the absence of the accused from India. It is also submitted that the possession of the flats in question was not at all forcibly taken by the accused, but that it was handed over to him by the builder himself. It is submitted that in the inquiry proceedings initiated under Section 145 of the Code of Criminal Procedure, statements of certain persons including that of the builder were recorded and that these statements falsify the case of the complainant.

9 In the view that I am taking it is not necessary to go in to the factual disputes that have been raised. The question that really needs determination is whether, on a reading of the complaint, a case for proceeding against the accused on the allegation of having committed an offence punishable under Section 453 of the IPC, was made out.

10 Section 453 provides punishment for lurking house trespass or house breaking. House trespass and house breaking have been defined in Sections 442 and 445 of the IPC, respectively. These

are aggravated forms of criminal trespass. Criminal trespass is defined in Section 441 of the IPC. It provides that whoever enters into or upon property in the possession of another:

- (i) With intent to commit an offence;
- (ii) or to intimidate, insult;
- (iii) or to annoy any person in possession of such property, is said to commit criminal trespass.

11 Now admittedly, even if the complainant's case is accepted in entirety, the entry by the accused in the flats was for the purpose of taking possession of the said flats. Taking possession simplicitor is not an offence punishable under Section 441 of the IPC. Entry with the intention of taking unauthorized possession of property does not constitute the offence of criminal trespass. Needless to say that if the ingredients of criminal trespass are lacking, the question of the accused having committed an offence punishable under Section 453 of the IPC, does not arise.

12 Since the complainant is a senior citizen and is appearing in person, this legal position was discussed in the course of hearing. The complainant, thereupon claimed that his movable articles including ornaments etc., were in the flat and that they have

been misappropriated or stolen by the accused. However, I find that there was no such averments in the complaint. No allegation of the accused having committed the offence of theft has been levelled in the complaint. In any case the Magistrate has already concluded that there were not sufficient grounds for proceeding against the accused with respect to the offences alleged in the complaint except the one punishable under Section 453 of the IPC. The Magistrate's view was that forcible entry in the said flats amounted to criminal trespass and being an aggravated form thereof was punishable under Section 453 of the IPC.

13 The dispute between the parties is purely of a civil nature. Even if the contention of the accused that no *prima facie* case to the effect that the accused had taken possession of the said flats by breaking open the locks put thereon is ignored, and even if the allegations levelled in the complaint are taken at face value, the most that can be said is that the accused has taken unauthorized possession of the flats in question. The alleged trespass committed by the accused would amount only to *civil trespass* in the facts and circumstances of the case and certainly would not amount to *criminal trespass*.

14 The complainant has relied upon the following three decisions of the Supreme Court of India:

- a) *Bihar V/s. Murad Ali* ¹
- b) *Om Wati V. State* ²
- c) *Som Mittal V/s. Government of Karnataka* ³

15 The proposition which the complainant seeks to canvass is that the High Court while exercising powers under Article 227 of the Constitution of India, or the inherent powers saved by Section 482 of the Code must act with circumspection, and interfere only in the rarest to rare cases. There can be no dispute about the correctness of this proposition. However, in this case, the complaint, on a fair reading thereof, does not disclose any offence whatsoever. It would be therefore, not possible to hold that the criminal prosecution initiated by the complainant ought to be permitted to continue.

16 When the dispute between the parties appears to be of a civil nature, and when proceedings under Section 145 of the Code of Criminal Procedure have already been initiated, permitting continuation of the prosecution when the ingredients of an offence punishable under Section 453 of the IPC are not at all disclosed from the complaint, would clearly amount to abuse of the process of the Court.

1 (1988) 4 SCC 655.

2 (2001) 4 SCC 333.

3 (2008) 3 SCC 753.

17 This is a fit case where the order issuing process needs to be quashed.

18 When this order was being dictated, the complainant submitted, in the midst of the dictation, that he be granted time to move the Supreme Court of India challenging this order. Needless to say that it will be open for the complainant to do so.

19 The Petition is allowed.

20 The order issuing process is quashed. The complaint stands dismissed.

21 Rule made absolute accordingly.

(ABHAY M. THIPSAY, J.)