

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO. 129/2016**

Reggie Fernandes,
through his Power of Attorney
Parvez Ahmed, r/o. Mapusa,
Bardez, Goa s/o. Rahmat Ali,
36 years of age, r/o. Flat No.5,
Braganza Trade Center, Raj waddo,
Mapusa, Bardez, Goa.

..... Petitioner.

V/s.

1. The Police Inspector,
Mapusa Police Station,
Mapusa, Goa.

2. The Deputy Collector &
S.D.M., of Bardez,
Mapusa, Bardez, Goa

3. Francis D'Souza,
s/o. Macario Alexander De Souza,
74 years of age, retired,
r/o. Villa No.5, Sun Park Resorts,
Cobra Vaddo, Calangute, Bardez,Goa.

4. The Public Prosecutor,
Bombay High Court,
Panaji, Goa.

..... Respondents.

Mr. Nitin Sardessai, Senior Advocate with Ms. Gautami Kakodkar,
Advocate for the petitioner.

Mr. S. D. Lotlikar, Advocate General with Mr. Pravin Faldessai, Addl.
Public Prosecutor for the respondents No.1, 2 and 4.

Mr. Aires Rodrigues, Advocate for the respondent No.3.

**CORAM :- F.M. REIS &
NUTAN D. SARDESSAI, JJ.**

Date : - 27/09/2016.

ORAL JUDGMENT : (PER F.M. REIS, J.)

Heard Mr. Nitin Sardesai, learned Senior Advocate appearing for the petitioner, Mr. S. D. Lotlikar, learned Advocate General appearing for the respondents No.1, 2 and 4 and Mr. Aires Rodrigues, learned Advocate appearing for the respondent No.3.

2. Rule. Learned Counsel appearing for the respondents waive service. Heard forthwith, with the consent of the learned Counsel.

3. Briefly, the case as stated by the petitioner is that a Memorandum of Understanding came to be executed between the petitioner and one Diago De Souza somewhere on 10/02/2009 wherein a consideration of Rs.80,00,000/- was fixed and also agreed that the possession of the subject property would be transferred on payment of the total consideration. Subsequently, a Sale Deed was executed on 19/02/2009 between the petitioner and said Diago De Souza. Thereafter, on 26/02/2009, another Memorandum of Understanding was entered into between the petitioner and the said Diago De Souza

deciding the manner in which the consideration would be paid. It was also agreed that the purchasing party shall not take or claim possession of the said property till the consideration of Rs.80,00,000/- was effected. It was also decided that until such time, the said Diago De Souza would not sell, transfer, mortgage or create any third party rights in respect of the said immovable property. On 23.3.2011, said Diago De Souza and his wife entered into a Sale Deed with one Francisco Macario De Souza in order to sell the said property, pursuant to which, the petitioner herein filed a suit for cancellation of the Sale Deed dated 19/02/2009 and for a permanent injunction which is pending before the Civil Court. Subsequently, on 3/2/2012, the petitioner filed an FIR against said Diago De Souza in Mumbai for offences punishable under Sections 467, 468, 469, 471 and 420 of I.P.C.. The respondent No.3 filed an FIR against the petitioner for the offences punishable under Sections 447, 427, 506 and 34 of I.P.C. It is further contended by the petitioner that on 17/6/2015, a notice came to be issued by the Office of the Deputy Collector and S.D.M. for initiating proceedings against the petitioner. It is further pointed out that Report No.21/15 under Section 145 of Cr.P.C. was filed with the Magistrate pursuant to another FIR lodged against the petitioner. In view of such FIR, the petitioner also sought an interim bail. It is

further pointed out that pursuant to receipt of such notice from the Deputy Collector and S.D.M. preliminary objections were raised by the petitioner that the matter in respect of said proceedings is already pending and hence, the same ought to be dismissed. Being aggrieved by the receipt of the said notice and the proceedings initiated by the Magistrate, the petitioner has filed the present petition.

4. Mr. Nitin Sardesai, learned Senior Counsel appearing for the petitioner has assailed the impugned order essentially on the ground that the respondent No.2 has not at all applied his mind whilst issuing such notice. It is further pointed out that no preliminary inquiry was conducted, nor any reasons recorded whilst issuing the notice to the petitioner. The learned Senior Counsel further submitted that there is total non-application of mind to ascertain whether the ingredients of Section 145 Cr.P.C. were satisfied to issue such notice. It is further submitted that the respondent No.2 has not even held any inquiry, nor examined the report sent by the police to justify issuance of notice to initiate such proceedings against the petitioner. The learned Senior Counsel further submitted that there is a civil dispute already pending before the Civil Court and as a counter blast, the respondent No.3 filed a false complaint against the petitioner. The learned Senior Counsel as such, points out that there is jurisdictional

error committed by the respondent No.2 whilst issuing such notice which would call for interference of this Court in the present writ petition. The learned Senior Counsel has also pointed out that there is no breach of peace to the public on account of any alleged action by the petitioner and, as such, the jurisdiction exercised by the respondent No.2 is misplaced. The learned Senior Counsel further submits that the respondent No.2 has failed to appreciate that it is only after a reasoned preliminary order is passed, the Magistrate can assume jurisdiction to proceed further to inquire and determine the facts of actual possession.

