

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.264 OF 2017

Keki Godrej Appoo, Age 66 years,
Occ.Business, R/o.Ramesh Building,
Jalbhair Street, New Charni Road,
Mumbai-400 004.

Applicant

versus

1. Kelly Jummy Bhagwagar, Age 58 years,
R/o.Bomanji Dhunjibhoy Bldg; Flat No.11,
Room No.2, 24 AB, Nawab Tank Road,
Sakerwadi, Mazgaon, Mumbai.

2. Pinky Homi Daruwalla, Age 59 years,
Occ.Service, R/o.347, United Chambers,
C Block, 2nd Floor, Grant Road, Mumbai.

3. Kishore Bhanji Lakhuk, Occ.Menial Work,
R/o.Mhada Colony, Pratik Nagar, Sion,
Mumbai.

4. The State of Maharashtra.

Respondents

Mr.Keki Godrej Appoo, Applicant in person, present.

Ms.Neeta S. Jain, APP, for State.

Mr.Rajiv Hingu i/by L.H.Hingu for respondent nos.1 and 2.

CORAM : PRAKASH D. NAIK, J.

DATE : 12th February 2018

PC :

1. The revision applicant has challenged the order dated 2nd January 2017 passed by the Sessions Judge, Greater Bombay in Criminal Revision Application No.1076 of 2016 filed by respondent

nos.1 and 2. The applicant is the original complainant. The complaint was filed in the Court of Metropolitan Magistrate alleging offence under Sections 380, 454 read with Section 120-B of Indian Penal Code. The said complaint was filed on 27th May 2012.

2. The complainant's case is that he had been residing at Bomanji Dhunjibhoy Building, Flat No.11, Room no.1, 2nd Floor, 24 AB Nawab Tank Road, Sakerwadi, Mazgaon, Mumbai and paying monthly rent of Rs.100/- per month. The accused no.1 is the son of deceased Mrs.Bapsi Bhagwagar. The accused no.2 is the daughter and accused no.3 is the sister of Mrs.Bapsi Bhagwagar. Accused no.4 was employee of the said deceased. The deceased had reposed complete faith in accused no.4 as the accused nos.1, 2 and 3 were residing separately. The complainant was paying rent to the landlord Mr.Rustom Kumana for residing and occupying room no.2 in flat no.11 of Bomanji Dhunjibhoy Building, 24 AB, Nawab Tank Road, Sakerwadi, Mazgaon, Mumbai. The complainant was staying there intermittently as he had to look after his aged mother. The deceased Mrs.Bapsi Bhagwagar was staying alone and occupying flat no.10 of Bomanji DBhunjibhoy Building and frequented room no.1 of flat no.11 which was in her possession. Being alone, she was feeling unsecured and requested the complainant to exchange her front room no.1 for room no.2 of flat no.11. The complainant agreed to the said request and started occupying front room no.1 of flat no.11 in the said building some where in the year 1986. In 1990, by way of settlement, the son of the landlord, the deceased Bapsi Bhagwagar, gave up flat no.10 and became tenant of flat no.11. After she became tenant and in accordance with the memorandum of understanding, the complainant continued to be in physical

possession of room no.1 of the said premises till 28th July 2007. The complainant thereby became the sub-tenant of Smt.Bapsi Bhagwagar and was occupying the front room no.1 in the said premises. He was also put in physical possession of the said premises. The complainant had kept old wooden cupboard in the premises. The cupboard contained copies of rent receipts issued to him by the landlord and Smt.Bapsi Bhagwagar. The accused no.4 was employed by Smt.Bapsi Bhagwagar as servant. On 28th July 2007, when the complainant visited the premises, he was shocked to see that the lock of the main door was changed thereby preventing the complainant from entering into the premises. He noticed that Smt.Bapsi Bhagwagar and others were present inside. His cupboard was in the process of being broken by accused no.4 with the hacksaw. The complainant objected for the same. He rushed to the police station for lodging the complaint. The police recorded the non-cognizable complaint. The police also visited the premises. The police, in stead of having registered the first information report, recorded non-cognizable complaint. It is further alleged that the accused had entered into a conspiracy to evict the complainant of the premises and thereby committed act of causing damage to the cupboard and dispossessed the complainant. A private complaint was filed by the complainant/applicant on 27th May 2012.

