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Bombay High Court

Case No: Criminal Application No. 862 of 1979

Bomanji Kavasji Boman Behram and Others	APPELLANT
Vs	
Mehernosh Minochar Mehta and Others	RESPONDENT

Date of Decision: April 28, 1980

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 - Section 13, 14, 2
- Penal Code, 1860 (IPC) - Section 114, 420

Hon'ble Judges: V.S. Kotwal, J; S.C. Pratap, J

Bench: Division Bench

Advocate: J.A. Barday, P.P., K.M. Desai and J.D. Ved, for Mulla and Mulla and C.B.C, for the Appellant; Ranjana S. Samant, for respondent No. 1, Ashok Desai and K.G. Menon for respondents Nos. 2 to 9, for the Respondent

Final Decision: Allowed

Judgement

S.C. Pratap, J.
This petition u/s 482 of the Code of Criminal Procedure is directed against the order dated 27th July, 1979 passed by the learned Additional Chief Metropolitan Magistrate, 19th Court, Bombay issuing against the petitioners and respondents Nos. 2 to 9 herein, at the instance of respondent No. 1, the original complainant, process under sections 13 and 14 of the Maharashtra Ownership Flats (Regulation of Promotion of Construction, Sale, Management & Transfer) Act, 1963 (hereinafter referred to as the "Ownership Flats Act").

2. Brief facts leading to the filing of this position are as follows :---

The petitioners and respondents Nos. 2 to 5 herein are the trustees of the Parsee Panchayat Funds and Properties, Bombay, a Public Trust registered under the Bombay Public Trusts Act. Petitioner No. 1 is the Chairman of the Board of Trustees. Respondent No. 9 is the Ex-chairman. Respondents 2 to 5, apart from being trustees, are also alongwith respondents Nos. 6 and 7 members of the Sponsoring Committee of B.S. Panthaki Baug Co-operative Housing Society (proposed). Respondent No. 8 is the Secretary of the Trust. This Trust is possessed of several lands being given and/or donated to it by various philanthropists in memory of their near and dear ones with directions to utilize the same in accordance with their wishes and consistent with the aims and objects of the Trust. As members of the Parsee community experience shortage of residential accommodation and as this community''s boys and girls of Marriageable age were also for the same reason unable to finalize their marriages the Trust formulated certain schemes for such members belonging to poor class, lower middle class and middle class. One such scheme was to construct, on ownership basis and without any profit, residential flats for deserving members on land leased at a very reasonable ground rent. With this object, the Trust constituted a committee viz. the Sponsoring Committee of B.S. Panthaki Baug Co-operative Housing Society (proposed).

3. The Trust entered into a lease agreement with the sponsoring committee to enable the said committee to construct or cause to be constructed a building or buildings of ownership flats on the Trust''s plot situated at Andheri, Bombay. Respondent No 1. (the original complainant) was one of the intending purchasers. As such intending purchaser, he confirmed in writing inter alia as follows :---

"In the matter of allotment, I shall abide by the decision of the sponsoring committee, and/or of the Co-operative Society, and shall accept such decision as final and binding on me...."

"In the event of my transfer from Bombay or in case of circumstances arising necessitating my relinquishing my flat, I agree to surrender the vacant and unencumbered possession of my flat, if so required, to the Co-operative Society and/or if so desired by the society, to the Trustee of the Parsee Panchayat or their nominees. In consideration of my relinquishing my right, title and interest in my flat, I shall be entitled to receive back from the transferee only the amount (without interest) which I have paid such right, title and interest."

"I agree to join the Society and abide by its rules and regulations as made from time to time, and until such society is formed, I shall accept as binding and final the decisions of the sponsoring committee on any question or issue relating to or arising out of this transaction."

4. In April 1977, respondent No. 1 was informed of the allotment to him of Flat No. A/12 in Building No. 7 in terms inter alia as under :---

"That in consideration of the said land being made available to the lessee (the Society) at a very reasonable ground rent, the lessee shall always have in its rules and regulations or bye-laws the following provisions, viz. :---

(a) That the society agrees to give the lessor first option to purchase the interest in any flat proposed to be disposed of by the flat holder by way of transfer of his interest to a third party.....

(b) That you will abide by the terms and conditions of the agreement arrived at between you and the Sponsors in connection with the said flat as recorded in your confirmation letter.

