

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 82 OF 2017

MRS. FILOMENA VALES AND ANR., ... Petitioners
Versus
STATE THR. AGASSAIM POLICE STATION
AND ANR., ... Respondents

Mr. Joaquim Godinho, Advocate for the petitioners.

Mr. Mahesh Amonkar, Additional Public Prosecutor for the respondents.

Coram:- C. V. BHADANG, J.

Date:- 16th June, 2017

P.C.

The petitioners are challenging the judgment and order dated 23/03/2017 passed by the learned Sessions Judge at Panaji in Criminal Revision Application No.100/2015, by which, the learned Sessions Judge has confirmed the order dated 09/12/2015 passed by the learned Executive Magistrate, by which the Executive Magistrate has appointed the Field Surveyor and Talathi of village Aggassaim to hold site inspection and give their report as to the existence of "debris" or "used construction material" in the suit property survey No.6/2.

2. The only contention raised on behalf of the petitioners is that the Court Commissioner could not have been appointed within the parameters under Order XXVI Rule 9 of C.P.C. On behalf of

the petitioners, reliance is placed on the decision of this Court in the case of SANJAY NAMDEO KHANDALE VS. SAHEBRAO KHANDARE; 2001(2) Mh.L.J. 959 and SYED MUSTHAQUE AHMAD VS. SYED ASHIQUE ALI KHAN; 2011(6) Mh.L.J. 334. It is submitted that the Commissioner cannot be appointed under Order XXVI Rule 9 of C.P.C. for collecting evidence. The learned Counsel points out that the complainant is presently under cross-examination. The only contention is that the Commissioner could not have been appointed during the course of cross-examination of the complainant. The learned Counsel states that there is no public nuisance as such, as it is a private civil dispute. The petitioner has already approached the Civil Court and the Civil suit is pending.

3. The learned Additional Public Prosecutor submits that the Executive Magistrate can direct local investigation and examination of an expert as per Section 139 of Cr.P.C. It is submitted that the jurisdiction under Section 133 of Cr.P.C. is essentially aimed at removal of public nuisance and enquiry contemplated is of summary nature. It is submitted that the requirement of Order XXVI Rule 9 of C.P.C. cannot, strictly, be imported in proceedings under Section 133 of Cr.P.C.

4. I have carefully considered the circumstances and the submissions made.

5. At the outset, in so far as the contention that the dispute is of civil nature and there is no element of public nuisance involved, it is always open to the petitioners to demonstrate before the Executive Magistrate that the nature of the dispute does not call for initiation and continuation of the proceedings under Section 133 of Cr.P.C. For limited purpose of examining the issue whether the Executive Magistrate could have directed local investigation, it is neither necessary nor appropriate to go into the question whether the dispute requires initiation of proceedings under Section 133 of Cr.P.C. because the substantive proceedings are still pending before the Executive Magistrate.

6. Coming to the impugned order, the provisions of Section 139 of Cr.P.C. clearly provide that the Magistrate can direct local investigation and examination of an expert and can direct local investigation to be made by such person as he thinks fit or summon and examine an expert. All that the Executive Magistrate has done is to call for a report, whether 'debris' or 'used construction material' is lying in the suit property, as claimed on behalf of the complainant. It is evident that the petitioners shall get an opportunity to question the report, if found to be adverse and if so advised. The powers under Section 139 of Cr.P.C. clearly permit the Executive Magistrate to direct

local investigation or for a report in order to enable it to decide the controversy. The impugned order also records the submission on behalf of the petitioners that no inspection needs to be carried out and if at all inspection is necessary, it may be through some officer as the Court may think fit. The judgments relied upon by the learned Counsel for the petitioners pertain to provisions of Order XXVI, Rule 9 of C.P.C., which cannot strictly be imported in an enquiry of the nature contemplated under Section 133 of Cr.P.C.

7. At this stage, the learned Counsel for the petitioners has submitted that they be permitted to further cross-examine the complainant. It is obvious that the petitioners can continue to cross-examine the complainant. The impugned order does not prohibit the petitioners from continuing to cross-examine. No case for interference is made out. Writ Petition is, accordingly, dismissed.

C. V. BHADANG, J.

SMA