

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 182 OF 2018

1. Mr. Deepak Khalap, son of Surendra Khalap, Major in age, Married, Indian National, r/o B.S.T. Officer Quarters, Opp. Bran Bavari House, Prabhadevi, Mumbai 400 025.
2. Mr. Sadashiv Khalap, son of Tarachand Khalap, Major in age, Married, Indian National, R/o H. No. 224/7, Khalap Waddo, Mapusa, Bardez - Goa.
3. Mrs. Kiran Tilve, wife of Rama Tilve, Major in age, Married, Indian National, R/o X 15, 4th Floor Kurtarkar Commercial Arcade, Sadar, Ponda - Goa.
4. Mrs. Teja Saraf, Wife of Manoj Saraf, Major in age, Married, Indian National, R/o H. No. 144, B/9, Queeny Nagar, Zariwada, Davorlim, Salcette - Goa.
5. Mrs. Kanan Satish Kumar, Major in age, Married, Indian National, R/o 28, G/3 Opp. Adv Narulkar House, Post Tivim Ind. Estate, Karaswada, Mapusa-Goa.
6. Mrs. Priya Pangam, wife of Rupesh Pangam, Major in age, Married, Indian National, R/o F/5, Ground Floor, Eden Gardens, Near Forest Check Post, Acoi, Karaswada, Tivim, Bardez-Goa.
7. Mr. Shantiprasad Khalap, Major in age, Indian National, R/o Near Ganesh Temple, Khorlim, Mapusa, Bardez-Goa.
8. Smt. Preetaam Khalap, son of Tarachand Khalap, Major in age, Indian National, R/o Near Ganesh Temple Khorlim, Mapusa, Bardez-Goa.

.... Petitioners

Versus

1. State Of Goa, Through the Public Prosecutor, Panaji - Goa.
2. Ms. Feliciana Mendonca, Major of age, married, R/o '301' Heredia Lotus New I.C. Ext. Link Road, Kanderpada, Dahisar (W), Mumbai - 400 068. Respondents

WITH
CRIMINAL WRIT PETITION NO. 183 OF 2018

Mr. Sandip Ganguli, son of Sauren Ganguli, major in age, Indian National, R/o 36, Sa Francis Dasis Street, Kuruchikuppam, Pondicherry - 605 001. Petitioner

Versus

1. State Of Goa, Through the Public Prosecutor, Panaji - Goa.
2. Ms. Feliciana Mendonca, Major of age, married, R/o '301' Heredia Lotus New I.C. Ext. Link Road, Kanderpada, Dahisar (W), Mumbai - 400 068. Respondents

WITH
CRIMINAL WRIT PETITION NO. 184 OF 2018

Mr. Kashinath Khalap, son of Surendra Khalap, major in age, Married, Indian National, R/o H. No. 230/7, Angod, Khalap Waddo, Mapusa-Bardez, Goa. Petitioner

Versus

1. State Of Goa, Through the Public Prosecutor, Panaji - Goa.
2. Ms. Feliciana Mendonca, Major of age, married, R/o '301' Heredia Lotus New I.C. Ext. Link Road, Kanderpada, Dahisar (W), Mumbai - 400 068. Respondents

Mr. Shivan Desai with Ms. Maria Viegas, Advocates for the Petitioners.

Mr. Mahesh Amonkar, Additional Public Prosecutor for Respondent No. 1.

Mr. Melwin Viegas with Ms. Menaka Korgaonkar, Advocates for Respondent No. 2.

Coram: M. S. JAWALKAR, J.

Reserved on : 8th MARCH 2021

Pronounced on : 18th MARCH 2021

COMMON JUDGMENT:

Rule. Rule made returnable forthwith at the request and with the consent of the learned Counsel for the parties.

2. All these Criminal Writ Petitions are filed by the petitioners challenging the order dated 07.08.2017, passed by the learned JMFC, Pernem in Private Criminal Case No. 03/2016, issuing summons to the petitioners.

3. The brief facts necessary for the disposal of Criminal Writ Petition Nos. 182/2018 and 184/2018 may be stated thus:-

The Mamlatdar of Pernem in an ex parte proceeding declared one Mrs. Felomena Mendonsa alias Felome D'Souza as a tenant of property bearing survey no. 4/1, 5/1 and 5/7 of village Tiracol, Pernem, Goa vide his order dated 30.06.1994.

