

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 1725 OF 2014

1. M/s. Kukreja Construction Company
a partnership firm duly registered under
the Indian Partnership Act, 1932,
having its Registered office at
Laalasis Plot No. 2019, 11th Road,
Chembur, Mumbai 400 071,
through its authorized representative
Mr. Rony Jacob Das

... Petitioner.

V/s.

1. State of Maharashtra.
Through the Senior Inspector
of Police Govandi Police Station,
Govandi, Mumbai 400 088.
2. Mr. Nitin Kantilal Gandhi
Age :- 56 Years, Occ. :- Managing,
Director, Utsav Infrastructure Pvt. Ltd.
Office at :- 401, Plot No. 520,
Utsav, 12th Road, Chembur,
Mumbai 400 071.
3. Mrs. Daksha Nitin Gandhi
Age:- 51 Years, Occ. :- Director,
Utsav Infrastructure Pvt. Ltd.
Office at :- 401, Plot No. 520,
Utsav, 12th Road, Chembur,
Mumbai 400 071.
4. Mr. Satish Walmiki
Age :- 33 Years, Occ. :- Supervisor,
Utsav Infrastructure Pvt. Ltd.,
Office at :- 401, Plot No. 520,

Utsav, 12th Road, Chembur,
Mumbai 400 071.

... Respondents

Mr. Vikram Sutaria a/w Mr. Parag Khandhar, Mr. Tapan Rodkar, Mr. Aayan Mohapatra i/by DSK Legal for the Petitioner.

Mr. Mayur Sonavane, APP for the Respondent-State.

Mr. Shyam Kochrekar a/w Mr. Rohan Karande i/by Divekar and Co. for Respondent Nos. 2 and 3.

PSI- Yadav, Govandi Police Station, Mumbai is present.

CORAM : RANJITSINHA RAJA BHONSALE, J.

RESERVED ON : 27th JULY 2026.

PRONOUNCED ON : 12th OCTOBER 2026

JUDGMENT :-

1) By the present petition filed under Article 227 of the Constitution of India, the Petitioner seeks to quash and set aside the Order dated 11th March 2014 passed by the Additional Sessions Judge, Greater Mumbai, in Criminal Revision Application No. 657 of 2012 in C.C. No. 126/SW/2011, whereby the Application filed by Respondent Nos. 2 to 4 (Original Accused Nos. 1 to 3) was partly allowed, inasmuch as the Order of issuance of process dated 27th January 2012 passed by the Additional Chief Metropolitan Magistrate, 11th Court, Kurla, Mumbai, in C.C. No. 126/SW/2011, issuing process against the original accused under Sections 427, 447, 452 read with Section 34 of the Indian Penal Code (IPC), was quashed as against Respondent Nos. 2 and 3 (Original Accused Nos. 1 and 2). The Order of issuance of process passed against Respondent No. 4 (Original Accused No. 3)

was sustained.

2) Heard Mr. Vikram Sutaria, learned Advocate for the Petitioner, Mr. Mayur Sonavane, learned APP for the Respondent-State, and Mr. Shyam Kochrekar, learned Advocate for Respondent Nos. 2 and 3.

3) The complaint proceeds on the following allegations:-

3.1) The complaint is filed by the Petitioner/Original complainant against Respondent Nos. 2 to 4 under Sections 427, 447, 452 and 34 of the IPC. The Petitioner is a partnership firm registered under the Indian Partnership Act, carrying on business as builders and developers in and around Mumbai city.

3.2) Respondent Nos. 2 and 3 (Original Accused Nos. 1 and 2) are the Managing Director and Director of Utsav Infrastructure Pvt. Ltd. Respondent No. 4, (Original Accused No. 3), worked as a Supervisor with Respondent Nos. 2 and 3. There is a civil litigation between the Petitioner and Respondent Nos. 2 and 3, in respect of the land admeasuring about 7579.44 sq. mtrs. bearing CTS Nos. 1813, 1814, 1814/1 to 54, (said property) situated at Village Chembur. The litigation is pending.

3.3) The Petitioner, pursuant to certain negotiations, entered into an agreement for development of the said property. Under the development agreement the Petitioner was put in possession and permitted to develop the said property.

3.4) Some of the co-owners of the said property entered into a

conveyance/agreement with Original Accused Nos. 1 and 2 without canceling the Petitioner's prior development agreement. This was done, by the co-owners, who had already received their share of consideration and with knowledge of the existing development agreement with the Petitioner. The Petitioner filed a criminal complaint against the said co-owners before the Additional Chief Metropolitan Magistrate, 11th Court, Kurla, being C.C. No. 39/SW/2009.

