

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

CRIMINAL WRIT PETITION NO. 1195 OF 2015

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1. Sd. Abbas Hussain S/o Ahmad
Hussain, Age: 41 years, Occu: Legal
Practitioner, R/o. S.V. Patel Road,
Purna, Taluka Purna, Dist. Parbhani.
2. Sd. Ahamad Hussain @ Mannan S/o
Ali Hussain, Age: 83 years, Occu: Nil,
R/o: As above.
3. Sd. Aayub S/o Sd. Akhtar,
Age: 39 years, Occu: Business,
R/o. Saha Bazaar, Aurangabad,
Taluka & District: Aurangabad.
4. Sk. Azahar S/o Sk. Kadar,
Age: 31 years, Occu: Business,
R/o: Shaha Bazaar, Aurangabad.

...PETITIONERS
(Orig. Accused)

VERSUS

1. The State of Maharashtra,
Through Police Station, Purna.
2. Sk. Mahboob S/o Majid Qureshi,
Age: 62 years, Occu: Agriculture,
R/o. Kureshi Mohalla, Tq. Purna,
Dist. Parbhani.

...RESPONDENTS

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Advocate for Petitioners : Mr S G Chapalgaonkar

APP for Respondent No.1 : Mr P G Borade

Advocate for Respondent No. 2 : Mr M V Ghatge

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CORAM : V.K. JADHAV, J.**Dated : August 29, 2016**

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PER COURT :-

1. The petitioners herein by filing the present writ petition are challenging the legality, propriety and correctness of the order passed by the Extra Joint Adhoc Additional Sessions Judge, Parbhani, dated 27.7.2015 in Criminal Revision Application No.125/2012 as well as the order passed by the Judicial Magistrate First Class, Purna below Exh.34 in RCC No.118/2011 thereby rejecting the prayers of the petitioners to discharge them for the offences punishable 143, 147, 148, 149, 506 of Indian Penal Code and section 3, 25 and 27 of the Arms Act.

2. Brief facts, giving rise to the present writ petition, are as under :-

a] On the basis of the complaint lodged by one sk. Mehboob s/o. of Majid Qureshi dated 28.7.2010 crime no. 133 of 2010 came to be registered at Police Station, Purna, District Parbhani for the aforesaid offences. It has alleged in the complaint that, the complainant

alongwith some eight persons as detailed in the complaint had purchased the land Sy.No.149 admeasuring 8H 26 R from owner Gangabai d/o Deorao Kadam under the registered sale deed dated 20.7.2010 for a consideration of Rs.81.00 lacs and accordingly the possession was delivered to them on the same day. On 28.7.2010 at about 3.40 to 4.00 p.m. the complainant alongwith the said persons sat in the said land gat no.149 and at that time, the accused no.1 Abbas Hussain came there in a red colour car. He was accompanied by his brother-in-law and his father Sayed Ahmed Hussain and some unknown persons. It has further alleged in the complaint that accused no.1 Advocate Abbas Hussain was holding a revolver in his right hand and a 12 bore gun in his left hand. Furthermore, his brother-in-law was holding a Air Gun in his hand. The accused persons asked the complainant and his associates to leave the field at once and after saying so the accused no.1 Advocate Abbas Hussain opened two fire of revolver in the air. At that time, the other persons accompanying the Abbas were abusing them. Since the complainant and his associates

did not leave the said land, accused no.1 Advocate Abbas Hussain again fired two rounds of revolver in the air. Shortly, thereafter the Police arrived on the spot and took away the accused persons alongwith the arms. After due investigation, Police Station Purna has submitted the Charge sheet against in all four accused persons for the aforesaid offences and accordingly R.C.C No.118/2011 is registered and numbered in the Court of Judicial Magistrate First Class, Purna. The petitioner-accused persons have filed an application Exh.34 seeking discharge before the Magistrate and the learned Magistrate First Class, Purna District Parbhani by its impugned order dated 28.11.2012 below Exh.34 in RCC No.118/2011 rejected the said application. Being aggrieved by the same, the petitioner accused persons preferred Criminal Revision Application No.125 of 2012 and the learned Extra Joint Ad-hoc Additional Sessions Judge, Parbhani, by order dated 27.7.2015 in Cri. Rev. Application No.125/2012 dismissed the revision, however, directed the Magistrate to hear the prosecution as well as defence on the point of framing of the charge and having due regard to the same in the light of the

material available in the charge sheet frame the charge and proceed with the Trial. Hence, this Writ Petition.

