

IN THE HIGH COURT OF BOMBAY AT GOA.
CRIMINAL WRIT PETITION NO. 114 OF 2018.

Kinnaresh Trimbak Borkar
Age 68 years,
Resident at D/41, Nand Dham
CHS-Ltd, B. P. Road, Dahisar (West),
Mumbai 400 068

... Petitioner.

Versus

1. The Stage of Goa,
Through its
Public Prosecutor
2. Smt.Surekha Suresh Gaude,
Resident at H. No. 67,
Near Shree Ganesh Temple,
Bondbag - Betora, Ponda, Goa.

... Respondents.

Shri S. Borkar, Ms. A. Borkar and Ms. G. Kamat, Advocates for the petitioner.

Shri M. Amonkar, Addl. Public Prosecutor for the respondent no.1.

Ms. A. Desai, Advocate for the respondent no.2.

Coram:- SMT. M.S.JAWALKAR, J.
Reserved on:- 24th February, 2021.
Pronounced on:- 4th March, 2021.

JUDGMENT

Heard Shri S. Borkar, learned counsel for the petitioner, Shri Mahesh Amonkar, learned Additional Public Prosecutor for Respondent no.1 and Ms. A. Desai, the learned counsel for the respondent no. 2.

2. Rule. Rule is made returnable forthwith at the request and with the consent of the learned counsel for the parties.

3. Heard Shri S. Borkar, the learned counsel for the petitioner. Shri

M. Amonkar, the learned Addl. Public Prosecutor for the respondent no.1 and Ms. A. Desai, the learned counsel for the respondent no.2.

4. The present petition is filed invoking inherent powers under Section 482 of Cr.P.C. to quash and set aside the order dated 7.11.2017 for issuance of process issued by the learned Judicial Magistrate First Class, 'A' Court Ponda, Goa("JMFC" for short).

5. The brief facts leading to file the present petition are as under :-

The petitioner has been charged for the offences punishable under sections 441, 506, 34 and 107 of IPC. The trial court enlarged him on bail. It is the case of the respondent no.2(legal heir of one Mrs. Anandi Gaude) that the petitioner is an original bhatkar and alongwith so called land sharks is trying to develop the properties of the respondent no.2. He claimed land bearing survey no.131/1, 131/3 and 132/10 at Village Bethora, Ponda, Goa under Tenancy proceedings No. TNC/PUR-BET/50/1993 from the Mamlatdar at Ponda. It is alleged by the respondent no.2 that on 12.9.2017, the petitioner along with two others at around 12.30 hours entered in the said properties for inspection and started arguing with the respondent no.2 and her husband threatened not to mess up with them otherwise they would have to face dire consequences and then they went away from the scene of offence.

6. It is further alleged that on 15.9.2017 at 8.20 hours some unknown labourers illegally trespassed in the said properties and

started cutting vegetation and trees in the said properties to develop the plots. When respondent no.2 tried to stop them the said unknown labourers assaulted the respondent no.2 and her husband. Therefore, the respondent no.2 approached Ponda police station to initiate action by registering FIR against the petitioner. As no action was taken, the respondent no.2 filed private complaint bearing Criminal Case No.102/Pvt/IPC/ 2017/A.

7. The process came to be issued under Section 204 of Cr.P.C. against the petitioner.

8. The said order of issuance of process is under challenge before this Court. The challenge to the order is to the issuance of the process mainly on the ground that the learned JMFC failed to appreciate the fact that the petitioner is the lawful owner of the land bearing survey no.131/2, therefore, there is no question of trespassing of his own property as alleged by the complainant. The learned Magistrate ought to have appreciated the facts that as per the documents the petitioner is the lawful owner of the said property.

9. The Learned Magistrate failed to appreciate that on mere prima facie reading of the complaint no commission of any cognizable or non cognizable offence has been made out as allegations are vague and without any specifications. The learned Magistrate failed to appreciate that as per the version of the complainant herself the petitioner had visited the said property with an intention to inspect and not with an

intention to intimidate insult, annoy the respondent no.2 complainant. Thus, there are no ingredients exist to attract section 441 of IPC.

