

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION (APL) NO. 96 OF 2015

1. Dr. Anil S/o. Shobha Rathod,
Aged about 35 years,
Occupation : Medical Practitioner,
R/o. Pusad, Distt. Yavatmal.

2. Dr. Vidya W/o. Anil Rathod,
Aged about 30 years,
Occupation : Medical Practitioner,
R/o. Pusad, Distt. Yavatmal.

. . . . **APPLICANTS**

. . . . **VERSUS**

1. The State of Maharashtra
Through P. S.O. Pusad (City) Police Station,
Tq. Pusad, Distt. Yavatmal.

2. Dr. Pankaj S/o. Bharatlal Jaiswal,
Aged about 37 years,
Occupation : Vaidya,
R/o. Tagadpallewar Layout,
Near Rani Laxmibai School,
Motinagar, Pusad,
Tq. Pusad, Distt. Yavatmal.

. . . . **NON-APPLICANTS**

Shri Firdos Mirza, Advocate for applicants.
Shri T. A. Mirza, A.P.P. for non-applicant no.1/State.
Shri V. N. Morande, Advocate for non-applicant no.2.

CORAM : Z.A.HAQ AND
AMIT B. BORKAR, JJ.

DATE : 22.02.2021.

ORAL JUDGMENT : (PER AMIT B. BORKAR, J.)

1. By this application under Section 482 of the Code of Criminal Procedure, the applicants have challenged registration of First Information Report No.16 of 2015 dated 13.01.2015 registered with the non-applicant no.1 - Police Station for offences punishable under Sections 447 and 34 of Indian Penal Code.

2. First Information Report came to be registered against the applicants with the accusations that the applicants have encroached plot owned by the non-applicant no.2 and have constructed over the property of the non-applicant no.2. It is alleged that the applicants have not carried out construction according to the sanctioned plan. It is alleged that the applicants have carried out construction on the service lane and have therefore, encroached on public property.

3. The applicants have challenged registration of the First Information Report by way of present application. This Court on 17.02.2015 issued notice to the non-applicants and by way of ad-interim relief, it was directed that no coercive steps be taken against the applicants.

4. This Court on 28.9.2015 issued Rule and continued interim relief already granted.

5. The non-applicant no.1 filed reply and stated that *prima facie* the land belongs to the non-applicant no.2 and the applicants have entered into the area of the non-applicant no.2 and illegally constructed over the plot owned by the non-applicant no.2. It is submitted that therefore, *prima facie*, offence punishable under Section 447 of the Indian Penal Code is made out against the applicants.

6. The non-applicant no.2 has filed his reply and written submissions and it is stated that the original owner Deepak Tagadpallewar trifurcated his plot into three portions; one portion was sold to Dwarkaprasad Sharma on 11.06.2009, admeasuring 218.74 sq.mtrs., another portion was sold to one Babulal Choudhari admeasuring 217.24 sq.mtrs and third portion admeasuring 220.62 sq.mtrs. was sold to one Suresh Paradh. The portions, which were sold to Shri Sharma and Shri Chaudhari, were purchased by the applicants and third portion of the plot was purchased by the non-applicant no.2 from Suresh Paradh. It is submitted that the applicants have agreed to sale half of the plot admeasuring 109.37 sq.mtrs. to the non-applicant no.2 but, they had shown less area in the description of the property and, therefore, Civil Suit bearing No.114 of 2010 came to be filed for correction of agreement, which

was compromised by granting area of 89 sq.mtrs. to the non-applicant no.2. It is submitted that there is no merit in the application of the applicants.

7. Shri Mirza, learned Advocate for the applicants, submitted that the allegations in the First Information Report are not sufficient to fulfill the ingredients of Section 447 of the Indian Penal Code, as there is no averment in the First Information Report that the applicants entered into property of the non-applicant no.2 with intent to commit an offence. It is submitted that the allegations in the First Information Report is the civil dispute. He invited our attention to various First Information Reports filed by the non-applicant no.2 against the applicants and submitted that filing of the First Information Reports are abuse of process of the Court. He relied upon the judgment of the Apex Court in the case of **Isaac Isanga Musumba and others Vs State of Maharashtra and others** reported in (2014) 15 SCC 357 and **Shrikant Purushotam Paranjape and others Vs State of Maharashtra and Anr.** reported in 2016 ALL MR (Cri) 1394.

