

(1995) 04 BOM CK 0052

In the Bombay High Court

Case No : Criminal Writ. Petition No. 874 of 1993

Vithal Vinayak Bhuskute and Another

APPELLANT

Vs

Narhari Pandurang Gandale and Another

RESPONDENT

Date of Decision : 17-04-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202
Penal Code, 1860 (IPC) — Section 380

Citation : (1995) 3 BomCR 324 : (1995) 97 BOMLR 497 : (1995) CriLJ 3733

Hon'ble Judges : G.R. Majithia, J

Bench : Single Bench

Advocate : R.S. Apte, for the Appellant; S.S. Kulkarni and Y.V. Patil, Additional Public Prosecutor, for the Respondent

Judgement

1. This judgment disposes of Criminal Writ Petitions Nos. 874 of 1993, 875 of 1993 and 636 of 1994.

2. Narhari Pandurang Gandale (hereinafter "the tenant") filed three complaints in the Court of the Judicial Magistrate, First Class, Pune, which came to be registered as Criminal Cases No. 343 of 1992, 10 of 1993 and 128 of 1993 against Vithal Vinayak Bhuskute (hereinafter "the owner") and Dilip Vasant Gupte (hereinafter "the builder"). In Criminal Case No. 343 of 1992, Acchyut Bhimaji Kulkarni was also arrayed as an accused. In the other two complaints he was not so arrayed. In Criminal Case No. 343 of 1992, the Magistrate ordered an enquiry u/s 202, of the Criminal Procedure Code (hereinafter "the Code"). The police did not submit report for a long time. The Magistrate, after considering the material placed before him, issued process to the accused, the builder and the owner. In criminal Case No. 10 of 1993, the Magistrate issued process to the accused, the builder and the owner. The builder and the owner challenged the orders of the Magistrate taking cognizance of the complaints and issuing process to them in Criminal Revision Applications Nos. 290/1993 and 289/1993, respectively, before the Additional Sessions Judge, Pune. The learned Additional Sessions Judge did

not find any impropriety/illegality in the orders of the Magistrate issuing process to the owner and the builder and dismissed the Revision Applications. The orders of the learned Additional Sessions Judge dismissing the Revision Applications have been challenged in Criminal Writ Petitions Nos. 875 of 1993 and 874 of 1993.

In Criminal Case No. 128 of 1993, the Magistrate, after perusing the record and the affidavit placed before him, passed the following order :-

"Heard the complainant and his learned Advocate perused the complaint, verification, xerox copy of punchanama, affidavit of complaint's son inj. 24 Court. and other documents placed on record. It appears that complt. has made out a prima-facie case against the accused. Hence issue process against accused No. 1 & 2 (the owner and the builder) u/S. 288, 336, 337 r/w 34 of I.P.C. r/o 28-9-93.

The owner and the builder challenged this order in Criminal Revision Application No. 777/1993. The learned Additional Sessions Judge not only set aside the order of the Magistrate dated August 3, 1993 summoning the owner and the builder but also dismissed the complaint. In the body of the judgment, he observed that the material placed before him did not justify the issuance of the process. The tenant has challenged this order in Criminal Writ Petition No. 636 of 1994.

It is in these circumstances that these cases are being disposed of by this common judgment.

3. In Criminal Writ Petitions Nos. 874 of 1993 and 875 of 1993, learned counsel for the petitioners, the builder and the owner, submitted that the learned Magistrate having sent for a report u/s 202 of the Code, could not have issued the process to the petitioners till the police report had been received. He submitted that the Magistrate sent for the report as he did not find sufficient material for issuing the process. I am not satisfied with the submission made. The Magistrate did send for the report u/s 202, of the Code but the report was not received and thereafter, considering the material as present on record, the Magistrate issued process to the accused in the complaints. The orders of the Magistrate issuing process upon the material available record cannot be faulted. In this connection, I drew support from the decision of this Court in *Shriram v. Ratanlal* 1980 Mh LJ 765, where it was observed :-

"5. Now the offence u/s 380, of the Indian Penal Code is punishable for a term which may extend to seven years and Shri K. H. Deshpande the learned counsel for the petitioner, therefore, rightly did not press the contention about the limitation before us. So also the contention that the Magistrate could not take cognizance, once he had directed an enquiry u/s 202, of the Criminal Procedure Code was also not pressed. The Magistrate by his order dated 23-12-1977 had directed an enquiry u/s 202, Criminal Procedure Code to be made by the police, but till 5-8-1978 no report was received. If under the circumstances the

Magistrate rescinds the order and proceeds to take cognizance and directs the issue of process upon the material already available before him, it cannot be said that he acted without jurisdiction.

Thus I find no ground to interfere with the order of the learned Additional Sessions Judge under challenge in Criminal Writ Petitions Nos. 874 of 1993 and 875 of 1993 filed by the owner and the builder.

4. In Criminal Writ Petition No. 636 of 1994, as observed earlier, the tenant has challenged the order passed by the learned Additional Sessions Judge dismissing the complaint and also holding that the material on record did not justify the issuance of the process. I am not impressed with the manner in which the learned Additional Sessions Judge has disposed of the Revision Petition before him. The learned Magistrate, after considering the material on record, passed the order which has been reproduced above. Sufficiency or insufficiency of the material for issuing the process is for the Court which is seized of the matter to decide. The learned Additional Sessions Judge was not well advised to comment that the material taken into consideration by the learned Magistrate was not sufficient for issuing the process. He was further in error in dismissing the complaint. Even if he had found that the material was not sufficient, the learned Additional Sessions Judge could have sent back the matter to the learned Magistrate to reconsider his decision and pass a fresh order for issuing the process to the accused. He, in no event, could dismiss the complaint. The order of the learned Additional Sessions Judge dismissing the complaint cannot be justified in law. I have considered the order passed by the Magistrate while issuing the process to the owner and the builder, who are arrayed as accused in the complaint. For sound reasons the learned Magistrate has taken cognizance and I do not find any reason to interfere with that order. The order of the learned Additional Sessions Judge in Criminal Revision Application No. 777/1993 dated January 31, 1994 cannot be sustained. Hence the following order :-

(i) Criminal Writ Petition No. 874 of 1993 and Criminal Writ Petition No. 875 of 1993 are dismissed.

(ii) Criminal Writ Petition No. 636 of 1994 is allowed. The order of the learned Additional Sessions Judge, Pune, in Criminal Revision Application No. 777 of 1993 dated January 31, 1994 is set aside and that of the learned Magistrate dated August, 3, 1993 is restored.

(iii) The complaints are remitted to the appropriate Courts for trial according to law.

(iv) If any discharge application is filed by the owner and the builder, the same will be disposed of in accordance with law. Learned counsel for the owner and the builder wanted to place some material before me in support of his submission that the order issuing the process was not justified. He will show that material to the learned Magistrate who is seized of the complaints when he files discharge application. The learned Magistrate will take note of that material and will deal

with the same in accordance with law.

(v) Interim stay is vacated. Trial is expedited.

(vi) Rule in Criminal Writ Petition No. 874 of 1994 and Criminal Suit Petition No. 875 of 1993 discharged.

(vii) Rule in Criminal Writ Petition No. 636 of 1994 made absolute in the terms stated above.

Certified copy expedited.

5. Order accordingly.