10. It is further contention that the learned JMFC also acted illegally by not adopting the procedure provided under Section 202 sub clause 1 of CRPC since the petitioner is a permanent resident of Mumbai which is beyond the territorial jurisdiction of the learned JMFC. The amended provision makes it mandatory on the part of the Magistrate to postpone the issue of process against the accused in a case where in the accused is residing beyond the area in which the learned Magistrate exercises his jurisdiction and to either inquire into the case himself or direct an investigation to be made by the police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. The learned Magistrate also failed to consider that there were tenancy matters and civil litigation pending in the Court and the dispute is purely of a civil nature. The respondent no.2 to coerce the petitioner to meet her unlawful demands filed a false complaint.

11. The learned counsel for the petitioner relied on ***Paramjeet Batra Vs State of Uttarkhand and ors., (2013)11 SCC 673*** in support of his contention that power under Section 482 of Cr.P.C. is to be used sparingly and only for the purpose of preventing abuse of process of any Court or otherwise. This Court is empowered to see whether essential ingredients of criminal offence are present or not. The dispute

which is essentially of civil nature is given a colour of criminal offence in such a situation if civil remedy is available and in fact it is available this Court should not hesitate to quash the criminal proceedings to prevent the abuse of process of Court.

12. It is further submitted that to make out offence of criminal intimidation under section 506 of the IPC, the complainant must satisfy the ingredients contained in section 506 of IPC. No such statement is made by respondent no.2 to attract section 506 of IPC. There is no case of criminal intimidation by the petitioner. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it needs to be quashed and set aside. It is also submitted that while issuing process there is no application of mind and the same was issued mechanically. The learned counsel relied on **Anil Kumar and ors. VS M. K. Aiyappa and anr. Civil Appeal Nos.1590-1591 of 2013 dated 1.10.2013 and Govind Prasad Kejriwal Vs State of Bihar and anr. In Criminal appeal no.168 of 2020.**

13. The learned counsel further relied on ***Aroon Purie and ors. Vs Jayakumar Hiremath, (2017) 7 SCC 767, Sumitra Hiralal Saklikar and ors Vs. Hemant Radhakrishna Sapale and ors., 2014(1) Bom CR(Cri) 105, Shrikant Purshottam Paranjape Vs The State of Maharashtra, 2014(4) Bom CR (Cri) 777, Biswajit Paul Vs State of Assam and ors. 2019(4) GLT 957, Md. Salauddin***

and anr. Vs The State of West Bengal and another decided on 26.6.2015 in C.R.R. No.1054 of 2008 and State of Goa Vs Pedro Lopes, Criminal App. No.3 of 1994 decided on 3.8.1995.

14. Ms. A. Desai, the learned counsel for the respondent no.2 submitted that there is no reason to file present petition. There is alternative remedy of revision available to the petitioner. On perusal of the order it is cleared that the learned JMFC considered complaint verification and accompanying documents and observed that there are sufficient grounds to proceed against the accused. In view thereof, it cannot be said that there is no application of mind. There is no prayer to quash the complaint or criminal proceedings in view thereof the petition is not maintainable.

15. She relied on **Bharat Dahanukar Vs State of Maharashtra, 2006 Law Suit(Bom) 1751.**

16. First of all, I would like to decide the issue of jurisdiction. The learned Counsel for the respondent Ms. Desai, relied on **Bharat S. Dahanukar**(supra) in support of her contentions that High Court must refuse to exercise its inherent powers, if there is specific provision in the Code or any other enactment for redressal of the grievance of the aggrieved party.

17. In reply, the learned counsel for the petitioner relied on Apex Court Judgment in **Aroon Purie and ors.**(supra) wherein it has held relying on the judgment in **Urmila Devi Vs. Yudhvir Sing.,[(2013)**

15 SCC 624], the power under section 482 of Cr.P.C would always be available to challenge an order issuing process or summons. In view of this principle laid down in **Aroon Purie** (supra) there is no doubt about inherent power of this Court to see legality of issue of process.