(c) You will unequivocally agree and undertake that you will be bound by the terms and conditions of the agreement of lease and the indenture of lease between the Parsee Panchayat Trustees and the Sponsors and will also be bound by the orders and directions issued by the Parsee Panchayat Trustees from time to time. If for any reason, a Co-operative Housing Society is not formed under the Maharashtra Co-operative Societies Act, the flat holders will form a "Limited Company" under the provisions of the Companies Act, 1956 and /or will form an Association under the Maharashtra Apartments Ownership Act, 1970 with the same aims, objects and purposes as stated above.

(d) On your confirmation that you are agreeable to the above conditions, you will be put in occupation of your flat."

5. Respondent No. 1 confirmed the terms and conditions in writing before a Notary Public. He was thereafter handed over actual possession of the flat in question and it is undisputed that he is presently in enjoyment thereof. Surprisingly, however, after entering into possession of the flat and while in enjoyment thereof, respondent No. 1 started raising frivolous disputes in respect of the terms and conditions already agreed to by him in writing more than once and without any demur. And even while the matter was at the stage of meetings and negotiations, he rushed to the criminal Court and hastened to file against the petitioners and respondents Nos. 2 to 9 herein (all arraigned as accused Nos. 1 to 11) the instant criminal complaint under sections 13 and 14 of the Ownership Flats Act as also under sections 420/114 of the Penal Code. On this complaint, a cryptic and reasonless order of process was issued against all the eleven trustees/members of the Sponsoring Committee. Hence, this petition.

6. Mr. K.M. Desai, the learned Advocate for the petitioners raised three contentions;

(1) The complaint was liable to be dismissed in limine as barred by the law of limitation vide section 468 of the Code of Criminal procedure.

(2) The petitioners not being promoters as defined by section 2(c) of the Ownership Flats Act, they were not liable to be proceeded against by way of a complaint of the instant nature.

(3) As on merits also the complaint fails to make out even prima facie any criminal offence, the same was on this ground itself liable to be dismissed. Respondents 2 to 9 as also respondent No. 1, the State of Maharashtra support the petitioners. The only contesting party is respondent No. 1, represented by his learned Advocate Miss R.S. Samant.

7. Hearing the respective Advocates and going through the considering the complaint as also the correspondence and documents shown to us by the complainant''s Advocate, we find no merit whatever in the original complaint qua any criminal offence. The complaint reflects a totally distorted attempt to build up an imaginary offence. It has no legitimate legs to stand upon. It is made to rest on artificial crutches. We have no hesitation in holding that the action and conduct of respondent No. 1 in resorting to criminal proceedings and inviting the Trustees and Members of the sponsoring committee to a Criminal Court to settle what can at the highest be termed as essentially a civil dispute is nothing short of abuse of Criminal process. It is not in the least a bona fide prosecution. On the contrary, it is a deliberate prosecution. Permitting such an ulterior motivated proceeding to go on would be manifestly unrest and against all canons and object of administration of criminal justice. The very basic and essential ingredient-''without reasonable excuse''---of the impugned offence is totally absent. It is nowhere in sight. On the contrary, the correspondence referred to in extenso by the complainant''s own Advocate totally belies and exposes the complainant himself. At no stage, did we find nay unwillingness on the part of the Trustees or the Members of the Sponsoring Committee in the matter of having the society registered. On the contrary, letter dated 27th April, 1979 pre-eminently shows their readiness and willingness to have the society registered. To quote therefrom :

''In the circumstances, our clients repeat that they are ready and willing to have the society registered, if all the flat-holders co-operate with our clients for having a society registered with bye-laws in conformity with the terms and conditions of the agreement to lease, so that, our clients'' rights are not, in any way, impaired or their position compromised having regard to the objectives with which they had started the scheme. If the flat-holders are willing to render co-operation in this respect, our clients are too willing to see that the society is registered immediately with the necessary provisions for safeguarding the interest of lessors, so that, the purpose with which the scheme was started by our clients is not defeated even in future either by way of trafficking or profiteering and the basic character of the society is preserved. Please, therefore, attend our clients'' office after taking appointment over the telephone and sign the application form, bye-laws and the proposal for registration and the other papers necessary for registration immediately on receipt of this letter.''

In face of this pre-eminently fair and response by the Trustees/Members of the sponsoring committee, where is then the guilty mind-the crux of any criminal offence? Significantly enough, it is precisely this letter that was suppressed by the complaint-for motives not difficult to fathom. Had it been disclosed, even the learned trial Magistrate

would have dismissed the complaint refusing to issue any process thereon. Inspite of this well-intentioned letter, unreasonable, non-co-operative and obstinate attitude was persisted in by respondent No. 1 resulting in a virtual deadlock making it impossible for the Trustees/Members of the sponsoring committee to forward to the Registrar for registration of the Society application duly signed by the requisite minimum of ten Members of the proposed Society. To nevertheless except them to forward an unsigned, incomplete and an invalid application for registration would be akin to putting the cart before the horse. We find the conduct of the Trustees/Members of the sponsoring committee totally blameless in this in this behalf. It is not possible to except the impossible from them.

