

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

Criminal Writ Petition No. 01110 of 2017

District : Ahmednagar

1. Shevraj Jivaram Gaikwad,
Age : 65 years,
Occupation : Agriculture,
R/o. Chikhalthan,
Taluka Rahuri,
Dist. Ahmednagar.
2. Tukaram Baburao Gaikwad,
Age : 35 years,
Occupation : Agriculture,
R/o. Chikhalthan,
Taluka Rahuri,
Dist. Ahmednagar.
3. Ashok Shevraj Gaikwad,
Age : 45 years,
Occupation : Medical
Practitioner,
R/o. Sakur,
Taluka Sangamner,
Dist. Ahmednagar.
4. Baburao Jivaram Gaikwad,
Age : 64 years,
Occupation : Agriculture,
R/o. Chikhalthan,
Taluka Rahuri,
Dist. Ahmednagar.
5. Machindra Baburao Gaikwad,
Age : 38 years,
Occupation : Agriculture,
R/o. Desurd,
Taluka Parner,
Dist. Ahmednagar.

..... Contd.

6. Dnyandeo Shevraj Gaikwad,
Age : 35 years,
Occupation : Agriculture,
R/o. Chikhalthan,
Taluka Rahuri,
Dist. Ahmednagar.

.. Petitioners
(Original
accused)

versus

1. The State of Maharashtra,
Through Police Station
Officer,
Rahuri Police Station,
Dist. Ahmednagar.

2. Bansi s/o. Bhaga Bagul,
Age : 55 years,
Occupation : Agriculture,
R/o. Sheri Chikalthan,
Rahuri, Taluka Rahuri,
Dist. Ahmednagar.

.. Respondents
(No.02 -
Original
complainant)

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Mr. N.V. Gaware, Advocate, for the petitioners.

*Mr. K.S. Patil, Addl. Public Prosecutor, for
respondent no.01.*

Mr. V.S. Bedre, Advocate, for respondent no.02.

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**CORAM : PRASANNA B. VARALE &
SMT. VIBHA KANKANWADI, JJ.**

DATE : 25TH APRIL 2018

JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :

Heard learned Advocate for the petitioners, learned Addl. Public Prosecutor for respondent no.01 and the learned Advocate for respondent no.02.

02. Rule. Rule made returnable forthwith. By consent, heard finally.

03. Present petition has been filed by the original accused persons for quashing of the first information report lodged against them at the instance of respondent no.02 - original informant and the proceedings i.e. the charge-sheet filed after investigation of the crime; by invoking powers of this Court under Article 226 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973.

04. The petitioners have come with a case, that ancestors of petitioner no.01 purchased agricultural land bearing Gut No. 123 admeasuring 1 hectare 54 R situated at village Sheri Chikalthan, Taluka Rahuri, District Ahmednagar, on 27.04.1967 from respondent no.02. In view of the said sale deed, the ancestor of petitioner no.01, namely, Jivaram Gaikwad was put in possession of the disputed property. The revenue entries regarding his name has been taken. Since then, the ancestor and after him, the petitioners are in possession and cultivation of the said land. Respondent no.02 had made unsuccessful attempt

seeking relief of declaration of ownership and possession over the said property by instituting civil suit bearing Regular Civil Suit No. 02 of 1999. The said suit came to be dismissed by the Civil Judge (Junior Division), Rahuri, on 19.02.2013.

05. Being aggrieved by the said decree, respondent no.02 had preferred appeal bearing Regular Civil Appeal No. 101 of 2013 before the District Court, Ahmednagar. The said appeal came to be dismissed. However, respondent no.02 and others started interfering with the peaceful possession of the petitioners over the disputed property and, therefore, petitioners instituted Regular Civil Suit No. 74 of 2003 on 12.03.2003 against respondent no.02 and one more, by name, Nana Gagappa Bagul, for permanent injunction. The said suit came to be decreed by Civil Judge (Junior Division), Rahuri, District Ahmednagar, on 30.07.2010. By the said decree, respondent no.02 has been permanently restrained from obstructing possession of the petitioners over the disputed property. In spite of all these facts, respondent no.02 has lodged first information report bearing Crime No. I-162/2017, contending that the present petitioners have committed offence punishable under Sections 435, 447 of the Indian Penal Code. The petitioners contend that the said attempt on the part of respondent no.02 is nothing but misuse and abuse of process of law. The FIR has been lodged in order to settle personal scores and in order to cause undue harassment to the

petitioners. Even respondent no.02 had lodged a false and concocted complaint under Section 3(1)(x) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 [For short, "Atrocities Act] in the past. The petitioners have been acquitted of the said offence.