3.5) Since the year 1981, the Petitioner is in possession of the said property.

3.6) On 31st March 2008, Respondent Nos. 2 and 3, along with their representatives, allegedly entered into the said property and attempted to disturb the peaceful possession of the Petitioner. The security guards of the Petitioner stopped/prevented Respondent Nos. 2 and 3. The security guards were abused, threatened and intimidated by Respondent Nos. 2 and 3. The Petitioner registered the grievance with the Chembur Police Station, as well as the concerned higher police authorities. No action was taken in respect of the said illegal acts/offences of Respondent Nos. 2 and 3.

3.7) The Petitioner filed Suit No. 180 of 2008 against Respondent Nos. 2 and 3 and the owner of the said property in this Court, seeking specific performance of the development agreement and for other incidental reliefs. This Court, by Order dated 13th October 2008, passed an Order of injunction and restrained Respondent Nos. 2 and 3 and the co-owners from creating any

third-party rights. Respondent Nos. 2 and 3 filed an Appeal before this Court challenging the Order dated 13th October 2008, but no relief was granted. The said Appeal was dismissed by Order dated 8th February 2010. Respondent Nos. 2 and 3 filed a Special Leave Petition (SLP) No. 1466 of 2010, which is pending. No interim relief has been granted.

3.8) On 21st May 2011, at about 1.00 p.m., Respondent Nos. 2 and 3 sent Respondent No. 4 to the property to take forceful possession. When the security guards of the Petitioner opposed and obstructed Respondent No. 4, they were assaulted and threatened by Respondent No. 4. The boards of the Petitioner were damaged. A non-cognizable complaint No. 1834 of 2011 was filed with the Chembur Police under Section 427 of the IPC by the Security Guard, Mr. Hemant Kilde.

3.9) Again, on 31st May 2011, at about 7 to 7.30 p.m., Respondent Nos. 2 and 3 sent Respondent No. 4 and some unknown persons with gas cutters to the said property. They assaulted and threatened the security guards and damaged the main gate of the property by cutting it with a gas cutter. The angle of the board belonging to the Petitioner was also cut off. Respondent Nos. 2 to 4 have allegedly committed offences punishable under Sections 427, 447, 323, 504, 506 and 34 of the IPC. On this basis, the complaint came to be filed.

4) The learned Magistrate, after perusing the complaint, verification and documents by Order dated 27th January 2012, issued process against all

the accused, i.e., Respondent Nos. 2 to 4, under Sections 427, 447, 452 read with Section 34 of the IPC.

5) The said Order was challenged by Respondent Nos. 2 to 4 by filing Revision Application No. 657 of 2012 before the Sessions Court. The Additional Sessions Judge, Greater Mumbai, after hearing the parties, by Order dated 11th March 2014, partly allowed the Revision Application and quashed the Order of issuance of process as against Respondent Nos. 2 and 3. It is against this Order the present petition has been filed.

6) Mr. Vikram Sutaria, learned Advocate for the Petitioner, submitted that:-

6.1) Respondent No. 4/Accused No. 3 was an employee of Respondent Nos. 2 and 3 and acting at the behest of Respondent Nos. 2 and 3. To that effect, Respondent No. 4 has filed an affidavit in reply to the present petition. That, Accused No. 3 has no personal interest in the the property/ issue. Respondent No. 4 has specifically stated that, he was informed by Respondent No. 2 that he was the owner of the said property. Respondent No. 4 was never informed of any civil suit which was pending between the parties in respect of the said property.

6.2) The attending facts, circumstances and past actions of Respondent Nos. 2 and 3 clearly indicate the common intention between Respondent Nos. 2 to 4, i.e., having a common office address, Respondent Nos. 2 and 3 being the directors of Utsav Infrastructure Pvt. Ltd., and

Respondent No. 4 being their employee. It is not the stand of Respondent Nos. 2 and 3 that, they were not concerned with the property when the alleged incident had taken place. The defence of Respondent Nos. 2 and 3 has to be tested at the trial. The Revisional Court and this Court cannot look into the defence of the accused at the initial stage of the issuance of process.