3. The learned for the petitioner submits that, the petitioner no.2 and his wife are declared as a protected tenants in respect of the land Sy.No. 149 situated at Purna District Parbhani to the extent of 8H 26R and the certificate of ownership u/s 38-E of the Hyderabad Tenancy and Agricultural lands Act, 1950 was issued, and accordingly the mutation entry no.2226 dated 23.10.1999 also sanctioned. They are cultivating the land in the capacity of protected tenants since more than 60 years and they are enjoying the property as owners after declaration of ownership. According to one Gangabai, one Bhimji Kadam was the original owner of the land Sy.No.149 and he was her grandfather. There was some contract of original owner Bhimji with one Balaprasad s/o Ramprasad and under said contract land sy. Ono.149 alongwith other lands were given to him. Thereafter, said Balaprasad mortgaged said lands in favour of one Sundermal Sagunmal Bankers of Hyderabad for the period of 50 years and the said period

was expired in the year 1989. Said Balaprasad had given the said land to one Ali Hasan for cultivation. Accordingly, said Ali Hasan's name is recorded in the cultivation column and later on petitioner no.1 and his wife who are the legal heirs of Ali Hasan declared as a tenants as aforesaid. The said Gangabai initiated the proceedings before the Deputy Collector, Parbhani for recovery of possession and redemption of mortgage. The Deputy Collector by order dated 6.4.2010 allowed the application of defendant no.1 Gangabai and directed to restore her possession in respect of said land Sy. No.149. The petitioner No.1 preferred an appeal before the Maharashtra Revenue Tribunal Aurangabad, and some interim orders also came to be passed in favour of petitioner no.1. Even, at later stage, the M.R.T Aurangabad also directed the parties to maintain status-quo. Meanwhile, the said Gangabai sold the said land to the present complainant and his associates under the registered sale deed as detailed in the foregoing paragraphs. Even though the matter was subjudiced and valuable rights of the petitioner were not cancelled by any competent court, the said Gangabai

illegally sold the land Sy. No.149 to the said persons. The petitioner no.1 alongwith his wife thus instituted a R.C.S.No.82/2010 wherein, the civil Court has protected his possession by restraining the defendants including the complainants and his associates from interfering with or obstructing the possession of petitioner no.1 or his wife over the suit property till the final disposal of the suit. Furthermore, the appeal preferred by the petitioner no.1 and his wife and others before the M.R.T. Aurangabad also allowed and the said order passed by the Deputy Collector, Parbhani also quashed and set aside by order dated 22.12.2011. The learned counsel submits that, thus, it is matter of record that the complainant and his associates had illegally entered in Sy.No.149 in violation of the orders passed by the competent courts. The petitioner nos.1 and 2 being the owners in possession of the land sy. no.149 reached the field, and found the illegal interference of the complainant and his associates. The complainant and his associates used the criminal force against them, caused damage to the car, and pelted stones on them. Thus, the petitioner no.1 has filed complaint regarding

the said incident and on the basis of his complaint, Crime No.134/2010 dated 28.7.2010 came to be registered in the same police station and the charge sheet is also filed before the Court which is registered as R.C.C. No.130/2011. The learned counsel submits that, in view of this background the allegations that the petitioner no.1 threatened the complainant and others to leave the field, cannot be said to be an offence. More so, when the petitioner no.1 was required to use the force in private defence of his person and property.