On 13.07.2007, Kashinath Khalap filed a Regular Civil Suit No. 35/2007 for negative declaration claiming that

the entry of Mrs. Felomena Mendonsa in the tenants column is erroneous and that she was not a tenant under the provisions of Goa Agricultural Tenancy Act.

The learned Civil Judge Junior Division at Pernem was pleased to declare that Mrs. Felomena Mendonsa was not a tenant of the property bearing survey nos. 4/1, 5/1 and 5/7 of village Tiracol, Pernem, Goa and that her name was wrongly recorded in the cultivator's column and the other rights column in the survey records. It was further directed that her name was to be deleted and she was restrained from entering the said property by way of permanent injunction.

Mr. Kashinath Khalap being the co-owner, as well as the power of attorney holder of the other co-owners, of the said property bearing several survey nos. 2 to 16 and the subdivisions thereto of village Tiracol, Pernem, executed a Deed of Sale dated 26.10.2007 in favour of M/s Leading Hotels Pvt. Ltd. The said deed of sale was subsequently rectified vide deed of rectification and sale dated 03.09.2010.

In view of the erroneous entry, petitioner Kashinath Khalap filed Civil Suit No. 35/2007 for negative declaration claiming that the entry of Mrs. Felomena Mendonsa in the tenant's column is erroneous and that she was not a tenant

under the provisions of Goa Agricultural Tenancy Act. The said suit came to be decreed and the entries were deleted in respect of Survey Nos. 4/1, 5/1 and 5/7 of village Tiracol, Pernem of Mrs. Felomena Mendonsa and others.

Another co-owner one Mr. Deepak Khalap filed a Tenancy Appeal bearing No. 26/2016 before the Learned District Judge at Mapusa, challenging the Order dated 30.06.1994 passed by the Mamlatdar of Pernem. The contention raised in the said Appeal was that the notices were never served on him and that the final Judgment and Order passed by the learned Mamlatdar was also not served on him, which was otherwise required to be served as per the relevant provisions of law.

By order dated 13.05.2016 the said appeal bearing no. 26/2016 was allowed by the Learned District Judge at Mapusa. The petitioner herein is one of the defendants in the said suit.

On 13.04.2016, respondent no. 2 herein along with two others filed a Regular Civil Suit for Declaration and Permanent Injunction before the Learned Civil Judge Junior Division at Pernem.

Despite the erroneous entry of Felomena Mendonsa

being deleted after resorting to the procedure contemplated under the law, respondent no. 2 filed a private criminal complaint invoking Sections 465, 466, 467, 468, 469, 420 and 120-B of Indian Penal Code and by the impugned order dated 07.08.2017, the learned JMFC at Pernem has issued summons to the petitioners.

Feeling aggrieved by the same, the petitioners is before this Court.

4. The brief facts necessary for the disposal of Criminal Writ Petition No. 183/2018 may be stated thus:-

Mr. Kashinath Khalap being the co-owner, as well as the power of attorney holder of the other co-owners, of the said property bearing several survey nos. 2 to 16 and the subdivisions thereto of village Tiracol, Pernem, executed a Deed of Sale dated 26.10.2007 in favour of M/s Leading Hotels Pvt. Ltd. The said deed of sale was subsequently rectified vide deed of rectification and sale dated 03.09.2010.

Respondent no. 2 herein along with two others filed a Regular Civil Suit for declaration and permanent injunction before the learned Civil Judge Junior Division at Pernem.

The petitioner states that M/s Leading Hotel Pvt.

Ltd. is one of the defendants in the said suit.

Despite the erroneous entry of Felomena Mendonsa being deleted after resorting to the procedure contemplated under the law, respondent no. 2 filed a private criminal complaint invoking Sections 420 and 120-B of Indian Penal Code and by the impugned order dated 07.08.2017, the learned JMFC at Pernem has issued summons to the petitioner, without joining Company as party accused.

Feeling aggrieved by the same, the petitioner is before this Court.