8. That apart, even when we go through the complaint itself, we find no case even prima facie for issuing the impugned process. In fact, major portion of the complaint itself indicates active negotiations and parleys between the parties. In the complaint itself, the complainant himself admits that :

(a) he agreed to purchase the flat in question on terms and conditions contained in the letter of the sponsoring committee;

(b) the scheme in question was meant for the benefit of members of the Parsee community;

(c) he did express his desire to purchase a flat on the agreed terms and conditions;

(d) all the other allottees did take possession of their respective flats and occupied the same on the terms and condition;

(e) the Trustees/Members of the sponsoring committee themselves suggested the taking of various steps for the purpose of forming a society; and

(g) meetings were held, a working committee was formed and the proposed bye-laws and amendments thereto were also discussed.

In the face of these several and significant admissions, where is then the scope for even a prima facie inference of criminal offence against the Trustees and Members of the sponsoring committee? On the contrary, action of respondent No. 1 in nevertheless filing a criminal complaint make his own conduct suspect indicating his zeal to enjoy all the benefits of the agreement and contract solemnly entered into by him but without in the least intending to honour its other terms and conditions.

9. The complainant''s Advocate Miss Samant contended, however, that certain proposed bye-laws were illegal and insistence thereon was a criminal offence. She was, however, unable to point out a single bye-law contravening the terms and conditions on which respondent No. 1 agreed to the allotment of flat in his favour nor a single bye-law contravening the aims and objects of the Trust in question nor a single bye-law contrary

to the terms and conditions of the lease between the Trustees and Members of the sponsoring committee. Even qua the Co-operative Societies Act, the learned Advocate was unable to independently point out any bye-law contravening any provision of the said Act. And yet, by placing blind and mechanical reliance on a letter dated 8th August, 1979, it was urged that bye-law No. 6(e) was contrary to section 22 of the said Act. When we asked the learned Advocate as to which part of section 22 was contravened by bye-law No. 6(e), she was unable to even faintly satisfy us on that aspect contending that whether a bye-law was contrary to a statue was a matter of evidence. We are unable to agree. Though application of law depends on evidence led and facts proved, law itself is not a matter of evidence. Legality or illegality of a bye-law qua a statue is a matter of pure construction of the former on the touch-stone of the latter.

10. Our attention was then invited to a condition that if the allottee left the city or left the flat in question (both of in won accord and voluntarily), he should return the flat to the society and/or to the Trust at the price at which it was given to him. It was contended that this condition was illegal. We, however, find no illegality whatever therein. On the other hand, we find it to be a just and fair term and in keeping with a true co-operative spirit . Moreover, a body of Trustees charged with the duty of fulfilling the dire need of the poorer sections of the Parsee community in respect of residential accommodation would be failing in its duty if it permits those allotted flats at cost price to themselves make huge profit therefrom. Having more than once solemnly agreed to the terms and conditions of allotments and having further, again on that basis and representation, entered into actual possession and enjoyment thereof, it does not in the least befit respondent No. 1 to turn round and day this just an fair term of allotment. To reiterate, we see no illegality whatever in the said condition. On the contrary, permitting respondent No. 1 to make huge profits would be repugnant to the very aims and objects of the Trust and the scheme in question and contrary even to the spirit behind the Co-operative Societies Act and also contrary to the benignant spirit in which the flat had been given to respondent No. 1 himself.

11. In this context, when we turn to the further averments in the complaint, we find ourselves really aghast at the various wild and reckless allegations of coercion, fraud and dishonesty levelled almost like a bolt from the blue by the complainant against the Trustees/Members of the Sponsoring Committee. It is a thoroughly dishonest, distorted and mischievous attempt to create an offence where none can even remotely be spelt out. The complainants not an illiterate person or a village simpleton. He is an educated person. He is a seasoned urbanite. He has solemnly affirmed and reaffirmed in writing the terms and conditions of the allotment. He made all meticulous arrangement to have and finalise the allotment of flat in his favour and he has, in pursuance of all this, also entered into possession and enjoyment thereof. It was only thereafter that he suddenly discovers, if not invents, fraud and coercion. And yet, significantly enough and though specifically asked, he is not willing to return the benefit (viz., the flat) received by him in this process and take back the price thereof. One cannot in this context, refuse to take judicial notice