06. Perusal of the FIR would show that by no stretch of imagination, ingredients of the offence have been attracted. Initially, the petitioners had prayed for quashing of the FIR and during pendency of the petition, since charge-sheet had been filed vide R.C.C. No. 194 of 2017 before Judicial Magistrate (F.C.), Rahuri, by way of amendment to the petition, they have prayed for quashing of the proceedings also.

07. Respondent no.02 has filed affidavit in reply, reiterating the contents of the FIR lodged by him. He says, that he was in possession of the disputed property. Though the petitioners have been acquitted from the complaint under the Atrocities Act, he has filed Criminal Appeal bearing No. 376 of 2017 before this Court. Police authorities have recorded statements of various persons and there is evidence against the petitioners. When there is evidence against the petitioners, there is no reason for quashing the FIR as well as the charge-sheet by invoking the discretionary powers of this Court. He has further submitted that land bearing Gut No. 123 was in his possession and he has planted pomegranate

trees. He has incurred huge expenses and developed the orchid. The petitioners had forcibly entered the orchid on 12.05.2017 and destructed the trees causing damage worth Rs. 15,00,000/- to him. Under such circumstance, he had lodged the FIR. He has, therefore, prayed for dismissal of the petition.

08. Affidavit in reply has also been filed on behalf of respondent no.01 - Investigating Officer. He has stated after reiterating the contents of the FIR, that evidence has been collected against the petitioners. Eye witnesses have supported the respondent no.02 and, therefore, he had filed the charge-sheet. He has also stated that since the charge-sheet has been filed, the petitioners can approach the learned Sessions Court for discharge under Section 227 of the Cr.P.C.

09. Perused copy of the charge-sheet made available as well as other documents which have been produced on record by the petitioners. The petitioners have produced on record, copy of the sale deed executed on 27.04.1967 between one Jivaram Gopal Gaikwad and Bhaga Ramaji Bagul. It is not in dispute, that Shevraj Jivaram Gaikwad, who is present petitioner no.01, was then aged 17 years and, therefore, the sale deed was got executed in his name through his guardian father. The said land was sold by the father of respondent no.02. At that time, survey numbers of the land were 84/2 admeasuring 03 Acres 32 Gunthas and 84/6 admeasuring 01 Acre 10

Gunthas. The petitioners have also produced on record, the 7/12 extract showing that out of Gut No. 123, Nana Bhaga Bagul is possessing 77 R area, Bansi Bhaga Bagul is possession 77 R area, whereas petitioner no.01 is possessing 01 Hectare 54 R area. Said Bansi Bhaga Bagul and Nana Bhaga Bagul had filed Regular Civil Suit No. 02 of 1999 before Civil Judge (J.D.), Rahuri, for declaration and possession. Copy of the judgment would show that the property involved in the said petition was different i.e. not Gut No.123. However, that suit was dismissed. It was held that the petitioners therein are not the owners and in possession of the suit properties.

10. Further, the documents on record show that petitioner no.01 had filed Regular Civil Suit No. 74 of 2003 before Civil Judge (J.D.), Rahuri, for permanent injunction. The suit property was Gut No.123 admeasuring 01 Hectare 54 R situated at village Chikthan, Taluka Rahuri, District Ahmednagar. The said suit was filed against present respondent no.02 and his brother Nana Bhaga Bagul. The said suit came to be decreed on 30.07.2010 and the defendants therein i.e. present respondent no.02 and his brother were permanently restrained from causing obstruction to the possession, enjoyment and cultivation of the suit property of the plaintiff. Surprisingly, at the time of arguments, it has been submitted on behalf of respondent no.02, that the said decree was challenged by respondent no.02 before District Court, Ahmednagar, and the said Civil Appeal

has been dismissed and the Second Appeal is now pending before this Court. However, there is no stay to the said decree. Therefore, these documents definitely give an impression that since the date of purchase, previously the guardian of petitioner no.01 and thereafter petitioner no.01 himself possess the suit property i.e. Gut No.123 admeasuring 01 Hectare 54 R land, till today.

11. At this stage, it is necessary to consider the contents of the FIR. Respondent no.02 has stated in the FIR, that the land admeasuring 01 Hectare 54 R in Gut No.123 situated at village Chikalthan belongs to him and his brother Nana Bhaga Bagul. Petitioner no.01 has land Gut No.122 which is adjacent to Gut No.123. He has stated that the dispute is pending before Rahuri Court and he has filed Regular Civil Suit No. 762 of 2015 before the said court. He was present in Gut No.123 on 12.05.2017. At that time, all the petitioners came and destroyed his pomegranate trees thereby causing him damage to the tune of Rs. 15,00,000/-. Thus, it can be seen from the FIR, that he intended to say that the petitioners had entered into 01 Hectare 54 R land of Gut No.123.