5. On the other hand, Shri Aires Rodrigues, learned Counsel appearing for the respondent No.3 has submitted that there is no jurisdictional error committed by the respondent No.2 whilst issuing the notice to the petitioner. The learned Counsel has pointed out that there is a dispute with regard to possession of the subject property and, as such, exercise of jurisdiction by the respondent No.2 is justified. It is further pointed out that even in a dispute between two persons, in case there is likelihood that it would lead to breach of peace, the respondent No.2 can exercise powers under Section 145 Cr.P.C.. It is further pointed out that the present notice issued by the respondent No.2 is pursuant to a police report and, as such, the learned Magistrate

was justified to rely upon such report to issue notice to the petitioner after being satisfied that the case is made out to issue such notice. The learned Counsel has further pointed out that the respondent No.3 who is a Senior Citizen was forcibly sought to be evicted from the subject house by unruly elements which forced the respondent No.3 to lodge the FIR before the concerned Police. The learned Counsel, as such, points out that the petition be rejected. In support of his submissions, the learned Counsel has relied upon a Judgment of the Supreme Court in the case of *Rajpati vs. Bachan and another* reported in (1980) 4 SCC 116.

6. Shri S. D. Lotlikar, learned Advocate General appearing for the respondents No.1, 2 and 4 has submitted that even in cases of dispute of possession of the property which could lead to breach of peace, the respondent No.2 can exercise powers under Section 145 Cr.P.C..

7. We have considered the submissions of the learned Counsel and we have also gone through the records. Before we examine the rival contentions, we would like to note that the object of Section 145 Cr.P.C. is to prevent breach of peace and for that end to provide a speedy remedy to bring the parties before the Court to

ascertain as to who of them was in possession and to maintain status quo until their rights are determined by a competent Court. The section requires that the Magistrate must be satisfied before initiating proceedings that a dispute regarding an immovable property exists and that such dispute is likely to cause breach of peace. But, once he satisfies that such two conditions are established, the section requires him to pass a preliminary order under sub-section (1) and thereafter to make an inquiry under sub-section (4) and pass a final order under sub-section (6). In the present case, the fact that there is a dispute in respect of the possession of the subject property cannot be disputed. The satisfaction under sub-section (1) is of the Magistrate. The question whether on the material before him he should initiate the proceedings or not, is therefore in his discretion which, no doubt, has to be exercised in accordance with the well recognized rules of law. In that behalf, no hard and fast rules, therefore, can be laid down as to the sufficiency of the material for his satisfaction. Such satisfaction can be arrived at both, from the police report or from other information, which can even include an application by a party dispossessed. In the present case, the Magistrate-respondent No.2 has noted that based on the police report, he has arrived at such satisfaction. The question remains is as to whether the preliminary order passed by the learned Magistrate

was in breach of Section 145(1) Cr.P.C. i.e. in the absence of either of the two condition precedent. No doubt, the section requires him to record reasons. But, however, the learned Magistrate has expressed his satisfaction on the basis of the police report which he found to be credible. This mean that the learned Magistrate found that the facts stated in the police report, *prima facie*, was sufficient to lead to his satisfaction.

8. Once the preliminary order was passed based on the police report which the learned Magistrate found to be a credible information, the interference of this Court, in exercise of its extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India, in such orders, would not at all be justified.

9. Apart from that, this Court in a Judgment reported in 1997 (1) Mh.L.J. 563, in the case of ***Sandu Keshvsingh Shinde and ors. vs. Ramsingh Mahasingh Shinde and ors.***, has observed at paras 3, 4 and 5 thus :

“ 3. In order to appreciate this question it may be stated that the object of the section is merely to prevent a breach of the peace by maintaining one or other of the parties in possession which the Court find

they had immediately before the dispute. The action which may ultimately be taken is not punitive but preventive, and for that purpose is provisional only until such time as final or formal adjudication on the rights affected may be obtained and carried into effect by a Court competent to deal with the matter in due course of law. That necessarily means that nothing that could affect the past, present or future rights of the parties, was contemplated in the section 145 of the Code of Criminal Procedure.

4. There cannot be any dispute that when the Magistrate who has passed the preliminary order was satisfied with the material which was produced before him, mere failure of the Magistrate to mention the ground for passing the order is not enough to interfere with the preliminary order in revision more so when facts as set out in the order by the learned Magistrate would constitute prima facie sufficient material leading to the satisfaction of the Magistrate. In other words a preliminary order under section 145 of the Code of Criminal Procedure can be passed only when the Magistrate is satisfied that the dispute concerning the property is likely to cause breach of peace. It is nobody's case that there was no any likelihood to cause breach of peace in given set of circumstances as recorded by the learned Magistrate. Therefore, it was not proper for the revisional Court to interfere with the said order.

5. The matter can be considered from another angle. When the Magistrate records his satisfaction as to the existence of breach of peace in his preliminary order, the revisional Court cannot go into the sufficiency or otherwise of the material on which the Magistrate's satisfaction was based. In the present case, the learned Additional Sessions Judge, therefore, seems to have exceeded his power of revisional jurisdiction in disturbing preliminary order passed by the Executive Magistrate.”

Taking note of the said observations, as the learned Magistrate has recorded his satisfaction on the basis of the material produced, we find that there is no case made out for interference in the impugned Order in the present petition at this stage. The petitioner can raise all the objections/defences available in law in the said proceedings before the learned Magistrate.

10. The writ petition is accordingly dismissed. Rule stands disposed of accordingly.

NUTAN D. SARDESSAI, J.
ssm.

F.M. REIS, J.