

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 144 OF 2002

The State of Maharashtra
P.S.I., Bhagyanagr Police Station,
Dist. Nanded.

....Appellant.

Versus

Shankarsingh Gopalsingh Gadiwale,
Age 39 years, Occu. Nil,
R/o. Badpura, Nanded,
Dist. Nanded.

....Respondent.

Mr. V.S. Badakh, APP for appellant/State.

Mr. H.S. Bedi, Advocate for respondent.

**CORAM : T.V. NALAWADE AND
ARUN M. DHAVAL, JJ.**

DATED : November 14, 2017

JUDGMENT : [PER T.V. NALAWADE, J.]

1) The appeal is filed against judgment and order of Criminal Appeal No. 74/1994, which was pending in the Court of learned Additional Sessions Judge, Nanded. The said appeal was filed by respondent to challenge the judgment and order of R.C.C. No. 507/1991, which was pending in the Court of Judicial Magistrate, First Class, ('J.M.F.C.' for short) Nanded. The J.M.F.C., Nanded had convicted and sentenced the respondent for offence punishable under section 326 of Indian Penal Code ('IPC' for short). Rigorous

imprisonment of two years was given and fine of Rs.2500/- was imposed by the learned J.M.F.C. This decision is set aside by the Sessions Court. Both the sides are heard.

2) In short, the facts leading to the institution of the present proceeding can be stated as follows :-

First informant Balbhim is resident of Sangvi Gopalnagar. There is some dispute between the first informant and the present respondent/accused in respect of boundary of their portions from land Survey No. 5. On 15.6.1991 at about 12.30 noon when the first informant went to the field along with Government Surveyor Masood and some assistants for taking measurement of the land purchased by him, present respondent Shankarsingh came there with one unknown person. Respondent questioned the first informant as to why he was taking the measurement of the land and he gave abuses. Accused interfered in the measurement and then he took iron bar which was with his associate and gave blow of iron bar on right leg of first informant below knee. The first informant sustained bleeding injury. The persons who had gathered there separated the quarrel. The first informant sustained fracture injury to his right leg. On the same day, he gave report and the crime came to be registered in Bhagyanagar Police Station under section 324 of IPC and then under section 326 of IPC. Doctor issued certificate that

there was fracture of right leg and the injury was caused by hard and blunt object. Police recorded statements of some witnesses and then filed the chargesheet.

3) Prosecution examined in all ten witnesses before the learned J.M.F.C., who include the first informant and the doctor. The Trial Court believed this evidence. The Sessions Court has held that there is possibility of exercise of right of private defence and the case is covered by section 97 of IPC.

4) The evidence of Balbhim (PW 1) is as per the contentions made in the F.I.R. He has given evidence that when blow of iron bar was given to his leg, his brother and other persons like Dhake and Mude were present there in addition to Surveyor Masood. In the cross examination, he has admitted that he does not know the boundaries of Survey No. 5. It appears that plots are laid in Survey No. 5. There is admission that plot Nos. 9-11 and 34 are standing in the name of brother of first informant. He has admitted that accused is a partner of his brother in plot Nos. 9-11 and 34. The evidence shows that the first informant had purchased 3 Acre 10 Gunta land in land Survey No. 5 in the year 1985 and it was purchased from accused and four brothers of accused. His evidence shows that there is more portion in Survey No. 5 of which the first informant is not

owner. He has admitted that the accused is illiterate person and there is dispute between the accused and him over the boundaries. No record is produced to show that notice of the measurement was sent to the accused by Surveyor.

5) Bharat (PW 2), brother of the first informant is examined by the prosecution and his evidence shows that Cadestral Surveyor had called the accused there and then the Cadestral Surveyor had started taking measurement. He has admitted that the land belonging to accused is situated to the east side of the portion purchased by them and for measurement they wanted to go to the land of the accused. He has admitted that accused restrained them from entering his land and then the quarrel started.

6) Bharat (PW 2) has given different version and he has described two incidents. He has not deposed that accused had brought one unknown person with him. He has deposed that accused returned after quarrel and came with iron bar and then the incident took place. His evidence shows that he has dispute with accused over the plotting business started by him with the accused in partnership. His evidence shows that they had purchased 3 Acre 11 Gunta land from Survey No. 5 when the area of the land is 14 Acre 5 Gunta. Shrirang (PW 6) is examined as other eye witness and his

evidence is similar to the evidence of aforesaid two witnesses. He has tried to say that the plot on which incident took place belongs to Bharat Renapurkar, brother of first informant. Sanjay (PW 7) has given similar evidence.

7) Other prosecution witnesses like panch witness Sambhaji (PW 3), panch witness Sahebrao (PW 4), who are on the recovery of iron bar have turned hostile. Sudam (PW 5), the panch witness on the spot panchanama has given evidence on spot panchanama and this document is proved as Exh. 20. No sign of incident was found on the spot.

8) Prosecution has examined Dr. Mohammad Khurshid (PW 8). His evidence shows that on the day of incident i.e. on 15.6.1991 at about 1.00 p.m. he examined the first informant and he found one laceration having size of 1" x 1" x 1/2" on right leg below knee. He has deposed that due to this injury, there was fracture of upper 1/3rd tibia and X-ray plate was taken to confirm that there was fracture. He has given evidence that the leg was kept in plaster due to fracture injury. In the cross examination, he has admitted that such injury can be caused if a person had simple fall. The injury certificate at Exh. 29 is proved in the evidence of doctor. Vijaykumar (PW 10), X-ray technician is examined to prove the X-ray plate and

his evidence is consistent with the evidence of Medical Officer. Thus, there is evidence to show that the first informant did sustain fracture injury to his right leg.

9) Evidence of Ramchandra (PW 9), Police Head Constable, who made investigation shows that initially the crime was registered for the offence punishable under section 324 of IPC and on the basis of report given by accused, the crime was registered for offence punishable under sections 323, 504 of IPC against the first informant.

10) It is already observed that prosecution did not produce the record to show that authorised measurement was going on at the relevant time. The dispute over the boundary is admitted and that is why the application was given to the Government Department for measurement. If there was the measurement and accused had share in the said land, in ordinary course, notice ought to have been given to the accused. Evidence is given that accused was called by Surveyor when he was seen on the spot. But that does not mean that notice was issued to the accused. In such a case, even the Surveyor could have given complaint against the accused as it would have amounted to interference in discharge of duty by public servant. That was not done. The Surveyor could have been

examined and he could have been the best witness for proving aforesaid things. Due to absence of such evidence, it can be said that material evidence is withheld by prosecution. In view of these circumstances, the Sessions Court has held that there is possibility of exercise of right of private defence as the measurement was going on and the accused had objection to the measurement as the persons involved in the measurement including the first informant were entering his field. Due to nature of dispute and aforesaid circumstances, this Court holds that the learned Sessions Court has not committed any error in allowing the appeal and setting aside the judgment and order of conviction given against the present respondent. This Court sees no reason to interfere in the decision given by the Sessions Court. In the result, the appeal stands dismissed.

[ARUN M. DHAVALÉ, J.]

[T.V. NALAWADE, J.]

ssc/