18. On the first place it appears that the petitioner is not resident of Ponda Goa. It is admitted position and from going through the complaint also the address of the petitioner is shown as of Mumbai. In spite of this fact without following the procedure laid down under Section 202(1) of Cr.P.C., the learned Magistrate issued summons under Section 202(1) of Cr. P.C. It is mandatory for the learned Magistrate to hold an inquiry either by himself or direct an investigation by the police prior to issuance of process. Failure to follow this mandate of provision of section 202(1) of Cr. P.C., the Court would not have jurisdiction to issue process. On this count only order of issuance of process is illegal and liable to be quashed and set aside.

19. Apart from this to attract Section 441 of IPC., i.e. offence of criminal trespass, person is required to enter upon a property which is in the possession of another with intention to commit an offence or to intimidate, insult or annoy any person in possession of said property.

20. As per the complaint there is civil dispute pending between the parties and petitioner entered into the plot for illegal inspection. It has also come in the complaint that the petitioner started arguing with the complainant and threatened the complainant and her husband not to

mess up with them and then they went away from the scene of offence. Thus intention as discussed by the complainant herself is prima facie inspection of the property may complainant referred it as illegal. Secondly there was no intention to remain/stay there with intend to commit an offence or intimidate, insult or annoy to the person in possession. The learned counsel for the petitioner relied on **Pedro Lopes**(supra) wherein this Court held that in order to sustain a prosecution under Section 441 it should be established before the Court that the complainant is entitled to have an unquestionable possession of the property in exclusion of entire cleared at the time of trespass alleged.

21. Admittedly in this case such position cannot be presumed or establish in view of the admitted fact that the dispute is going on between the party and suit is pending.

22. From the complaint and the documents placed alongwith complaint the learned Magistrate ought to have appreciated the nature of the litigation as a civil nature. In view of **Paramjeet Batra**(supra) wherein it is held that whether essential ingredient of criminal offence are present or not has to be judged by the High Court. The dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation if civil remedy is available then taking criminal proceedings is nothing but an abuse of process of Court.

23. Even to attract section 506 of IPC, one has to commit an offence

of criminal intimidation as defined in Section 503 of Cr.P.C.

24. There has to be intention to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do. There is no such ingredients prima facie existing. As such, the complainant has to prima facie establish such intention. There is no specific allegations on which plot the complainant entered. The learned Magistrate without giving any consideration to this aspect proceeded to issue process in the matter.

25. It appears that there is no application of mind while issuing process. The order says that perused complaint, verification and accompanying documents. There are sufficient grounds to proceed against the accused for the offence punishable under sections 441 and 506 read with section 34 of IPC.

26. The learned counsel for the petitioner relied on judgment of the Hon'ble Apex Court in **Anil Kumar** (supra) wherein specifically held that the application of mind of Magistrate should be reflected in the order. Mere statement that he has gone through the complaint, documents and heard the complainant will not be sufficient. It is further observed that what weighed Magistrate to order issuance of process needs to be reflected in the order. Though detail expression of his view is neither required nor warranted.

27. In the case of **Govind Prasad Kejriwal**(supra), the Hon'ble Apex

Court held thus:-

“It cannot be disputed that while holding the inquiry under Section 202 Cr.P.C. the Magistrate is required to take a broad view and a prima facie case. However, even while conducting/holding an inquiry under Section 202 Cr.P.C., the Magistrate is required to consider whether even a prima facie case is made out or not and whether the criminal proceedings initiated are an abuse of process of law or the Court or not and/or whether the dispute is purely of a civil nature or not and/or whether the civil dispute is tried to be given a colour of criminal dispute or not.”

28. In the present matter the learned JMFC not followed the procedure laid down under section 202(1), not applied the mind whether the matter is of civil nature and also not seen whether the ingredients of Section 447 or 506 exist or not and passed order mechanically. In such circumstances, order issuing process is liable to be set side.

29. Accordingly, I proceed to pass the following order:-

ORDER

- (i) Petition is allowed.
- (ii) Order passed in Criminal Case No.102/Pvt/IPC/2017/A dated 7.11.2017 by JMFC “A” Court at Ponda Goa, is hereby quashed and set aside. Matter

restored for fresh consideration.

Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

M.S.JAWALKAR, J.

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