3. In pursuant to the verification statement of the complainant, the learned Magistrate vide order dated 14th June 2012, directed to call for the report under Section 202 of Indian Penal Code. In pursuant to the said order, the Sewree Police Station conducted an inquiry and submitted report dated 30th November 2.12. In the said report it was indicated that the complaint was lodged belatedly after

about five years and that the dispute is of civil nature. The report also raised doubt about the genuineness of the complaint.

4. Learned Magistrate vide order dated 26th August 2013 issued process against the accused under Sections 454, 380 read with Section 120-B of Indian Penal Code. The respondents had thereafter approached this Court challenging the order of process, however, they were permitted to exhaust alternate remedy of filing a revision application. The respondents thereafter filed revision application before the Sessions Court challenging the order of issuance of process. The learned Sessions Judge vide order dated 2nd January 2017 set aside the order of process issued against the accused nos.1 and 2 who are respondent nos.1 and 2 in this application. The Sessions Court, however, remanded the matter back to the Metropolitan Magistrate for passing appropriate order in the light of directions contained therein. The applicant has, therefore, filed this revision application challenging the order of Sessions Court remanding the case back to the Trial Court.

5. The applicant in person submitted that the order of Sessions Court is contrary to the provisions of law as well as evidence on record. The applicant had filed complaint with all the details and on the basis of which the Trial Court had issued process against the accused. There was no reason for setting aside the order of process and remanding the case back to the Trial Court. It is submitted that the reasons assigned by the Sessions Court were not warranted. Prima facie case was made out for issuance of process and the learned Magistrate on perusal of the complaint and the verification statement, had issued process against the accused. It is submitted

that the conclusion arrived at by the police on completing inquiry u/s 202 of Cr.PC is biased and the documents were against the applicant and they did not carry out proper inquiry. The applicant had lodged the complaint with the police and it was incumbent upon them to register first information report, which is not done by them. It is further submitted that the material collected during the course of inquiry by police in accordance with Section 202 of Cr.PC itself indicate that the applicant-complainant had made out a case for issuance of process. He also pointed out several documents which are annexed to this application, which supports his complaint. He pointed out that the findings of the investigating authority in the report are false. He placed reliance upon the rent receipts which are annexed to the application. It is submitted that the police had travelled beyond scope of inquiry u/s 202 of Cr.PC. The police were acting in collusion with the accused. They did not conduct fair inquiry. It is submitted that the non-cognizable complaint was lodged by the complainant which shows that the incident did occur, as stated in the complaint. It is further submitted that the fact that cupboard was damaged is spelt out in the inquiry conducted by police and therefore, there was no reason to set aside the order of process. It is also submitted that the observations made by the Sessions Court in paragraph no.3 of the order are also contrary to the documents on record. It is submitted that there is plausible explanation for filing complaint belatedly. It is, therefore, prayed that present revision application be allowed by setting aside the impugned order passed by the Sessions Court.

6. Learned counsel for respondent nos.1 and 2 submitted that the learned Sessions Judge has only remanded back the matter to the

Trial Court for fresh consideration and, therefore, no interference is called for in the said order. It is further submitted that there is no substance in the complaint lodged by the applicant and it is not supported by any cogent evidence. The dispute is purely of civil nature and no case for the offence alleged was even prima facie made out in the complaint. It is further submitted that police had conducted an inquiry u/s 202 of Cr.PC and in the inquiry it was revealed that no case for the offence, as alleged by the applicant, is made out and, therefore, the report was submitted in that regard to the Court. The learned Magistrate had issued the process against the accused without assigning any reasons as to why the report submitted by police u/s 202 of Cr.PC is required to be discarded. It is submitted that the non-cognizable complaint lodged by the applicant-complainant is contrary to the version as spelt out in the complaint. The complaint was lodged after a period of about five years. It is therefore submitted that there is no infirmity in the order passed by learned Sessions Judge. The respondents-accused had not challenged the order of Sessions Court remanding the matter back to the Trial Court. It is also submitted that respondent no.1 is residing at Muscat and names of respondent nos.1 and 2 were not mentioned in the non-cognizable complaint. It is also submitted that no role has been assigned to respondent nos.1 and 2 in the complaint.

