

**SIN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 1138 OF 2005

1. Keshav Narher Wani,
age 75 yrs, Occ. Agriculturist
2. Govind Keshav Wani,
age 45 yrs, Occ. Agriculturist
3. Gopal Keshav Wani,
age 35 yrs, Occ. Agriculturist
4. Nandu Dattu Wani,
age 35 yrs, Occ. Agriculturist
5. Punju Eknath Wani,
age 35 yrs, Occ. Agriculturist
6. Nana Harchand Wagh,
age 35 years, Occ. Agriculturist
7. Dilip Nago Kutumble,
age 40 yrs, Occ. Agriculturist
8. Vikram Mahadu Mahajan,
age 45 yrs, Occ. Agriculturist ...Petitioners...

VERSUS

1. Motilal Ragho Sutar,
age 52 yrs, Occ. Carpenter and welding work,
R/o Bahal, Tq. Chalisgaon,
District Jalgaon.
2. The State of Maharashtra. ...Respondents...

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Advocate for Applicant : Mr L V Sangit
Advocate for Respondent 1 : Mr R S Shinde h/f N L
Choudhari

APP for Respondent 2 : Mr A R Kale

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CORAM : V.K. JADHAV, J.

Dated: November 18, 2016

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ORAL JUDGMENT :-

1. Being aggrieved by the order dated 21.3.2005 passed by the Judicial Magistrate First Class, Chalisgaon, District Jalgaon in RCC No.14/2005 thereby issuing process against the applicant for the offence punishable u/s 379, 448, 427 323, 504, 506 read with section 34 of the IPC, the original accused persons approached to this Court by filing present criminal application.

2. Brief facts, giving rise to the present application are as follows :-

Respondent no.1 has approached to the Magistrate, Chalisgaon, District Jalgaon and filed a complaint against the applicants for having committed offence as aforesaid. Learned Judicial Magistrate First Class, Chalisgaon after going through the complaint and verification statement sent the matter to concerned

police station for proper investigation as provided under section 156 (3) of Cr.P.C. Accordingly, the concerned police station has submitted two reports firstly on 10.2.2005 vide Exh.5 and 25.2.2005 vide Exh.7 and submitted before the court that no such incident had taken place as alleged in the complaint. Thereupon, respondent no.1 original complainant has filed an application Exh.6 contending therein that the concerned police station has submitted a false report and that, as per the allegations made in the complaint process may be issued against the applicants original accused. Learned Magistrate, Chalisgaon by order dated 21.3.2005 allowed said application and accordingly issued process as aforesaid against the applicant accused by order dated 21.3.2005 impugned in the present criminal application.

3. Learned counsel for the applicants submits that, petitioner no.1 is owner of land gat no.57/2 situated within the limits of Grampanchat, Bahal and land is adjacent to the Gavthan land of Grampanchayat. Since the land owned and possessed by petitioner no.1 is

adjacent to the Gavthan land many persons though erected their small shops for business purpose in the Gavthan area, some of them also made encroachment on the land owned and possessed by petitioner no.1. Even petitioner no.1 has measured the land gat no.57/2 and found that respondent no.1 complainant has encroached to some extent upon his land. Consequently, petitioner no.1 has submitted an application before the Grampanchayat for removal of said encroachment for the reason that village Grampanchayat, Bahal was recovering rent from the said persons occupying Gavthan area for their small business. Village Grampanchayat in its meeting dated 28.6.2004 discussed on the application submitted by the petitioner no.1 and further directed the petitioner that village Grampanchayat has no objection if petitioner removed said encroachment on his own. Learned counsel submits that, accordingly the petitioner no.1 has approached the Sub Divisional Officer, Pachora requesting therein removal of the encroachment. Sub Divisional Officer, Pachora has conducted inquiry through the Tahsildar, Chalisgaon

