

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 5TH DAY OF FEBRUARY 2015/16TH MAGHA, 1936

Cr1.MC.No. 2734 of 2013 ()

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C.C.NO.393/2013 OF J.F.C.M, MATTANNUR

PETITIONERS/ACCUSED :

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1. KANHOLI MUKUNDAN NAMBIAR, AGED 56 YEARS,  
S/O. KUNHIRAMAN NAMBIAR, VISWAM, KOLARI P.O.  
MATTANNUR.

2. SAROJINI,  
W/O. KANHOLI MUKUNDAN NAMBIAR, RESIDING AT VISWAM  
KOLARI P.O., MATTANNUR.

BY ADV. SRI.CIBI THOMAS

RESPONDENT/COMPLAINANT/STATE :

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1. K.V. SATISH NAMBIAR, AGED 40 YEARS,  
S/O. LATE K.V.NARAYANAN NAMBIAR, THADATHIL VEEDU,  
KOLARI AMSOM, PARIYARAM DESOM, KOLARI P.O.  
MATTANNUR, KANNUR DISTRICT-670 702.

2. STATE  
REP.BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA  
ERNAKULAM-682 031.

R1 BY ADV. SRI.N.UNNIKRISHNAN  
R2 BY PUBLIC PROSECUTOR SRI. ROY THOMAS

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON  
05-02-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

APPENDIX

PETITIONERS' ANNEXURES:

ANNEXURE I : COPY OF THE PRIVATE COMPLAINT FILED BY THE RESPONDENT AS CMP 6113/2012 BEFORE THE JUDICIAL 1ST CLASS MAGISTRATE, MATTANNUR.

ANNEXURE II: COPY OF THE SWORN STATEMENT OF THE RESPONDENT NO.I.

ANNEXURE III: COPY OF THE PLAINT IN OS 265/2012 PENDING BEFORE THE SUB COURT, THALASSERY.

ANNEXURE IV : COPY OF THE COMPLAINT FILED BY THE 1ST RESPONDENT DTD.17.9.2012.

ANNEXURE V : COPY OF THE COMMUNICATION ISSUED BY THE KERALA STATE POLICE CHIEF.

ANNEXURE VI: COPY OF THE REPORT SUBMITTED BY THE SUB INSPECTOR OF POLICE, MATTANNUR POLICE STATION.

RESPONDENTS' ANNEXURES:

ANNEXURE -R1(a) TRUE COPY OF THE FIR NO.20/2013 DATED 12.1.2013 OF THE PET BASHEERBAD POLICE STATION, ANDHRA PRADESH STATE.

ANNEXURE -R1(b) TRUE COPY OF REPORT DATED 15.6.2013 SUBMITTED BY SHRI.NELAWFER NAZER, ADVOCATE COMMISSIONER.

ANNEXURE -R1(C ) TRUE COPY OF INTERIM REPORT DATED 27.3.2014 OF ADVOCATE COMMISSIONER, SHRI. SONI P.V.

/TRUE COPY/  
P.S TO JUDGE

**K. RAMAKRISHNAN, J.**

.....  
Crl.M.C.No.2734 of 2013  
.....

Dated this the 5<sup>th</sup> day of February, 2015.

**O R D E R**

The accused in C.C.No.393/2013 on the file of the Judicial First Class Magistrate Court, Mattannur have filed this petition for quashing the proceedings under section 482 of the Code of Criminal Procedure (hereinafter referred to as 'the Code').

2. It is alleged in the petition that the petitioners were arrayed as accused in C.C.No.393/2013 on the file of the Judicial First Class Magistrate Court, Mattannur on the basis of Annexure -I private complaint filed by the first respondent as complainant alleging offences under sections 447,353, 193, 201 and 506 of the Indian Penal Code. After taking the sworn statement, the learned Magistrate has taken cognizance of the case as C.C.No.393/2013 only for the offences under sections 447 and 506 (1) of the Indian Penal Code. The first respondent has already filed Annexure-III suit as O.S.No.265/2012 before the Sub Court, Thalassery for fixation of boundary, injunction and recovery of possession and

that is pending. Earlier the petitioners filed Annexure-IV complaint dated 17.9.2012 before the Mattannur police station with a copy to the Director General of Police, Superintendent of Police, Chief Minister of Kerala, President of India, Prime Minister of India and National Human Rights Commission and on receipt of Annexure-IV complainant, the Director General of Police directed the subordinate officers to conduct an enquiry regarding the same and Annexure-VI report was filed stating that the complaint was baseless and filed with ulterior motive. The allegation that the petitioners have encroached the property etc is not correct. Further, even assuming that the entire allegations in the the complaint are accepted, the documents produced will go to show that the petitioners are in possession of the property and whether they have got right to possess the property etc is a matter to be considered by the civil court in the civil suit filed by the first respondent and it is purely of civil nature and no criminal offence is attracted and allowing the case to continue will amount to an abuse of process of court. So the petitioners have no other remedy except to approach this Court seeking the following reliefs:

“For these and other grounds to be urged at the

time of hearing, it is most humbly prayed that this Hon'ble Court may be pleased to quash Annexure-I complaint and all further proceedings pursuant to the same in C.C.393/2013 on the file of the Judicial Ist Class Magistrate Court, Mattannur, in the interest of justice."