5. It is submitted by the learned Counsel for the petitioners that the main challenge in the present Petitions is that there is no question of applicability of Section 465 to 469, 420 and 120-B of IPC, which is in respect of punishment for forgery, forgery of record of Court, forgery of valuables, forgery for purpose of cheating, forgery for the purpose of harming reputation, cheating and dishonestly inducing delivery of property and criminal conspiracy. It is submitted that the erroneous entry of Felomena Mendonsa was deleted after pursuing appropriate procedure contemplated under the law. It is stated that secondly, respondent no. 2 filed a Civil Suit on

13.04.2016 being Regular Civil Suit No. 37/2016, challenging the order dated 25.09.2007. The said suit filed by respondent no. 2 in the year 2016 is pending before the Civil Judge at Pernem. The petitioners are defendants therein. Pending adjudication of the civil suit, the question of respondent no. 2, invoking criminal jurisdiction on same facts does not arise. It is submitted that the learned JMFC lost sight of these facts and erred in issuing summons upon the petitioners. There is no application of mind and the impugned order is passed as a matter of course, without appreciating that summoning of an accused in a criminal case is a serious matter and specially in matters, such as the present one, which involve detrimental consequence.

6. It is submitted that the learned JMFC ought to have appreciated that the complaint is nothing, but abuse of the process of law. The learned JMFC failed to appreciate that otherwise also, the complaint does not make any offence under Section 465 to 469, 420 and 120-B of IPC as there is no forgery or any false document is created. There are findings of the Courts that adjudication is within the realm of the civil lis, which issue is pending in the suit filed by respondent no. 2 and

it is nothing but pressurizing techniques. There is an interim order passed by the Civil Court.

7. The learned Counsel for the petitioners relied on the decision of the Hon'ble Apex Court in the case of **Dhariwal Tobacco Products Ltd. & Others Vs. State of Maharashtra & Others**, AIR 2009 SC 1032; **Rajiv Thapar & Others Vs. Madan Lal Kapoor**, (2013) 3 SCC 330 and **State of Haryana & Others Vs. Bhajan Lal & Others**, 1992 SCC (Cri) 426. He also relied on the decision of this Court in **Shri Dominc Mendes Vs. State & Another** (Criminal Writ Petition No. 68/2018 dated 08.06.2018) and in **M/s Curlies Guest House & Another Vs. The Goa State Pollution Control Board & Another** (Criminal Writ Petition No. 69/2018 dated 08.06.2018).

8. The learned Counsel for respondent no. 2 raised a preliminary objection that the alternate remedy of revision is available to the petitioners and therefore, the Petitions are not maintainable. It is also contended that the suit is collusive to deprive their rights of tenancy.

The learned Counsel for respondent no. 2 relied on

the decision of the Hon'ble Apex Court in the case of **Sau. Kamal Shivaji Pokarnekar Vs. State of Maharashtra & Others, (2019) 14 SCC 350** and the decision of the Principal Seat of this Court in the case of **Kisanlal Dagdulal Rathi Vs. State of Maharashtra & Others, 2009 ALL MR (Cri) 3294**.

9. Heard Mr. Shivan Desai, the learned Counsel for the petitioners, Mr. Amonkar the learned Additional Public Prosecutor for respondent no. 1 and Mr. Melwin Viegas, the learned Counsel for respondent no. 2.

10. In view of the judgments relied on by the learned Counsel for the petitioners, power under Section 482 of Cr.P.C. can be invoked by the High Court inspite of alternate remedy. The Hon'ble Apex Court in **Bhajan Lal** (supra) gave category of cases by way of illustration, where such powers can be exercised either to prevent abuse of the process of any Court or otherwise, to secure the ends of justice. The list of myriad types of cases where such powers should be exercised are given as under:

(a) 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;

(b) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. 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;

(c) 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;

(d) 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;

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

(f) 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;

(g) 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.

11. To make good the proposition of law laid down in **Kisanlal Rathi** (supra) applicable in the present matter, it is incumbent on the complainant that he should show that there is material to make out charge, to make an offence against the accused. The complaint may sustain even if there is some *prima facie* material against the accused, he being criminally liable to answer the charges. Even in the citation **Sau. Kamal Shivaji Pokarnekar** (supra), the Hon'ble Apex Court observed thus:

“Quashing the criminal proceedings is called for only in a case where the complaint does not disclose any offence, or is frivolous, vexatious, or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same. It is not necessary that a meticulous analysis of the case should be done before the Trial to find out whether

the case would end in conviction or acquittal. If it appears on a reading of the complaint and consideration of the allegations therein, in the light of the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for the High Court to interfere.”

12. I have gone through the impugned order issuing summons against respondent nos. 1 to 16. Though it is a matter of record that the complainant is claiming in the complaint that the original tenant was the deceased father of the complainant, however, the complainant placed on record death certificate in respect of one Sebastian Mendonca, whereas in Form No. I & XIV, the name is shown Sebestao Mendes as Khoti and as per the complaint, he died on 05.09.1962.