and directed the petitioner no.1 that since land on which the encroachment has been made is privately owned by him, petitioner no.1 may remove said encroachment on his own expenses as directed to him by the village Grampanchayat by maintaining law and order situation in the village. Sub Divisional Officer, Pachora has passed said order on 11.1.2005. Accordingly, the petitioner has approached the concerned police station and sought police protection for removal of the said encroachment and also deposited the fees of Rs.863/- as directed by the said police station. Learned counsel submits that, accordingly petitioner no.1 has removed encroachment in the presence of the police staff by maintaining the law and order situation in the village and thus, police submitted report to the Magistrate in response to the order passed by the Magistrate directing investigation into the matter that no such incident had taken place as alleged in the complaint. Learned counsel submits that, petitioner no.1 alongwith other applicants had taken recourse to all the legal remedies available to him for removal of the encroachment and even though on his own expenses

under the police protection removed the encroachment, respondent no. 1 has filed false complaint by making wild allegations. Learned counsel submits that Magistrate has not accepted the report submitted by the police and further decided to inquire into the allegations himself made in the complaint. However, respondent no.1 has not examined himself before the court nor Magistrate has directed respondent no.1 to examine himself and to examine his witness before the court to consider the allegations made in the complaint to the effect whether a prima facie case is made out for issuance of the process as alleged in the complaint. Learned counsel submits that, for no reason Magistrate has ignored report submitted by the police and issued process against the applicants.

4. Learned counsel for respondent no.1 original complainant submits that at the time of passing an order of issuance of process, presence of the accused persons is not solicited. Consequently, probable defence of the accused cannot be considered. Learned counsel submits that there are allegations made in the

complaint and respondent no.1-complainant was given a short notice of removal of encroachment by the police on the date of incident itself, respondent no.1 went to consult his lawyer. Thus behind his back incident had taken place and therefore he approached the court by filing a private complaint. Learned counsel submits that, considering the verification statement of respondent no.1 original complainant, learned Judicial Magistrate First Class, Chalisgaon has rightly issued process against the applicant. No interference is required. Criminal application is thus liable to be dismissed.

5. On perusal of the record, it appears that, concerned police station has brought to the notice of the court by filing a report that no such incident has taken place as alleged in the complaint still then, Magistrate has ignored said report and allowed the application filed by respondent no.1 original complainant Exh.6. It is a part of record and same is also not disputed that the applicant no.1 had initially approached the concerned Grampanchayat for removal of the encroachment by

filing an application and since village Grampanchayat had directed him to remove the encroachment on his own approached Sub Divisional Officer of the division seeking help for removal of the encroachment made on his property by respondent no.1 original complainant. Even though, Sub Divisional Officer has conducted inquiry through Tahsildar, Sub Divisional Officer has directed the petitioner no.1 to remove encroachment on his own under his own expenses by maintaining law and order situation. It is also a part of record that, petitioner no.1 has thereafter approached the concerned police station and deposited charges for availing police protection. It is thus clear that, applicant no.1 has taken recourse to all legal remedies available to him. It is clearly mentioned in the police report that police staff was present between 11 a.m. to 8 p.m. in the village and no such incident as alleged in the complaint had taken place. There was an apprehension in the mind of the applicant no.1 that respondent no.1 original complainant may file complaint against him for removal of encroachment and therefore he has taken all care by approaching village Grampanchayat and Sub Divisional

Office and finally concerned police station.

6. Respondent no.1 original complainant has filed an application Exh.6 after police submitted negative report in the court requesting therein to issue process against applicants accused. However, the learned Magistrate by ignoring said report decided to conduct inquiry by himself into the allegations made in the complaint. Even, the learned Magistrate had called upon the learned APP to submit the say and the learned APP before the Trial court submitted that State has no objection if the chance is given to the complainant for adducing the evidence. Even then, respondent no.1-original complainant has not examined himself nor examined any witnesses. Learned Magistrate while conducting inquiry into the allegations of the complaint has not directed respondent no.1-complainant to adduce evidence in support of the allegations.

7. In view of the aforesaid admitted facts and said approach of the Magistrate, I find that, order of issuance of process only on the basis of application Exh.6 is

improper, incorrect and illegal.

8. On the basis of admitted record as discussed in the foregoing paragraph no purpose would be served in remanding the matter directing the Magistrate to record the statement of the complainant and his witnesses, if any. In view of the above, I proceed to pass the following order. Hence, following order.

ORDER

1. Criminal application is hereby allowed in terms of prayer clause 'A'.
2. Rule is made absolute in above terms.
3. Criminal application accordingly disposed off.

(V.K. JADHAV, J.)

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