3. The first respondent appeared and filed counter affidavit along with certain documents and also filed Crl.M.A.No.1027/2015 to receive additional documents and that application is allowed and the same is also received and permitted to mark as Ext.R1(b) and (C ).

4. Heard the counsel for the petitioners, the 1<sup>st</sup> respondent and the Public Prosecutor.

5. The counsel for the petitioners submitted that it will be seen from the allegations in the complaint itself that the alleged trespass was completed long ago and that was the reason why the complainant filed a suit for fixation of boundary, recovery of possession and also prohibitory injunction. If the petitioners are in possession of the property believing that it is their property, there is no question of criminal trespass arises and any act done in the property on such belief will not amount to criminal act so as to attract the offence under section 447 of the Indian Penal Code. Further the allegation regarding

threatening is also not properly explained and there is no consistency in the allegations made. If a matter has to be decided on the basis of evidence adduced by the civil court, then proceeding with criminal action is nothing but an abuse of process of court and this Court has power to quash the same under section 482 of the Code in such cases and criminal action cannot be used as a tool to pressurize a civil action to be settled.

6. On the other hand, the learned counsel for the first respondent submitted that the allegation of trespass was not of old one but a new one when he came to his native place and in his presence. Whether the petitioners have got right to possess or not is to be considered on the basis of evidence and whether the act of the petitioners is bona fide one or mala fide one is also to be considered by the criminal court on the basis of evidence. Further, the allegation will go to show that the petitioners trespassed into the property and threatened the complainant to withdraw the suit with dire consequences. All these things will go to show that the offences under sections 447 and 506 (1) of the Indian Penal Code have been made out.

7. Heard the Public Prosecutor also.

8. It is an admitted fact that the petitioners and the first respondent are having property adjacent to each other. It is also an admitted fact that Annexure-III civil suit has been filed by the first respondent herein against the first petitioner claiming several reliefs including fixation of boundary, injunction and recovery of possession of the property, if any found to be in his possession. The allegation of the complainant in the complaint was that when he came from Hyderabad, where he is residing, to the property which he obtained from his ancestors and he wanted to make construction in the property, the petitioners have objected. So he wanted the assistance of the Village Officer to measure the property and for that purpose, on 24.12.2011 he made an application to the Village Officer for measuring and demarcating the property and on 22.6.2012, the Village Officer came to inspect and measure the property but it was prevented by the first petitioner and his men using criminal force without assigning any lawful reason. So the officials were constrained to return back without measuring the property. Thereafter the petitioners criminally trespassed into the property and constructed a compound wall with an oblique

motive to create an artificial boundary in the property belonging to the complainant by encroaching into the eastern portion. They had attempted to make a false claim over the eastern side of the plaint schedule property and made the officials to give a false report. The complainant obtained an injunction order by filing civil suit and while the injunction order was pending, both the petitioners along with unknown persons came and threatened him to withdraw his suit, otherwise he will have to face dire consequences including loss of his life and that prompted him to file the complaint. The learned Magistrate took sworn statement, which is produced as Annexure-II along with this petition. He had reiterated the same allegations made in Annexure-I complaint in his sworn statement also. It was on that basis that the learned Magistrate has taken cognizance of the case for the offences under sections 447 and 506 (1) of the Indian Penal Code.

9. There is no dispute regarding the propositions laid down by the Apex Court and this Court in catena of decisions relied on by the counsel for both sides namely **Daljith Singh Gujral and others v. Jagjit Singh Arora and**