8. Shri V. N. Morande, the learned Advocate for the non-applicant no.2, submitted that the ingredients of offence are made out, if the accusation in the First Information Reports are presumed

to be correct. He submitted that the applicants have made criminal trespass on the property of the non-applicant no.2 and, therefore, the criminal application deserves to be dismissed.

9. We have carefully considered the contents of the First Information Report and replies filed by the non-applicants. At this stage, it will be relevant to note Section 441 of the Indian Penal Code, which defines criminal trespass as under:

“Section 441: Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit “criminal trespass”.

10. The ingredients of Section 441 of the Indian Penal Code would thus contemplate entry into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. This Court in the case of ***Shrikant Purushottam Paranjape*** (Supra) in paragraph no.18 has held as under:

*“18. It is clear that to constitute criminal trespass the entry in the property in possession of another must be;
(i) with intend to commit an offence;*

or

(ii) to intimidate, insult or annoy any person in possession of the such property. It is trespass with the requisite intention, as mentioned in the said section, that would amount to criminal trespass. Here, the case of the complainant itself is that the trespass allegedly committed by the accused persons is for the sake of trespass. In other words, the trespass has, allegedly, been made with the object of grabbing the property by falsely asserting a right or claim over the same. Whether the right actually exists or not, is quite immaterial in the context of the correctness of issue of process. Thus, the acts attributed to the accused persons would amount to only civil trespass and not criminal trespass. Unlawfully taking possession of the property in somebody else's possession, simpliciter, has not been made an offence punishable under the Indian Penal Code. It is for the Legislature to decide whether such cases should be made punishable. (There have been State amendments (Orissa & U.P.) to Section 441 to make trespass with the intention of taking unauthorised possession of property an offence). The learned counsel for the complainant attempted to suggest that even under section 441 of the IPC, as it stands, such trespass would amount to criminal trespass, but I am unable to agree with him. If this theory is accepted, the distinction between civil trespass and criminal trespass would be abolished and every trespass can be termed as 'criminal trespass'.

11. On consideration of the First Information Reports in the light of the law laid down by this Court, we are of the view that the allegations in the First Information Report are not sufficient to fulfill the ingredients of the offence of criminal trespass, as defined under Section 441 of the Code of Criminal Procedure.

12. It appears that the non-applicant no.2 had filed F.I.R. No.121 of 2012 against the applicants on the ground that the applicant no.1 had forged signature on the application made to the Land Survey Department for measurement of land. The said FIR was quashed by this Court on 27.3.2015 in Criminal Application No.404 of 2012. Another Criminal Complaint No.405 of 2012 alleging that the applicants made construction in violation of the MRTP Act was unconditionally withdrawn on 13.12.2012. Criminal Case No.1033 of 2012 was made by the non-applicant no.2 to the Chief Officer, Municipal Council, alleging that the applicant no.1 had made illegal construction wherein the applicant no.1 was acquitted by 7th Judicial Magistrate First Class, Pusad on 24.1.2014. Regular Criminal Case no.441 of 2012 filed by the non-applicant no.2 against the applicants on the identical allegations, which were made in Criminal Complaint No.405 of 2012 and Criminal Case no.1033 of 2012 are pending.

13. Taking into consideration filing of several criminal cases against the applicants alleging similar accusation, we are of the view that present proceeding instituted by the non-applicant no.2 is not the legitimate prosecution. We are satisfied that the

continuation of present proceedings would amount to abuse of process of Court. We, therefore, pass following order:

ORDER

First Information Report No.16/2015 dated 13.01.2015 registered with the non-applicant no.1 - Police Station for offences under Sections 447 and 34 of the Indian Penal Code is quashed and set aside.

Rule is made absolute in above terms.

JUDGE

JUDGE

ambulkar