4. The learned counsel submits that, the Crime was registered against four accused persons and, after due investigation the charge-sheet also came to be submitted against the petitioners four in numbers only. In order to attract the provisions of Section 143 of the Indian Penal Code, there must be five or more persons forming an unlawful assembly assembled together with a common unlawful object of using the criminal force. Thus, the petitioners are entitled for discharge for the offence punishable u/s 143, 147 and 149 of the Indian Penal Code. The learned counsel submits that, in the given

set of allegations, the ingredients of Section 506 of the Indian Penal Code also not attracted.

5. The learned counsel submits that, the petitioner no.2 was duly licensed to hold the said arms i.e. revolver and 12 bore guns as per the relevant provisions of the Arms Act 1959. It is also not in dispute that at the time of alleged incident, the accused no.2 who is old aged person accompanied his son i.e. petitioner no.1. The learned counsel submits that, section 25 of the Arms Act provides punishment for violation of the provisions of Arms Act, 1959. The learned counsel submits that in view of provisions of Section 39 of the Arms Act, no prosecution shall be instituted against any person in respect of an offence u/s 3 without previous sanction of the District Magistrate. The learned counsel submits that on perusal of the entire charge sheet, it appears that, no sanction is obtained from the District Magistrate before filing of the charge sheet under the provisions of the Arms Act. The learned counsel submits that, both the courts below have not considered these provisions and rejected the application at Exh.34.

6. The learned counsel for the petitioners in order to substantiate his submissions places his reliance on following judgments :-

- i. Dinesh Ramsevak Prajapati and another Vs. State of Maharashtra reported in [2016 (2) ABR (Cri) 355].
- iii. Rajan and ors. Vs. State of U.P. Reported in [2008 Cri.L.J. (NOC) 454 (ALL).
- iii. State of H.P. Vs. Tape Ram and another reported in [2011 Cri.L.J. 919 (H.P).
- iv. Ashok Kukar S/o Chhakori Pathak and anr. Vs. State of U.P. Reported in [2013 (3) ALJ (NOC) 199 (ALL).
- v. Kamalsingh s/o Matasingh Shiv Vs. State of Maharashtra reported in [2005 (1) Mh.L.J.].
- vi. Dilip Madhukar Jadhav Vs. State of Maharashtra and another reported in [2011 (3) ABR (NOC) 299 (BOM).

7. The learned counsel for respondent no.2 original complainant submits that, there are allegations in the complaint to the effect that, the petitioner no.1 alongwith his father and brother in law i.e. petitioner nos.2 and 3 respectively alongwith some unknown persons entered in the land sy. no.149 and accordingly

the incident had taken place as detailed in the complaint. The essential element is whether the number of persons who took part in the crime was five or more than five and the identity of the persons who were members thereof relates to the determination of the guilt of the individual accused. It is competent to a court to come to a conclusion that, there was an unlawful assembly of five or more persons even if less than that number have been identified and convicted. The learned counsel submits that, the Act of the petitioner No.1 holding a revolver in the right hand and 12 bore gun in the left hand at the time of alleged incident is sufficient to attract the ingredients of section 506 of the Indian penal Code. Furthermore, the petitioners have raised the plea of private defence of the property. The petitioners have also filed another complaint in respect of the same incident to substantiate their contention that, they have used the justifiable criminal force while exercising the right of private defence of property. It is also the case of the petitioners that, the petitioner no.2 is having license of the said revolver and the bore gun and in his presence

the petitioner no.1 being a son of petitioner no.2 held those weapons for protecting their property. The learned counsel submits that, the same is in contravention of the provisions of sub-section (1) of section 3 most particularly, the proviso appended to it. The learned counsel submits that in the given set of allegations and in the back drop of the plea raised by the petitioners about exercising the right of self defence of the property and the complaint lodged by them, its mixed question of fact and law as to "*Whether the sanction as provided under Section 39 is required or not*"? The learned Sessions Judge has therefore, rightly passed the order granting liberty to both the sides to make their submissions before the Magistrate at the time of framing of the charge. No interference is required and the writ petition is thus liable to be dismissed.