13. The learned Magistrate ought to have first verified that Sebastian Mendonca and Sebestao Mendes are one and the same person. The complainant has not placed anything on record, *prima facie*, to satisfy this contention of the petitioners. Mrs. Felomena Mendonca in the year 1994 had filed tenancy proceedings and got her name mutated as a tenant in revenue records. The said order when came to the notice of the owner

of the property, he filed Civil Suit bearing No. 35/2007. All these facts are on record through complaint. It was the pleading in the suit that for last 14 years nobody is cultivating the property. The said suit was decreed vide judgment dated 25.09.2007 and it was declared that the applicant nos. 1 and 2 are not tenants in the suit property. The tenancy application is of 1994 and the suit is filed in the year 2007. The learned JMFC ought to have taken into consideration whether there is any element of criminal conspiracy. It is alleged that accused no. 1, in tenancy proceedings, showed original tenant as a female person whereas it is a male person and it is alleged that the name of grandmother of respondent no. 1 as Sebestao Mendes. It is alleged in the complaint that the suit was collusive and misleading with an intention to defeat the rights of the complainant and other co-owners in the suit properties. It is also alleged that the Police Authority refused to lodge a crime as the complaint is of civil nature. It is also a matter of record that the complainant filed a Civil Suit bearing No. 37/2016 for declaration that the judgment and decree dated 25.09.2007 passed in Regular Civil Suit No. 35/2007 is illegal, collusive and frivolous. The said suit is pending for adjudication.

14. In view of these facts, it is clear that the petitioners herein are pursuing their legal civil remedies. Whether the suit was collusive or not, will be decided in the pending civil suit filed by the complainant. The learned Magistrate after going through the material on record, placed by the complainant, ought not to have issued summons to the present petitioners. There is no question of any forgery as alleged. The petitioners being the co-owners of the property are pursuing their legal remedies. If at all any fraud is alleged to be committed, at the most, it is attributable to accused no. 1, in view of the allegations made by the complainant. It is also a matter of record that there is discrepancy in the name of the deceased father of the respondent no. 2 (complainant). The death certificate produced shows a different name than the name shown in the revenue records. The complainant ought to have satisfied on this point or the learned Magistrate ought to have got satisfied itself before issuing of summon to the petitioners. It is also surprising that in para 10, the learned JMFC observed as follows:

Now coming to the offence punishable u/s 467 of IPC, it deals with forgery of valuable security, will etc. is also made out against accused nos. 1 to 16 because based on the false orders the accused nos.

3 to 16 got sale deed executed in favour of accused no. 17. Hence case for issuing summons against accused nos. 1 to 16 for the offence punishable u/s 467 is also made out.

15. While describing the lawful orders as false orders, the learned JMFC ought to have borne in mind that unless it is declared by the competent Court that the order is illegal and unsustainable in the eyes of law, such remarks describing false order is uncalled for. As such, the order passed by the learned JMFC, issuing process against the petitioners is totally erroneous without application of mind and is liable to be set aside.

16. Insofar as Criminal Writ Petition No. 183/2018 is concerned, Company is not made a party as an accused, which is the purchaser of the property in 2007. The complaint is defective to that extent. It needs to be noted here that there is no application to the Mamlatdar for last 40 years by the complainant to get their name mutated as a tenant. As such, there is no question of having knowledge of the same to the accused/Director of the Company. Even rights of complainant are not legally adjudicated and matter is pending in Civil Court. As such, no *prima facie* case is made out by the complainant to

attract the ingredients of the offence alleged to have committed. As such, issuance of summons order in respect of the petitioners is apparently passed without application of mind. Hence, liable to be set aside.

17. Accordingly, I proceed to pass the following order:

ORDER

- (i) Criminal Writ Petition Nos. 182/2018, 183/2018 and 184/2018 are allowed.
- (ii) The Order dated 07.08.2017, passed by the learned JMFC, Pernem, issuing process to the present petitioners in Private Criminal Case No. 03/2016, is hereby quashed and set aside, to the extent of the present petitioners.
- (iii) All the Petitions stand disposed of accordingly.
- (iv) Rule is made absolute in the aforesaid terms with no order as to costs.

M. S. JAWALKAR, J.

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