
(2013) 08 BOM CK 0022

In the Bombay High Court

Case No : Criminal Writ Petition No. 1704 of 2012

Ms. Sumitra Hiralal Saklikar and Sanjiv Vithal Samant	APPELLANT
Vs	
Hemant Radhakrishna Sapale and State of Maharashtra	RESPONDENT

Date of Decision : 19-08-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200
Penal Code, 1860 (IPC) — Section 34, 441, 447, 504

Citation : (2013) 5 ABR 883 : (2013) ALLMR(Cri) 3780 : (2014) 1 BomCR(Cri) 105

Hon'ble Judges : Abhay M. Thipsay, J

Bench : Single Bench

Advocate : Jatin Shah instructed by Mr. Mohan R.P. Rao, for the Appellant; P.R. Arjunwadkar, Advocate for the Respondent No. 1 and Mrs. G.P. Mulekar, APP and Mr. Hemant Radhakrishna Sapale, for the Respondent

Final Decision : Allowed

Judgement

Abhay M. Thipsay, J.—Rule. By consent, Rule is made returnable forthwith. Respondents waive service.

2. By consent, heard finally forthwith.

3. The petitioners are the accused nos. 1 and 2 in C.C. No. 13911/SS/2009 pending before the Metropolitan Magistrate, 65th Court at Andheri. The said case arises on a complaint filed by the respondent no. 1 herein (hereinafter referred to as "the complainant" for the sake of clarity and convenience).

4. Including the petitioners, totally six persons were mentioned as the accused, in the complaint, but after examining the complainant on oath as contemplated u/s. 200 of the Code of Criminal Procedure, the learned Magistrate issued process only against five of them, i.e. the petitioners and three others. The allegation against the petitioners and other accused is in respect of offences punishable u/s 447 IPC, 504 IPC read with section 34 of the IPC. Aggrieved by the order issuing

process against them, the petitioners approached the Court of Sessions by filing an application for revision. A number of objections to the order issuing process as passed by the learned Magistrate were taken, but the learned Addl. Sessions Judge who heard the revision found that a prima facie case in respect of an offence of criminal trespass, had been made out. Holding so, he dismissed the revision application. Being aggrieved by the order passed by the Magistrate issuing process against them, and the order dismissing their revision application, as passed by the learned Addl. Sessions Judge, the petitioners have approached this Court invoking its constitutional jurisdiction.

5. I have heard Mr. Jatin Shah, learned counsel for the petitioners. I have heard the respondent no. 1 who initially appeared in person, and I have thereafter heard Mr. P.R. Arjunwadkar, his counsel. With the assistance of the learned counsel, I have gone through the revision, the annexures thereto and more particularly the complaint, as filed by the complainant, and the order passed by the Court of Sessions in revision.

6. In the complaint, the complainant has alleged as follows:-

That the complainant is the owner and landlord of a house property known as "Pundlik Nivas" situate at Vile Parle (East). The petitioners and the other accused are the tenants/occupants of different premises in the said property. (One of the accused i.e. accused no. 6 is a civil contractor, but against him no process has been issued). It also appears that the tenants and occupants of the said property have formed an association, and are after the complainant for disposing of his property by giving it to a developer or builder. The complainant is not ready to dispose of his property just for the convenience of the tenants/occupants, and therefore, there exists civil dispute between the complainant and the accused persons, including the petitioners. That, on 30 May 2009, the complainant noticed that the accused had unlawfully put up scaffolding on the southern side of the said property without his permission. That, the accused persons had thus committed trespass on the open area forming part of the said property. That, when questioned, the petitioners and the other accused, instead of being apologetic for their unlawful trespass, started abusing the complainant's son in a filthy language. The complainant came there, and he was also abused by the petitioner and the other accused. It is on these averments that an allegation of an offence punishable u/s 447 of the IPC and 504 of the IPC, has been levelled in the said complaint against the petitioners and other accused.

7. In my opinion, even if the averments in the complaint are taken at the face value, and accepted in entirety, they do not constitute the offence of criminal trespass.

8. The offence of criminal trespass punishable u/s 447 of the IPC is defined in section 441 of the IPC. The ingredients of this offence are as follows:-

(i) Entering into or upon the property in the possession of another;

(ii) Such entry should be with the intent to

(a) to commit an offence

(b) to intimidate, insult or annoy any person in possession of the property.

9. It is clear from the facts alleged in the complaint that the case is purely of a civil trespass. The distinction between the civil trespass and the criminal trespass cannot be forgotten. Here, the scaffolding was, clearly, not erected for committing any offence, but for the exercise of an alleged right in favour of the petitioners and other tenants. It is immaterial that such a right may not be in existence at all, but the intention of the petitioners and other accused could not have been to commit an offence. Making an unlawful entry in any property or taking possession-for that matter-does not amount to any such offence. The aim behind the erecting of the scaffolding could not be to commit any offence, or to cause annoyance to the complainant. Even if annoyance would actually be caused to the complainant, that was not the aim or intention behind the erecting of the scaffolding. In the instant case, in the background of the dispute that was already pending between the parties, clearly the case was of a civil trespass.

10. Even with respect to the offence punishable u/s 504 IPC, the ingredients thereof are not prima facie made out. The offence contemplated u/s 504 IPC consists of intentional insult giving provocation to any person intending, or knowing it to be likely that such provocation would cause the person to whom such provocation is given to break the public peace or to commit an offence. In the instant case, the incident of giving abuses to the complainant and his son is only incidental to the demand of the complainant requiring scaffolding erected by the petitioners and other tenants to be removed. No intention to cause breach of public peace can be prima facie attributed to the petitioners and the other accused.

11. In the course of hearing, it was submitted on behalf of the petitioners that the scaffolding erected on the part of the property has already been removed by them. That this is so, has been confirmed by the complainant, who is present before me in person.

12. It is therefore clear that though going by the averments made in the complaint, petitioners appear to have committed civil trespass and some wrongs, still, it is not possible to hold that they have committed criminal trespass as defined in section 441 of the IPC, and/or an offence punishable u/s 504 of the IPC.

13. The learned Magistrate did not take into consideration the ingredients of an offence punishable u/s.447 of the IPC, and failed to differentiate between a case of civil trespass and criminal trespass. Similarly, the learned Addl. Sessions Judge while hearing the revision application failed to grasp the ingredients of the offence of criminal trespass, and did not realize that in the instant case, the trespass was for the sake of trespass, and not for committing any offence. The

trespass allegedly committed by the petitioner and the other accused was to be an end in itself, and thereafter, such trespass could not be considered as having done for the purpose of committing any offence etc.

14. In my opinion, the proceedings against the petitioner and other accused cannot be allowed to be continued when only a case of civil trespass is disclosed from the complaint and no offence of criminal trespass or the one punishable u/s 504 of the IPC, is made out.

15. Consequently, the constitutional jurisdiction of this Court is required to be exercised to put an end to such prosecution.

16. Petition is allowed.

17. The order issuing process passed by the learned Magistrate against the petitioner and other accused, and the proceedings in respect of C.C. No. 13911/SS/2009, are quashed. Rule is made absolute in the aforesaid terms.