of the vital circumstance that an ownership flat in Bombay having a built-up area of nearly 500 sq. feet has been allotted to this complainant at a price of only Rs. 35,000/- and odd (Rs. 70/- per square foot) when it is common knowledge that the market price thereof even at the relevant time would have been atleast one and a half times the said amount if not more and with prices rising continuously thereafter. No wonder then that the complainant refuses to return the flat and take back the price paid by him. Here, therefore, is a complainant who has got a very vital advantage and benefit in the context of the prevalent hopeless situation of extreme shortage of accommodation in the city and on terms and conditions so attractive and tempting as are bound to result in innumerable other member of the Parsee community ready and willing to jump at and accept the same if offered.

12. Yet another aspect : Have the Trustees/Members of the Sponsoring Committee altered any existing term? No. Have they imposed any new condition? No, Have they refused to abide by the agreed conditions ? No. Just the reverse indeed is the conduct of the complainant. He is out to violate the agreed terms and conditions. He wants all the benefits thereof minus his liability thereunder. On which side then is coercion and, again, on which side then is dishonesty ? The irresistible answer is : On the side of the complainant himself. Having reaped full benefits and advantages, he has thereafter chosen to turn himself into a picture of ingratitude personified dishonestly trying to coerce the Trustees/Members if the Sponsoring Committee to come to is how terms under the threat of a hanging sword of a criminal prosecution. The weapon of a criminal prosecution is here converted into a weapon of oppression and prosecution. To permit this would be akin to permitting abuse of criminal process and mutilation of the true ends of administration of criminal justice.

13. The best and highest inference that can be drawn in this case is that there is between the complainant and the Trustee/Members of the Sponsoring Committee a dispute. But by no stretch of imagination can the said dispute be said to partake the character of a criminal offence. Mechanical use and insertion in the complaint of words that constitute the offence cannot convert an essentially civil dispute into a criminal offence.

14. In this view of the matter that we take and reading the complaint as a whole and considering the materials shown to us by the complainant"s own Advocate Miss Samant, we are convinced that this was not at all a case for any criminal process. Issues of process is a vital step. Order in that behalf is a judicial order. Is it not be passed in a mechanical manner and without application of mind. And in a case such as this where the consequences qua the Trustees/Members of the Sponsoring Committee could be far and wide, reasons however brief these be, are desirable, though not obligatory before the trial Magistrate takes, atleast so far as his Court is concerned, the rather irreversible step of process against these persons. Taking the order as it is and bearing in mind the context and background already referred to, it is difficult to resist the contention that it (the order) is arbitrary and capricious.

15. It is undoubtedly true as admitted by the complainant"s learned Advocates that jurisdiction u/s 482 of the Code of Criminal Procedure is limited and circumscribed. But, it is also equally true that the said jurisdiction is one intended to be invoked in a just and proper case. The instant in our view is one of those few cases where it deserves to be so invoked to meet the ends of justice. Scope of section 482 has been laid down in a catena of cases to some of which our attention was invited by the respective Counsels. Going through the cited authorities, we find the position flexible. There is no hard and fast rule nor any fixed or rigid principle. There is no scientific or mathematical formula of any exactitude. As observed by the Supreme Court in R.P. Kapur Vs. The State of Punjab,

"It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction.

Much, therefore, depends on the ever changing circumstances of case after case. It is, however, still a jurisdiction to be exercised in exceptional cases to prevent abuse of criminal process and to meet the ends of justice. As held by the Supreme Court in the case of Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others,

"Where the allegation made in the complaint.....taken at their face value make out absolutely no case against accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused, the process issued by the Magistrate can be quashed and set aside."

And further :

"Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused, the process issued against the accused can be quashed and set aside."

And still further on :

"Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible, in such a case again process can be set aside or quashed."

16. In Hareram Satpathy Vs. Tikaram Agarwala and Others, , the Supreme Court has cautioned that the High Court cannot launch on a detailed and meticulous examination of the case on merits, nor enter into a detailed discussion of the merits or demerits of the case. We have, therefore, refrained ourselves from making any detailed or meticulous examination of the case herein. We are resting our judgment on the complaint itself and the material referred to therein and the correspondence and documents referred to by the complainant"s own Advocate Miss Samant before us and on certain undisputed positions herein. The aims and objects of the Trust are not disputed. That lands are given or donated to the said Trust by certain philanthropic Parsees is also not disputed. That the

Trust leased out the land in question herein to the Sponsoring Committee in pursuance of or in fulfilment of some of those aims and object is also not disputed. That the complainant was made aware of and he more than once confirmed the terms and conditions of allotment of flat is also not disputed. That he responded to and accepted the allotment and took possession of the flat is also not disputed. And there is again no dispute that he is presently enjoying the same. There is also no dispute about the fact that meetings were actually held and negotiations and parleys were still actually going on in the matter getting the society registered. There is also no dispute that in the event of formation of a society being not possible, the alternative agreed was the formation of a limited under the Companies Act, 1956 or on Association under the Maharashtra Apartments Ownership Act, 1970.