12. At this stage, we would like to consider the statements of the witnesses which have been recorded by the Police Officers. One Sitaram Bansi Bagul i.e. son of present respondent no.02, Dilip Dagadu Bhosle, Subhash Karbhari Jadhav and Raosaheb Namdev Kakade

are the witnesses whose statements have been recorded. They are in echo with respondent no.02. Important point to be noted is that, statements of the witnesses appears to have been recorded on 25.05.2017, whereas as per the FIR, the offence had taken place in between 10.00 a.m. of 11.05.2017 to 07.30 p.m. of 12.05.2017. There appears to be total suppression of decree passed in Regular Civil Suit No. 74 of 2003 dated 30.07.2010 by the informant - respondent no.02 as well as witnesses. By suppression of Regular Civil Appeal and suppression of pendency of Second Appeal before this Court, on the contrary, respondent no.02 and his son have now come up with a case, that one round of litigation has been started by them by instituting Regular Civil Suit No. 672 of 2015. Respondent no.02 has not placed on record, copy of the plaint in Regular Civil Suit No. 672 of 2015. He has also not stated whether any interim relief has been granted in his favour in this specially instituted suit.

13. Thus, when a civil court of competent jurisdiction has given its finding, though it is subjudice in Second Appeal before this Court, yet, possession of the petitioners over the said land admeasuring 01 Hectare 54 R from Gut No.123 is concerned, that possession will have to be held as legal and valid. Even respondent no.01 has not stated that whether he had collected the pronouncement of the competent court and other such documents in order to see whether there is any truth

in the contention of respondent no.02. Merely because some eye witnesses have supported respondent no.02, it cannot have negative effect on the decree that has been passed by a competent civil court.

14. In order to attract Section 447 of the Indian Penal Code, which prescribes for '*punishment for criminal trespass*', we will have to consider what amounts to '*criminal trespass*' as contemplated under Section 441 of the IPC. In order to prove offence under Section 441 of the IPC, the prosecution should prove (1) entry into or upon property in the possession of another (2) if such entry is lawful, then unlawfully remaining upon such property, (3) such entry or unlawful remaining must be with intent - (a) to commit an offence; or (b) to intimidate, insult, or annoy any person in possession of the property. Thus, the Section revolves around possession of a person over the property. Here, in this case, as aforesaid, as per the decree passed in Regular Civil Suit No. 74 of 2003, respondent no.02 and his brother were permanently restrained from disturbing / obstructing possession of present petitioner no.01 over the suit property. That means, respondent no.02 and his brother were never in possession of the suit property. Under such circumstance, ingredients of the offence under Section 441 of the IPC, punishable under Section 447 of the IPC, cannot be said to have been attracted in this case.

15. Further, for offence punishable under Section 435 of the IPC i.e. '*mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees or upwards*'; the prosecution should prove firstly, offence under Section 447 of the IPC. When the ingredients of Section 447 of the IPC are not attracted here, the question of attracting ingredients of Section 435 of the IPC does not arise. Therefore, taking into consideration material in the charge-sheet, no offence has been made out. It would be an abuse of process of law, if trial is attracted to be conducted in this case. The petition is squarely covered under the guidelines given by the Hon'ble Apex Court in the matter of *State of Haryana & others Vs. Ch. Bhajan Lal & others (AIR 1992 SC 604)*. In the said case, the Hon'ble Apex Court has observed thus :-

" The following categories of cases can be stated by way of illustration wherein the extraordinary power under Article 226 or the inherent powers under Section 482 CrPC can be exercised by the High Court either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulate and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised :

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face

value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can even reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and / or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with

mala fide and / or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

16. In the light of above discussion, we are of the opinion that the petition deserves to be allowed.

17. In the result, the criminal writ petition is allowed.

The first information report bearing Crime No. I-162/2017, dated 13.05.2017, registered with Rahuri Police Station, District Ahmednagar, for offence punishable under Sections 435, 447 of the Indian Penal Code, is quashed and set aside. So also, consequential proceedings in Regular Criminal Case No. 194 of 2017 pending before Judicial Magistrate (F.C.), Rahuri, District Ahmednagar, against the petitioners, are quashed and set aside.

18. Rule made absolute in the above terms.

(Smt. Vibha Kankanwadi)
JUDGE

(Prasanna B. Varale)
JUDGE

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