

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 4823 OF 2014

Sitaram Kunte & Ors.

... Petitioners

V/s.

The State of Maharashtra & Anr.

... Respondents

...

Mr. Shirish Gupte, Senior Advocate a/w. Ms. Surekha Sonawane for the Petitioner.

Mr. K. V. Saste, APP for the Respondent No.1.

Mr. S. T. Markendeye for the Respondent No.2.

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CORAM : A. S. OKA & A. A. SAYED, JJ.

DATE : 30 AUGUST, 2016.

ORAL JUDGMENT (PER A.S. OKA, J.)

1. Heard the learned Senior Counsel appearing for the Petitioners and the learned counsel appearing for the 2nd Respondent. As observed in the order dated 14th June 2016, as the Regular Bench presided by the Hon'ble Shri Justice Naresh H. Patil is not in a position to take up this writ petition, as per general administrative order issued by the Hon'ble the chief Justice, this petition will have to be heard by this Bench. By order dated 26th

July 2016, the petition was ordered to be listed for final disposal today at 3 pm.

2. By this writ petition under Article 226 and 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (for short Cr.P.C), the prayer is for quashing the proceedings of a complaint filed by the 2nd Respondent by setting aside the order dated 5th November 2014 passed by the learned Magistrate on the said complaint.

3. On 27th September 2013, a building known as Babu Genu Market, vesting in the Mumbai Municipal Corporation collapsed early in the morning. It resulted in loss of human lives. A first information report being CR. No. 94 of 2013 was registered by the Seweree Police Station, Mumbai. The said first information report was registered for the offences punishable under Section 304, 336, 337, 338, 268, 114, 201, 109 read with Section 34 of the Indian Penal Code.

4. After completing investigation, a charge sheet has been already filed by the police against several accused. However, the petitioners have not been shown as accused.

5. The 2nd Respondent who is a leader of Municipal Union of the Mumbai Municipal Corporation, filed a private complaint alleging commission of offences against the present petitioners punishable under Section 304 of the Indian Penal Code read with Section 34 and 114 of the Indian Penal Code.

6. The present petitioners are officers belonging to Indian Administrative Service. The 1st Petitioner at the relevant time was the Municipal Commissioner of the Mumbai Municipal Corporation. The 2nd Petitioner was an Additional Municipal Commissioner. The 3rd Petitioner at the relevant time was also an Additional Municipal Commissioner in charge of Western Suburbs. The 4th Petitioner was the Additional Municipal Commissioner in charge of City Area, who

retired on 31st September 2014.

7. In the private complaint filed by the 2nd Respondent, it is pointed out that the investigation on the basis of CR. No. 94 of 2013 was in progress. Allegation is that the offence under Section 304 of the Indian Penal Code is committed by the present petitioners, on the ground that there was a gross negligence on their part. It is alleged that they showed total indifference. The action of vacating the building was not taken. Therefore, the life of the employees could not be saved. In the complaint, a reliance was placed on inspection report submitted by Shri B. K. Sagvekar, Deputy Chief Engineer (Planing and Design) of the Mumbai Municipal Corporation. In the report it was stated that the building was in dilapidated condition and was required to be vacated to avoid any loss of life. Allegation is that notwithstanding the report dated 6th July 2012, action under Section 354 of the Bombay Municipal Corporation Act, 1888 was not initiated by the Petitioners for vacating the building. It is alleged that the Petitioners failed to perform their lawful duties and wasted

time of 14 month. It is contended that the Petitioners have no protection of Section 197 of the Cr.P.C.

8. The learned Metropolitan Magistrate on 22nd October 2013, passed an order referring to the CR. No. 94 of 2013. In view of the investigation which was in the progress on the basis of the said first information report, further inquiry on the complaint was stayed by exercising the power under Section 210 of the Cr.P.C. The learned Metropolitan Magistrate directed the investigating officer to submit a report. Accordingly, a detailed report was submitted on 5th February 2014 presumably under Section 202 of the Cr.P.C. On 7th July 2014, 2nd Respondent applied to the learned Metropolitan Magistrate for committing the case to the Court of Sessions. It appears that on 3rd March 2014, the learned Magistrate recorded statement on oath of 2nd Respondent. Thereafter he recorded statements of the witness Shri Sanjay Pandurang Waghmare and Shri Manohar Govind Gurav. Thereafter, by the impugned order dated 5th November 2014, the learned Magistrate proceeded to issue a

process against the Petitioners for the offence punishable under Section 304 read with Section 34 of IPC.