6.3) At the stage of issuance of process, only a prima facie case is required to be seen. Perusal of the complaint, verification statement and documents would clearly make out a prima facie case against Respondent Nos. 2 to 4. There are sufficient grounds for proceeding against Respondent Nos. 2 to 4. The offences as alleged and for which process has been issued are prima facie made out. Respondent Nos. 2 and 3 have through Respondent No. 4 tried to forcefully take possession of the property and attempted to disturb the peaceful possession of the Petitioner. There is contemporaneous record available, which indicates that, complaints were filed on behalf of the Petitioner by the concerned security guards. There is prima facie material in the form of photographs.

6.4) Reliance was placed on the Judgment in the case of *Kewal Krishnan Vs. Suraj Bhan & Anr.* reported in (1980) Supp. SCC 499 to submit that, at the stage of Sections 203 and 204 of the CrPC, the Court has to only see whether, on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry, there is prima facie evidence in support of the charge.

6.5) Reliance was placed on the Judgment in the case of *Amit Kapoor Vs. Ramesh Chander And Anr.* reported in (2012) 9 SCC 460 and while referring to para 19, it was submitted that at the initial stage, the Court is not concerned with the proof but only with strong suspicion that the accused committed the crime.

6.6) Section 34 of the IPC is clearly applicable to Respondent Nos. 2 to 4, as all of them acted in common intention in an allotment to forcefully dispossess the Petitioner and causing damage. Only because Respondent Nos. 2 and 3 were not physically present at the property, it cannot be said that they did not have common intention. The said findings of the learned Sessions Court are erroneous and untenable.

6.7) Reliance was placed on the Judgment of Hon'ble Supreme Court in the case of *Jaikrishnadas Manohardas Desai v. State of Bombay*, reported in 1960 SCC OnLine SC 59 which states that, participation and not just the presence is required for joint liability under Section 34 of the IPC.

6.8) Reliance was placed on the Judgment of the Hon'ble Supreme Court in the case of *Aizaz v. State of U.P.*, reported in (2008) 12 SCC 198 which held that, liability under 34 of the IPC requires common intention and participation in the offence. Common intention is inferred from the facts, acts, conduct and surrounding circumstances and the totality of these must indicate that all the participants shared the common purpose to commit the crime.

6.9) Reliance was placed on the Judgment in the case of *Virendra*

Singh Vs. State of M.P reported in (2010) 8 SCC 407 to submit that, Section 34 is intended to cover cases where a number of persons act together with a common purpose, thereby making each responsible for the act of the others. The common intention implies a pre-arranged plan and acting in concert. The same can develop on the spot and must be inferred from the facts, circumstances and the conduct of the accused.

6.10) Reliance was placed on the Judgment in the case of *Sanjay Puran Bagde Vs. State of Maharashtra* reported in *(2022) 18 SCC 53* to submit that Section 34 of the IPC creates a deeming fiction and criminal acts committed by one person are deemed to have been committed by other persons, provided there is common intention and meeting of minds.

6.11) At the stage of considering a discharge application, the Court must proceed on the basic assumption that the material brought on record by the prosecution is true. Reliance was placed on the Judgment in the case of *State of Gujarat Vs. Dilipsinh Kishorsinh Rao* reported in *(2023) 17 SCC 688*.

6.12) The offences as alleged under Section 452 for house trespass are clearly made out, as it is alleged that Respondent Nos. 2 and 3 sent Respondent No. 4 and other people armed with gas cutters, prepared to cause hurt and/or assault. The ingredients of Section 452 are clearly made out.

6.13) Reliance was placed on the Judgment in the case of *Pasupuleti Siva Ramakrishna Rao Vs. State of A.P* reported in *(2014) 5 SCC 369* to submit that it is not a requirement of Section 452 of the IPC that the “house”

is to be a private residence. The intention of the section is to protect any house (including an office) from trespass when the intruder has prepared to cause hurt or put the victim in fear.

7) Mr. Shyam Kocharekar, learned Advocate appearing for the Respondent Nos. 2 and 3 submitted that :-

7.1) Perusal of the complaint does not make out any case against Respondent Nos. 2 and 3 for having committed offences under Sections 427, 447, 452 read with Section 34 of the IPC. There are no allegations against Respondent Nos. 2 and 3.

7.2) The specific allegation of the Petitioner is that on 31st May 2011, the Respondent Nos. 2 and 3 sent Respondent No. 4 along with some unknown persons with gas cutters to the said property, that they assaulted and threatened the security guard and damaged the gate with the help of the gas cutter. This was done with an intention to take forceful possession. These are the only allegations, which one finds in paragraphs 9 and 10, as against Respondent Nos. 2 and 3 in respect of the said alleged incident.