7. On perusal of the documents it is apparent that the complaint was filed on 27th May 2012 in respect to the incident which had occurred on 28th July 2007. The case of the applicant-complainant is that he was in possession of the premises and he was dispossessed from the said premises by the accused. It is also alleged that damage was caused to the cupboard which was lying in the said premises. It

is pertinent to note that the Sessions Court has remanded the matter back to the Metropolitan Magistrate for passing appropriate order in the light of directions contained in the order dated 2nd January 2017. In paragraph 2 of the order, it has been observed that the learned Magistrate had called for a report u/s 202 of Cr.PC in which it was submitted that there was no substance in the complaint. If the Court was to take a different view, it was incumbent upon the Court to give specific reasons for the same. The observation has been made by the Sessions Court in the light of the fact that the inquiry was conducted by police u/s 202 of Cr.PC and wherein a doubt was raised in respect to the genuineness of the complaint and it was also stated that the dispute is of civil nature. This Court has taken a view that in the event the report u/s 202 of Cr.PC is negative, the Court is empowered to issue process, however, the reasons are required to be assigned for deferring with the report u/s 202 of Cr.PC. In the present case the learned Magistrate has referred to report u/s 202 in the order of process, however, order does not reflect application of mind qua the fact that the report was negative. In the decision of this Court in the case of B.H.Patil and others Vs. Chandrashekhar Titarmare (2014-ALL M.R.{Cri}-188), it was observed that the learned Magistrate ignored the negative report, nor gave any reasons for not agreeing with the matters stated in the same, shows that the order was mechanically passed without any application of mind. In the facts of this case particularly and considering the fact that the dispute is with regards to the property wherein the complainant claims to have been dispossessed of the property and that damage is caused to his property, the observations made by the Sessions Court are well founded. However, since the Sessions Court had remanded the matter back to the Trial Court, the Sessions Court was not

expected to make any observations on the merits of the case. On perusal of the observations in paragraphs 3 and 4 of the order passed by the Sessions Court, the Trial Court would be bound by the said observations and there will be no scope for the Trial Court to consider the case afresh on merits and in accordance with law. The learned Sessions Judge has observed in paragraph no.3 that the non-cognizable complaint was lodged in respect of the incident and non-cognizable reveals that there is no averment in the complaint as against the respondents. The complaint is against the mother of the applicant therein, who has passed away, and the aunt of the applicant (accused no.3) who also passed away as well as the domestic help of the mother of the applicant therein (accused no.4), who is not before the Court. It is also observed that the complaint itself mentions that the applicant no.1 was residing at Muscat and applicant no.2 was residing elsewhere. The applicant in person has submitted that the said observation was uncalled for. Since the Sessions Court had directed the Trial Court to consider the complaint afresh and pass appropriate orders, the opinion as expressed by the Sessions Judge with regards to the merits of the case and the observation that the complaint was filed after a period of five years, was not warranted. The Sessions Court could have left it to the Trial Court to consider the merits of the case after hearing the complainant and perusing the documents on record.

8. The complainant has submitted that there is voluminous evidence against the respondents-accused. It is also submitted that police did not conduct proper investigation and even the non-cognizable complaint was not registered according to his version. The remedy against the improper investigation or biased approach of

the police or to challenge the manner in which the investigation is conducted, lies in appropriate proceedings. As far as present proceeding is concerned, the Court is concerned with the order of issuance of process and the order passed by the Sessions Court remanding the matter back to the Trial Court for fresh consideration.

9. In the aforesaid circumstances, the order passed by the Sessions Court remanding the matter back to the Trial Court can be maintained. However, the Trial Court shall not be influenced by the observations made by the Sessions Court on the merits of the case and shall decide the complaint in accordance with law after hearing the complainant. The verification statement of complainant is already recorded. The complainant is also at liberty to adduce any other additional evidence by examining any other witness, if he deems fit and proper in support of his case for issuance of process.

10. Hence, I pass following order :

ORDER

(i) Criminal Revision Application No.264 of 2017 is partly allowed;

(ii) The order of Sessions Judge for Greater Bombay in Criminal Revision Application No.1076 of 2016, dated 2nd January 2017, remanding the case back to the Metropolitan Magistrate, 62nd Court, Dadar, Mumbai, is confirmed, however, it is directed that the Trial Court shall not be influenced by any observations made by the Sessions Court on the merits of the case and shall deal with the complaint in accordance with law;

(iii) The complainant will be at liberty to examine any other witness in support of the complaint, if he deems fit and proper, for issuance of process in the complaint;

(iv) Criminal Revision Application No.264 of 2017 is disposed of.

(PRAKASH D. NAIK, J.)

MST