8. I have also heard the learned APP for the State.

9. The legal position in connection with a formation of an unlawful assembly has been explained by the Supreme Court in the Catina of judgment and this

position can be summarized as follows :-

1. It is competent for a court to come to the conclusion that there was an unlawful assembly of five or more person, even if less than that number have been convicted by it, if :

a) the charge states that apart from the person named other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act.

B) that the first information report and the evidence show such, to be the case even though charge does not state so.

C) No prejudice has resulted to the convicted person by reason of the omission to mention in the charge that, the other unnamed persons had also participated in the offence.

10. In the instant case, there are specific allegations in the complaint that petitioner nos.1 to 3 also accompanied by some unidentified persons and all of them abused the complainant and his associates whereas, the petitioner no.1 opened the fire in the air with the help of revolver to disperse them. I do not find

any substance in the contention raised by the learned counsel for the petitioner that, the ingredients of section 143 to 149 are not attracted at all. I am not agree with the submission that, there is no prima facie evidence to attract the ingredients of criminal intimidation as provided under section 503 of Indian penal Code.

11. The petitioner no.1 admittedly has no license to carry and use the Arms, revolver and the bore gun. According to the petitioner no.1 his father petitioner no.2 is holding a license and, thus, in his presence he had carried those weapons and used them for protecting their possession over the land. The petitioner no.1 being a lawyer is fully knowing the consequences of his Act. As per the provisions of section 3 (1) of the Arms Act, 1959 and most particularly the proviso, under certain given circumstances the person without himself holding a license, carry any fire arm or ammunition in the presence, or under the written authority, of the holder of the licence. Those circumstances are detailed in the proviso and as such, a person having no license may carry the said fire arm in the presence or written

authority of the holder of the licence for repair or for renewal of the licence or for use by such holder. In the instant case, the petitioner admittedly used the said fire arms and open the fire in the air to terrorize the complainant and his associates.

12. It is also the case of the petitioners that the petitioner no.2 is having licence of the said revolver and bore gun and in his presence petitioner no.1 being son of petitioner no.2 held and used those weapons for protecting their property. As per the provisions of section 3 of the Arms Act, 1959, a person cannot acquire or cannot be in possession or carry any firearm or ammunition unless he holds in this behalf a licence issued in accordance with the provisions of the Act and the Rules made thereunder. However, he may acquire or have in his possession or carry any fire arm or ammunition under the conditions as stated in the proviso of Sub-section (1) of Section 3 of the Arms Act, 1959. In the instant case, it is an admitted position that the petitioner no.1 used said firearm and ammunition without any licence issued under the provisions of the

Act and the Rules made thereunder and opened the fire twice in the air by using the weapon revolver. In view of these peculiar facts of the present case, the cases cited above and relied upon by the learned counsel for the petitioners cannot be made applicable to the facts and circumstances of the present case.

13. Thus, the question of prior sanction as provided under section 39 of the Arms Act, 1959 for prosecuting the petitioners for the offence punishable u/s 25 of the Arms Act is concerned, I am agree with the observations made by the learned Adhoc Additional Sessions Judge, that this is not a fit case where in a blanket order of discharge of accused persons can be passed in respect of the offences made punishable under the provisions of the Arms Act, 1989 for want of sanction considering the peculiar facts of the case. Furthermore, no such sanction is required for the offence punishable under Section 27 of the Act, if the act alleged contravenes the provisions of Section 5 of the Act. The learned Extra Jt. Adhoc Additional Sessions Judge, Parbhani has also directed the Magistrate to hear the prosecution and the

defence on the point of framing of charge in the light of the material available in the charge sheet. No interference is required. Hence, I proceed to pass the following order.

ORDER

- I. Writ Petition is dismissed.
- II. At this stage, the learned counsel for the petitioners submits that, interim relief granted by this Court may be continued for another four weeks.
- III. Considering the peculiar facts and circumstances of the present case, said request is hereby refused.

sd/-

(**V.K. JADHAV, J.**)

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