7.3) There is no allegation of common intention or meeting of minds. The essential requirements to attract the provisions of Section 34 of the IPC and charge Respondent Nos. 2 and 3 with joint liability are not even pleaded. The only allegation is that, Respondent Nos. 2 and 3 are alleged to have sent Respondent No. 4 to the said property in question. There is no allegation of meeting of minds or any allegation of acting in concert or acting with

common intention.

7.4) It is an admitted position that Respondent Nos. 2 and 3 were not present at the spot. It is not even the allegation that Respondent Nos. 2 and 3 were present at the spot.

7.5) Reliance was placed on the Judgment of the Hon'ble Supreme Court in the case of *Shreekantiah Ramayya Munipalli Vs. State of Bombay* reported in (1954) 2 SCC 992 to submit that the presence of Respondent Nos. 2 and 3 is required. The Sessions Court correctly held that the presence of some overt act at the time of the offence is necessary to attract the provisions of Section 34 of the IPC. Considering the offences alleged, the physical presence of the Respondent Nos. 2 and 3 is very much essential. The Order of the Revisional Court is a reasoned order and deals with the illegality and impropriety of the Order of issuance of process.

8) Mr. Mayur Sonavane, learned APP for the State, adopted the arguments advanced by Mr. Vikram Sutaria, learned advocate for the Petitioner.

9) Perused the entire record. Perusal of the complaint would indicate that, the allegations against Respondent Nos. 2 and 3 are that Respondent No. 4 was sent at the instance and on the instructions of Respondent Nos. 2 and 3. It is not the case of the Petitioner that, Respondent Nos. 2 and 3 were present at the spot. I have noted that there is not even a whisper in respect of the alleged common intention or meeting of minds in the complaint. There is no

pleading and/or averment made out in the complaint in that regard.

10) The Order of issuance of process was under Sections 427, 447, 452 and 34 of the IPC. The said Order was challenged by Respondent Nos. 2 to 4 by filing a Revision Application. The Sessions Court, in the Revision Application held that, Respondent Nos. 2 and 3 were admittedly not present when the alleged incidents on 21st May 2011 and 31st May 2011 occurred. The order records that, there is only a vague statement that, Respondent Nos. 2 and 3 sent Respondent No. 4 and some other persons. It further observes that, it is not clear from the complaint as to how the Petitioner learnt that Respondent No. 4 was sent by Respondent Nos. 2 and 3. There is no pleading or averment in that regard.

11) I have also noted that, the learned Sessions Judge has refereed and relied upon the Judgment of the Hon'ble Supreme Court in the case of *Aizaz and Ors. Vs. State of U.P. (Supra)* and concluded that, after going through the contents of paragraphs 9 and 10 of the complaint, it is difficult to hold that the provisions of Section 34 of the IPC are attracted in the peculiar facts of the present case. Perusal of the record would indicate that, there are no specific allegations as to the manner in which the pre-arranged plan was prepared and how Respondent Nos. 2 and 3 participated in the commission of the offence. There is not pleading or averment on prior meeting of minds or acting in concert. The facts as pleaded in the complaint do not contain any averment in respect of Section 34 of the IPC. There are no pleadings to draw

an inference.

12) The complaint refers to an incident of an alleged attempt made to enter into the property on 31st March 2008 by Respondent Nos. 2 and 3 along with their representatives, for which action was taken by the Petitioner by filing a NC complaint with the Chembur Police Station as well as the DCP/Commissioner of Police. The said averment pertains to a different and distinct incident of 2008. Only because a past incident is referred to it cannot be considered for a purpose to decide if an offence has been made out in another distinct alleged incident of 31st May 2011.

13) Considering the law as laid down by the Hon'ble Supreme Court, I am of the view that, it is necessary to consider the facts and circumstances of each case in totality to see if the common intention can be gathered therefrom. It is also necessary to see the nature of the basic offence which has been alleged to have been committed and to see if the said offence is even made out.

14) As far as Section 34 of the IPC is concerned, it is clear that it is not necessary that, in all circumstances and in all cases, the presence of the accused is necessary at the spot of the incident. The requirement of the presence of the accused at the spot of the incident or the consequences of his absence would depend on the facts of each case and more particularly on the nature of the offences alleged in the first place and the manner in which the act/ offence was carried out. It is well settled that, participation need not, in

all cases, be by physical presence or by an overt act. It entirely depends on the nature of the offence alleged. Generally, offences involving physical violence or a positive overt act require presence at the scene of the offence. Physical presence is a must but, the same cannot be considered necessary in respect of all other offences when the offence consists of diverse and different acts which may be done by one or all or by any of them at different times and places and where the allegation is that of a conspiracy i.e. Section 120B of the IPC is invoked.

