
(1991) 09 BOM CK 0053

In the Bombay High Court

Case No : Criminal Writ Petition No. 1256 of 1986

Vinayak Laxman Vartak

APPELLANT

Vs

Laxmidas Vithaldas Ganatra and Another

RESPONDENT

Date of Decision : 04-09-1991

Acts Referred:

Penal Code, 1860 (IPC) — Section 288

Citation : (1992) 1 BomCR 447 : (1991) MhLj 1201

Hon'ble Judges : S.M. Duad, J

Bench : Single Bench

Advocate : P.R. Vakil and A.P. Mundargi, for the Appellant; C.M. Kothari, Public Prosecutor for State-respondent No. 2, for the Respondent

Judgement

S.M. Duad, J.—Petitioner, who is accused No. 2 in Criminal Case No. 434/P of 1985 pending in the Court of the Metropolitan Magistrate, 4th Court at Girgaon, Bombay, has brought this petition to quash the issue process order against him.

2. Respondent No. 1 has filed a complaint in the Court of the afore-mentioned Magistrate ascribing to accused No. 2 and one Amin Hassan the commission of offences punishable u/s 288, 403 and 406 read with section 114 of the Indian Penal Code. His case, briefly stated, is that he is a tenant of a building known as "Kishor Bhavan" situated at 29, Vithalbhai Patel Road, Bombay 400 004. The Bhavan is divided into two parts-one facing the road and the other to its rear. The two parts are separate and distinct. Complainant resides on the front side of the Bhavan on the ground floor. Accused No. 1 is the partner of a firm carrying on the business of Building Contractors and accused No. 2 is a Consulting Engineer. The Maharashtra Housing and Area Development Act empowers the authority to carry out repairs to buildings in a dilapidated and dangerous condition. The front side of the Bhavan was in a sound condition and did not require major repairs. The representations made by the tenants to the rear part of the Bhavan had the desired effect and the Authority as also the Bombay Municipal Corporation (BMC) directed the carrying out of certain repairs to the

building. The Contractor, with ulterior motives, despite the limitation not to touch the front side, started carrying out repairs to that part of the building which faced the Vithalbhai Patel Road. To enable the carrying out of repairs, overhead water storage tanks were pulled down and the terrace demolished. The work being done by the Contractor was not upon the mark and the material used therein was substandard as also inadequate. Valuable parts of the building were removed and misappropriated by the first accused through his servants and labourers. Complainant and the association of tenants addressed several letters to the Authority complaining of the defects and incomplete work carried out by accused No. 1. The second accused was requested not to sanction the bills submitted by the first accused. No heed was paid to the warnings of the complainant. As a result, accused had committed offences punishable under sections 403 and 406 as also 288 read with 114 of the Indian Penal Code. The Magistrate took cognizance only u/s 288 read with 114 of the Indian Penal Code and directed the issue of process to both the accused.

3. The accused No. 2 submits that section 288 of the Indian Penal Code is not attracted to the facts of the present case. To appraise this contention it will first be necessary to set out the relevant portion of the said section:---

"Whoever, in pulling down or repairing any building, knowingly or negligently omits to take such order with that building as is sufficient to guard against any probable danger to human life from the fall of that building, or of any part thereof, shall be punished..."

A close reading of the section would show that the starting point of the offences is the pulling down of a building or part thereof or repairing the same. It is while the pulling down or repairing is in process that the offence contemplated by the section can take place. The offence lies in the puller down or repairer knowingly or negligently omitting to do certain things. What the section requires the puller down or the repairer to do is "to take such order with that building". These words imply no more than the taking of such steps with reference to the building. The purpose of taking the said step is, "to guard against any probable danger to human life". The need to guard against the probable danger to human life is from "the fall of the building or any part thereof." Once the section is split up, it would be clear that the offence can be committed only while the building is being pulled down or repaired. Once the pulling down or repairing is completed, the offence cannot be committed regardless of the deficiencies in the carrying out of repairs. The complaint in the instant case speaks of the first accused having removed valuable parts of the front portion of the building with a view to misappropriate the said parts. Next, it is alleged that accused No. 1 has used inadequate and sub-standard material in the carrying out of repairs and that such user has endangered the safety and security of the residents of the building. Now that is not something which is covered by section 288. If there had been an accusation of the pulling down or repairing process being so knowingly or negligently carried out as to give rise to a reasonable apprehension about a probable danger to

human life, that would have been a different matter. The complaint here is that the building has been so inefficiently and inadequately repaired that it is likely to fall and this is said to constitute a probable danger to human life. To put it differently, sub-standard and insufficient material has been used to carry out repairs to the building, thus rendering it probable that it or a part thereof may fall and this constitutes a probable danger to human life. That state of affairs would not attract section 288 of the Indian Penal Code. The interpretations set out above finds some support from the judgment of Chandrachud, J., in *Manohar Shrinivas Mantri v. Adtarsingh Gangasingh*, reported at LXXII Bombay Law Reporter 629. The learned Judge says:---

"In this case the injury was caused to Shirish not in the process of pulling down the building or its being repaired. The injury was caused because a worker engaged in the work of construction of the third floor threw down a brick. What section 288 requires is that a person must knowingly or negligently omit to take the necessary order with the building in pulling it down or repairing it. It is not sufficient that an injury is caused while the building is being pulled down or repaired. In other words, the injury must be the direct consequence of the building being pulled down or repaired What the section further requires is that the accused must knowingly or negligently omit to take such order with the building as is sufficient to guard against a probable danger to human life "from the fall of that building or any part thereof".

Applying the ratio spelt out by the learned Judge to the facts of the present case the position emerging is this : Accused No. 1 has been deficient in the pulling down of the parts of the building and effecting repairs thereto. The work is of a shoddy quality and this endangers the lives and persons of those residing in it. This is the aftermath of the pulling down and the repairing. The complaint therefore does not attract section 288 of the Indian Penal Code for two reasons. Firstly, nothing has been done or omitted to be done which can be said to constitute a danger to human life while the process of demolition or repair was in progress. Secondly, negligence or dishonesty attributed to accused No. 1 cannot be said to be shared by the petitioner who is the second accused in this case. If defective work has been done by the Contractor, it is difficult to see how the Consulting Engineer or the Architect as the petitioner describes himself, can become liable u/s 288 of the Indian Penal Code. Even the element of abetment cannot be attributed to him merely because he happens to be the Consulting Engineer or someone who has been warned against according sanction to the payment of the bills submitted by the Contractor. The learned Magistrate \\was in error in directing the issue of process against the petitioner, Accused No. 2 and the impugned order is hereby quashed.