17. Miss Samant referred to the following from the Supreme Court ruling in Kurukshetra University and Another Vs. State of Haryana and Another,

"Statutory power (under section 482 of the Code of Criminal Procedure) has to exercised sparingly with circumspection and in the rarest of rare cases."

Now, the observations in any decided authority have to be read and considered in the light of the facts and circumstances of that case. Observations torn out of context are likely to result in miscarriage of justice and a mutilated ratio. That apart, Mr. Desai has invited our attention to a ruling of the Supreme Court itself in the case of State of Karnataka Vs. L. Muniswamy and Others, , and in particular, to the observations in paragraph 7 thereof the following effect :---

"In the exercise if his wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of Justice require that the proceeding ought to be quashed. The saving of the High Court"s inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a Court proceeding ought not to be permitted to degenerate into a weapon of harassment or prosecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interests of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observation is that without proper realisation of the object and purpose of the provisions which seeks to save the inherent powers of the High Court to do justice between the State and its subject it would be impossible to appreciate the width and contours of that salient jurisdiction."

Our attention was also invited by Mr. Desai to yet another decision of the Supreme Court in R.P. Kapur Vs. The State of Punjab, we find the following observations :

"It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. Ordinarily, criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice.....Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirely, do not constitute the offence alleged; in such cases, no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases, it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal Court to be issued against the accused person."

18. Inherent powers are thus saved to the High Court, inter alia, to secure the ends of justice or to prevent abuse of the criminal process or to prevent manifest miscarriage of justice or to prevent criminal courts being utilised as weapons of harassment for selling disputes basically, essentially and inherently of civil nature, without even a tinge of criminality involved therein. Even if inherent powers are to be exercised in exceptional cases, we would, in the exercised of that "wholesome power" and "salient jurisdiction" unhesitatingly includes the instant case in that category. This, in our view, is a case which pre-eminently establishes far more than reasonable excuse cause qua the trustees/members of the Sponsoring Committee in not being able to submit application for registration of the Co-operative Society within the normal period. This pre-eminently is a case where the trustees/members of the Sponsoring Committee have been, for no fault on their part and entirely because of the conduct of respondent No. 1 and other like him, prevented and rendered helpless and unable to forward application for registration duly signed by the minimum number of persons requisite in that behalf. When even such minimum required are not ready to sign the application for registration and when as a result of such refusal there has arisen a virtual deadlock in the matter and efforts were actually going on to have the said deadlock resolved, problems solved and bottle necks removed, it is impossible, in the face of these stark realities, to find even prima facie any criminal offence or offences disclosed against the trustees/members of the Sponsoring Committee. There is no justification at all to criminally proceed against the trustees/members of the Sponsoring Committee. Indeed, it would be the height of injustice to do so. Allowing such a prosecution to proceed would be an abuse of the process of the Court and permitting it to use the words of the Supreme Court to

degenerate into a weapon of harassment or prosecution.

Vide L. Muniswamy"s case cited supra.

There is no question here of waiting for evidence or appreciating evidence. The prosecution is ex facie unsustainable and its continuance would be manifestly unjust. The same pre-eminently deserves to be quashed.

19. The original complaint is one and the same against eleven accused person viz., the petitioners and respondents Nos. 2 to 9 herein. The said complaint against respondents 2 to 9 herein being thus based on circumstances similar and identical as against the petitioners herein, it would not be just to permit the same to proceed against the said respondents even while dismissing the same as against the petitioners. The impugned process deserves to be quashed as a whole.

20. In the result, this petition succeeds and the same is allowed. The impugned order is set aside and quashed, and the complaint in question is dismissed.

21. Rule earlier issued on this petition is made absolute.

22. Miss Samant prays for leave to appeal to the Supreme Court. Scope and extent of section 482 of the Code of Criminal Procedure already stands discussed and decided by the Supreme Court in its several rulings. There is also no question of any public importance nor any undecided substantial question of law involved herein. Ends of justice would be better served by discouraging such ill-motivated prosecution. Leave refused.