**others** (2014 (12) SCC 198), **Vijayander Kumar and others v. Sate of Rajasthan and another** (2014 (3) SCC 389), **N. Soundaram v. P.K. Pounraj and another** (2014 (10) SCC 616), **Rishipal Singh v. State of Uttar Pradesh and another** (2014 (7) SCC 215), **Homi Rajvansh v. State of Maharashtra and others** (2014 (12) SCC 556), **Madhavrao Jiwaji Rao Scindia and another v.Sambhajirao Chandrojirao Angre and others** (AIR 1988 SC 709), **Chandran Ratnaswami v. K.C. Palanisami and others** and connected cases (2013 (6) SCC 740), **V.Y. Jose and another v. State of Gujarat and another** (2009 (3) SCC 78), **S.N. Palanitkar and others v, State of Bihar and another** (AIR 2001 SC 2960), **Rajan Babu P.T and another v. Anitha Chandra Babu and another** (2011 (3) KHC 320), **Rajinder and others v. State of Haryana** (1995 (5) SCC 187), **Smt. Mathri and others v. The State of Punjab** (AIR 1964 SC 986), **Smt. Kanwal Sood v. Nawal Kishore and another** (AIR 1983 SC 159), **Kunjan Ammini v. State of Kerala** (1967 KLT 621), **Krishnan Moothan v. V.K.A. Krishnankutty Moothan** (1960 KLT 556), **Paramjeet Batra v. State of Uttarakhand and others** (2012 (12) SCALE 688),

**Maung Chan Tha and others v. Emperor** (AIR 1936 Rangoon 116) and **Gorige Pentaiah v. State of Andhra Pradesh and others** (2008 (12) SCC 531) .

10. In most of the cases where the Hon'ble Supreme Court has considered the power of the High Court under section 482 of the Code, it has been observed that if the allegations in the complaint are of purely civil nature and a criminal complaint has been filed only to preaurise the other party to yield for the civil action, then such an attitude of the person should not be encouraged and in such cases, power under section 482 of the Code can be invoked to quash the proceedings. It is also observed by the Hon'ble Supreme Court that where on the basis of allegations of both criminal and civil actions were possible and merely because civil remedy is available is not a ground to stifle the criminal prosecution if on the basis of the allegations, criminal offence is also made out. It is also settled law by the Supreme Court that in cases where the right of the parties has to be decided on the basis of the evidence and complicate question of law and facts are involved to be considered, then it is not a fit case to consider invoking the power under section 482 of the Code to

quash the proceedings. Some of the decisions relied on by the counsel for the petitioners came to the conclusion as to whether the offences under sections 447 and 506 (1) of the Indian Penal Code were committed or not are all cases where decision was taken by the trial court and conviction was passed on the basis of evidence, which were challenged and in such circumstances the courts have to consider whether such offence has been made out or not on the basis of evidence. It is also settled law that, if a bonafide prosecution has been filed by person that should not be stalled at the initial stage itself invoking the power under section 482 of the Code. Most of the documents relied on by the petitioners and the first respondent are all matters to be considered by the trial court to come to a conclusion as to whether trespass alleged was a completed trespass long ago or it is a recent trespass which prompted the complainant to file the complaint. Further, on going through the complaint, it cannot be now said that the allegations are not sufficient to attract the offences under section 447 and 506 (1) of the Indian Penal Code. Whether allegations are sufficient to attract the offence or it is sufficient for conviction etc are all matters to be considered by the court

on the basis of evidence to be adduced by the parties. Further, colourable right over a property claimed as defence is a matter to be alleged and proved by the defence at the time of trial and it is for the court to appreciate evidence and come to the conclusion whether colourable claim by the defence is probable and bonafide or not is a matter to be proved which cannot be gone into by this Court while considering the petition under section 482 of the Code. So considering the above circumstances and also on the basis of the evidence available on record, it cannot be said that the Magistrate has committed any illegality in taking cognizance of the case only for the offences punishable under sections 447 and 506 (1) of the Indian Penal Code though the other offences were also alleged by the complainant in the complaint and this Court feels that it is not a fit case where power under section 482 has to be invoked to quash the proceedings as allegations and counter allegations show that it is a matter to be gone into by the court on the basis of evidence in which case the remedy of the petitioners to face trial and not case of quashing under section 482 of the Code. So the petitioners are not entitled to the relief of quashing the proceedings invoking the power

under section 482 of the Code and the prayer is liable to be rejected. However, the observations, if any, made by this Court are only made for the purpose of considering the question as to whether there is any prima facie case made out for proceeding with the complaint for issuing process and not for any other purpose. The trial court is entitled to consider the evidence to be adduced later by both the parties during the course of trial and take appropriate decision on merit in accordance with law. Considering the fact that identity of the petitioners is not in dispute, personal presence of the petitioners can be exempted by the court below, if they file an application for that purpose and if such an application is filed, then the court below is directed to pass appropriate orders on that application in accordance with law.

In the result, this petition is dismissed with the above observations and directions. Interim order of stay granted as per Crl.M.A.5388/2014 is vacated and that application is dismissed.

Office is directed to communicate this order to the concerned court immediately.

**Sd/-**  
**K. RAMAKRISHNAN, JUDGE.**

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/true copy/

P.S to Judge