15) It cannot, as a universal rule be said that, physical presence at the scene of the offence by the offender is a must to invoke the provisions of Section 34 of the IPC and render a particular person liable under Section 34 of the IPC. It is also equally necessary that, before a person can be held liable for the acts done by others under the provisions of Section 34, it is necessary and of critical importance that it is established that there was a common intention or a pre-arranged plan between two or more persons, there was a meeting of minds and acting in concert, and that the persons participated in some manner in the act which constitutes an offence. The essence is that common intention and participation must both be present and it is necessary that the common intention comes into existence before the act was committed. All of this and whether Section 34 of IPC is even attracted or made out would depend on the nature of the offence alleged. It is of the utmost importance that the aforesaid facts are pleaded in a proper an appropriate manner. This is

a very important aspect. This Court while exercising its powers under Section 482 ought not to interfere with the order of the Court unless the conclusions are completely erroneous, unsustainable and/ or there is a perverse illegality. On the other hand if no prima facie case is made out or when the basic offence which is alleged to have been committed is not made out, this Court while exercising the power under Section 482 CrPC can interfere to prevent the abuse of the process of law or to secure the end of justice.

16) The inference of common intention is to be drawn from the facts and circumstances of the case. Section 34 of the IPC does not create an offence, it only states a principle to joint liability. To make out a case under Section 34 of the IPC, it is necessary and of critical importance that the principal offence is prima facie made out, based on legal material/evidence, and is pleaded and averred that there was a plan or meeting of minds of all the accused persons to commit the offence for which they are charged. In offences involving physical violence, or a specific physical overt act the physical presence is necessary. In short, if physical presence is required or not is to be seen and gathered from the nature of the offence alleged and the ingredients which are required to make out the said offence. I have noted that in the present case the offences are of criminal trespass and house trespass in which the physical presence is absolutely necessary. Admittedly, in the present case Respondent Nos. 2 and 3 are not physically present. Further, I find that there is no pleading in respect of Section 34 of IPC.

17) The case of *Shreekantiah Ramayya Munipalli Vs. State of Bombay (Supra)*, has been discussed and explained by the Hon'ble Supreme Court in the case of *Jaikrishnadas Manohardas Desai And Anr. Vs. State of Bombay (Supra)*, wherein, in para 9, the Hon'ble Supreme Court has held that the ratio in the case of *Shreekantiah Ramayya Munipalli (Supra)* is not universally applicable to all instances of Section 34. It is not that the view taken by the Hon'ble Supreme Court in the case of *Shreekantiah Ramayya Munipalli (Supra)* has not been overruled.

18) The Hon'ble Supreme Court, in the case of *Sanjay Puran Bagde Vs. State of Maharashtra (Supra)*, has observed that Section 34 of the IPC creates a deeming fiction by infusing the criminal act committed by one into others, provided that there is a prior meeting of minds and acting in concert for a common intention. The common intention is the basic foundation of Section 34 of the IPC. It is therefore essential and of extreme importance that the same is pleaded and averred in a proper and sufficient manner. In the present case, it is the case of the Petitioner that Respondent Nos. 2 and 3 have sent Respondent No. 4 and others to the said property. The offence as alleged is that of mischief, criminal trespass and house trespass. Perusal of the complaint, prima facie indicates that there is no pleading or averment as would be required. To commit an offence of criminal trespass or house trespass physical presence would be a must. In the present case admittedly there is no pleading or averment to that effect. In my considered view, the

learned Sessions Court has correctly pointed out and stressed on the fact that, it is not at all mentioned/ pleaded as to how and on what basis is it said that the Accused No. 1 and 2 sent Accused No. 3. In my considered opinion, in the peculiar facts of the present case, the Petitioner has failed to make out any prima facie case against Respondent Nos. 2 and 3. In the present case no prima facie case is made out in respect of the primary offence alleged and also there is no pleading that the parties were acting with a common intention.

19) In view of the aforesaid facts and circumstances, and after considering the law as laid down by the Hon'ble Supreme Court, I am of the considered view that the Petitioner has not made out a case for interfering with the impugned order. Hence, the Petition is dismissed.

(RANJITSINHA RAJA BHONSALE, J.)

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