

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1525 OF 2016

Suvarna Shashikant Shinde	Applicant
versus	
Aslam Kadar Shaikh and others	Respondents

Mr.Prathamesh Bhargude for applicant.
Mr.Drupad S. Patil for respondent no.2.
Mr.S.R.Shinde, APP, for State.

CORAM : PRAKASH D. NAIK, J.
DATE : 7th June 2018

PC :

1. The applicant is the original complainant. The applicant had filed a complaint on 20th December 2014 before the Court of learned Judicial Magistrate, First Class, Pune. The complaint was filed alleging offences under Sections 405, 406, 420, 427, 453, 454, 455, 504 and 506 of Indian Penal Code.

2. The grievance of the applicant-complainant is that the applicant and his family members had executed a development agreement with the accused on 10th November 2006. It was agreed that the respondent-accused should develop the property and hand over two flat premises and one shop to the parties. In the mean time, the mother of complainant had expired and the parties thereafter executed a correction deed. The brothers of the complainant received money from the accused in lieu of premises. The complainant's case is that her right to allot the flat premises was maintained. It is further alleged that the applicant was put into

possession of the premises and she had performed certain rituals after getting the possession. Subsequently it was noticed that the accused had put up a different lock on the premises and dispossessed her from the said premises.

3. Learned JMFC recorded the verification statement on 4th February 2015 and called for a report under section 202 of Code of Criminal Procedure, 1973. The police conducted inquiry and submitted a report to the Trial Court on 8th May 2015. Apparently the conclusion in the report was that no offence was made against the accused. However, the learned Magistrate by order dated 22nd September 2015 issued process against the accused for offences under sections 406, 420, 427, 453, 454, 504 r/w 34 of Indian Penal Code.

4. The order issuing process was challenged by the respondent-accused before the Court of Sessions. The learned Sessions Judge by order dated 14th October 2016 set aside the order of process. Being aggrieved by the said order, the applicant-complainant has preferred this revision application.

5. Mr.Bhargude, learned advocate appearing for the applicant, submits that the learned Sessions Judge has committed an error in passing the impugned order. Prima facie case was made out against the accused for issuance of process. The requirement for issuance of process is the material on record and after going through the said material, the learned Magistrate had issued process. It is also submitted that the applicant had filed a suit in the Civil Court in which an application was preferred for seeking injunction. The Civil

Court has passed an order directing the accused not to create third party interests. It is submitted that there is no bar for parallel proceedings. The learned Sessions Judge has erred in passing the impugned order by observing that the Court could have ordered further investigation to support the complaint since report submitted by police was negative. It is submitted that it was open to the Sessions Court to remand the matter back to the Trial Court and the process ought not to have been quashed by the Sessions Court. He relied upon the following decisions :

- (i) Jagdish Ram Vs. State of Rajasthan and another (2004)4-SCC-432;
- (ii) Maikaal Fibers Ltd. and another Vs. ICICI Bank Ltd. & others (2005)12-SCC-229; and
- (iii) Dy.Chief Controller of Imports & Exports Vs. Roshanlal Agarwal and others (2003)4-SCC-139.

6. Mr.Patil, learned counsel appearing for the respondent submitted that the dispute is purely of civil nature. There is no evidence on record to establish that the applicant was put into possession of the premises. He further submitted that the parties to the agreement had given up their rights to possess and own the premises. The police conducted inquiry in accordance with Section 202 of Cr.PC and on the basis of material collected during investigation, they had arrived at the conclusion that no case is made out against the accused. He further submitted that the learned Magistrate has passed a cryptic order without assigning any reasons for issuance of process. The order is mechanical and without application of mind. It is further submitted that complainant had already resorted to civil proceedings and the civil suit is pending

before the competent Court. Although the Civil Court has passed an order directing the defendant/respondent not to create third party interests, the Court has not decided the right of complainant in respect to subject premises. It is submitted that the learned Magistrate has not assigned any reasons for discarding the report submitted by police qua inquiry conducted under section 202 of Criminal Procedure Code. In the circumstances no case is made out for interfering in the order passed by the Sessions Court. It is submitted that the Civil Court would decide the rights of parties and initiation of criminal proceedings amounts to abuse of process of law.

7. I have gone through the documents on record. The complaint was filed on 20th December 2014 alleging offence as stated hereinabove. After recording the verification statement, the learned Magistrate thought it fit to order an inquiry u/s 202 of Cr.P.C. During the course of inquiry, statements of various persons were recorded. Learned counsel for applicant had contended that the statements in fact supports his case that some rituals were performed in the premises which shows that the complainant was put into possession. Learned Magistrate had issued process pursuant to the report submitted by police. Learned Sessions Judge while setting aside the order of process has observed that in spite of negative report, the Magistrate issued the process against the accused, without conducting further inquiry by himself. If the Court had conducted further inquiry and issued the process against the accused, no fault could have been found in the order of process. However, in the absence of any further material on record, learned Magistrate issued process for the said offences without satisfying himself whether prima facie ingredients of the alleged offence have been made out.

He had not assigned any reason for issuance of process. Learned Judge further observed that the complainant has failed to examine any of his relatives before the Trial Court to show that she was handed over possession of the premises and that she had performed pooja. She did not examine her husband who was allegedly present at the time of wrongful restraint. The Court, therefore, concluded that the order passed by learned Magistrate suffers from illegality, impropriety and invalidity. The complainant has failed to make out a case for the said offence and there is no ground to proceed against the accused. The learned Sessions Judge, therefore, set aside the order issuing process.

8. It is noted that during the course of investigation conducted by police, statements of witnesses were recorded. Learned Sessions Judge has, however, set aside the process on the grounds stated hereinabove. In the light of reasons given by the Sessions Judge, it would have been appropriate for the Sessions Court to remand back the matter to the Trial Court for further consideration. If the Sessions Judge was of the opinion that the Trial Court has not assigned any reasons for issuance of process, the matter could have been remanded back to the Trial Court. It is pertinent to note that the Sessions Judge has also observed that the Trial Court could have conducted further inquiry himself. It is a settled law that even if the report of the investigating authority submitted u/s 202 of Cr.PC is negative, the Court is not precluded from issuing process, provided, the Court is satisfied that there is prima facie material before the Court for issuance of process. The Court has also observed that the complainant could have examined witnesses in support of her complaint pursuant to the report submitted by police. If the report

submitted u/s 202 of Cr.PC is negative, it is expected from the Trial Court to apply its mind to the said fact and give some reasons or express its views as to why the report is discarded while issuance of process. In the aforesaid circumstances, considering the tenor of the order passed by the Magistrate issuing process, it would be appropriate to set aside the order passed by the Magistrate as well as Sessions Judge and remand the matter back to the Trial Court for dealing with the complaint in accordance with law.

9. Hence, I pass following order :

ORDER

- (i) Criminal Application No.1525 of 2016 is partly allowed;
- (ii) The order dated 22nd September 2015 passed by Judicial Magistrate issuing process as well as order dated 14th October 2016 passed below Exhibit-21 in Criminal Revision application No.69 of 2016 passed by Sessions Judge, are set aside and the learned Magistrate is directed to proceed with the complaint in accordance with law;
- (iii) It would be open for the complainant to adduce additional evidence in support of her complaint;
- (iv) It should not be construed that this Court has expressed any opinion on merits of complaint;
- (v) Criminal Application No.1525 of 2016 is disposed off.

(PRAKASH D. NAIK, J.)