9. The learned Senior counsel appearing for the petitioners has taken us through the averments made in the complaint and the impugned order. He pointed out that a detailed procedure was laid down on 6th June 2008 by the said City Engineer under the approval of the Municipal Commissioner for dealing with dilapidated buildings in the city area. He submitted that the Municipal Corporation appointed M/s Pentacle Consultants (India) Pvt. Ltd for carrying out structural audit of the said building. In the structural audit, the said building was classified as falling in C – 2B category. Thus, it was classified as the building which requires major structural repairs but need not be vacated. He submitted that even assuming that the averments made in the complaint and assuming that what was stated by the witnesses was correct, by no stretch of imagination, the offence under Section 304 of culpable homicide not

amounting to murder could have been applied. He submitted that even for that matter, Section 304A of IPC could not have been applied as the Petitioners had no role to play as regards taking action in respect of the said building. The learned senior counsel for the Petitioners submitted that it is not necessary to go into the aspect of the protection under Section 197 of Cr. P.C. The learned counsel appearing for the original complainant submitted that even after receiving the report from the Deputy Chief Engineer on 6th July 2012, the Petitioners took no action. In fact it was their responsibility to initiate proceeding under Section 354 of the Bombay Municipal Corporation, Act, 1888 (for short the said Act) for getting the building vacated. He submitted that the building which collapsed was vesting in the Municipal Corporation and therefore the 1st Petitioner being the Commissioner of Municipal Corporation and the three other Petitioners being the Additional Commissioners were personally responsible. There was a complete neglect on their part to take action under Section 354 of the said Act. He submitted that as the petitioners were not shown as accused in the charge sheet filed

by the police on the basis of C.R. No. 94 of 2013, the 2nd Respondent was forced to file a private complaint. He urged that if there is no material against the Petitioner, the Sessions Court can always pass appropriate order.

10. We have given careful consideration to the submissions. Firstly we deal with the factual aspects. It is true that the Deputy Chief Engineer (P & D) City, submitted a report dated 6th July 2012 as per the directions of the Assistant Commissioner, E - ward. The report is submitted only on visual inspection of the said building. The officer recommended immediate vacation of the building to avoid any loss of life and property.

11. Perhaps, on receipt of the said report, by a letter dated 6th October 2012, the Pentacle Consultants (India) Pvt. Limited, structural auditors, were appointed to conduct structural audit of the said building. A copy of a very detailed report submitted by the structural consultants after performing several tests is placed on

record. It is pointed out from the petition that Municipal Corporation has divided dilapidated buildings into 4 categories. Category 'C – 2 (B)' is of the buildings which require major structural repairs but which need not be vacated. Category 'C-1' is of buildings of very dangerous nature which are required to be vacated and demolished immediately. The structural consultants appointed by Municipal Corporation in their report classified the building as 'C – 2(B)'. After considering the said report, on 26th September 2013, the Chief Engineer (P & D) had categorized the building as 'C - 2 (B)'. We have perused the averments made in the complaint filed by the 2nd Respondent. The entire basis of the complaint is the report dated 6th July 2012 submitted to the Assistant Municipal Commissioner Eward by the Deputy Chief Engineer (Planning and Design). As stated earlier, the said report was submitted on visual inspection of the building. On the basis of said report that the aforesaid structural consultants were appointed. Only allegation made in the complaint against the petitioners is that notwithstanding the said report dated 6th July 2012, the Petitioners failed to take steps to get the building

vacated and therefore, they were guilty of dereliction of their duties and were negligent. Guidelines dated 5th June 2008 issued in relation to dilapidated buildings are on the record. Clause 4 of the said guidelines deals with dilapidated buildings vesting in Municipal Corporation. The offices who are responsible for taking action have been specified therein. The Commissioner or the Additional Municipal Commissioner have not been assigned any role. We have also perused the deposition of the 2nd Respondent and two other witnesses examined before the learned Magistrate. As far as the 2nd Respondent is concerned, he again relied upon the report dated 6th July 2012 and stated that no action was taken on the basis of the said report by the Petitioners. Second witness is Sanjay Pandurang Waghmare who again relied upon the report dated 6th July 2012 of the Deputy Engineer. Even the 3rd Witness Manohar Govind Gurav relied upon the same report.

12. Even assuming that whatever is stated in the complaint is correct and even the statements made in the deposition of the

witnesses are correct, obviously intention of causing injury to the occupants of the building cannot be attributed to the Petitioners. It cannot be said that due to alleged inaction on their part, they had knowledge that the building is likely to be collapse and is likely to cause loss of lives. Therefore, by no stretch of imagination, Section 304 of the Indian Penal Code is applicable. Even Section 304-A of Indian Penal Code was not applicable as no rash and negligent act or omission can be attributed to the Petitioners in relation to the death caused of the occupants of the said building.

13. Hence, in our view, there was absolutely no material before the learned Magistrate to proceed against the present petitioners. Therefore, the order issuing process is completely illegal.

14. Accordingly, the Writ Petition shall succeed and we pass the following order.

ORDER

A. Rule is made absolute in terms of prayer clause “a”.

“a. That this Hon'ble Court be pleased to call for the records and proceedings in C.C.

No.157/SW/2013 pending in the file of the Ld. Metropolitan Magistrate 62nd Court, Dadar and on examination of the same be pleased to quash and set aside the impugned order dated 05.11.2014 and said proceedings of C. C. No. 157/SW/2013 as against the petitioners herein.”

- B. We make it clear that the observations made in this judgment and order are only for limited purposes of testing the order passed by the learned Magistrate of issuing process. This order shall not be construed as any finding in relation to CR. No. 94 of 2013 and the concerned Court before which the case is pending shall decide the same in accordance with law without being influenced by the observations made in judgment and order;
- C. Rule is accordingly made absolute in above terms;
- D. All concerned to act the judgment and order;

(A. A. SAYED, J.)

(A. S. OKA, J.)