

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

922 CRIMINAL WRIT PETITION NO.939 OF 2022

SALIM PIR MOHAMAD SHAIKH
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

...
Advocate for Petitioner : Mr. Rahul R. Karpe
APP for Respondents: Mrs. R. P. Gaur
...

CORAM : R. M. JOSHI, J.
DATE : 19th AUGUST, 2023

PER COURT :

1. Respondent no. 2 is duly served. In spite of service of notice, he remained absent. This indicates that respondent no. 2 has no inclination to oppose the petition.

2. This petition seeks quashing of order dated 19.10.2018 passed by learned Judicial Magistrate First Class, Shrirampur, in R.C.C. No. 193/2017 thereby issuing process against the petitioner for the offence punishable under Section 489 of the Indian Penal Code.

3. Learned counsel for the petitioner submits that the petitioner and respondent no. 2 have adjoining properties and there is

a dispute between them with regard to the boundaries thereof. It is submitted that the respondent no. 2 had filed Civil Suit bearing R.C.S. No. 15 of 2017 seeking mandatory injunction as well as for restoration of wall which is subject matter of the present petition. It is submitted that only with a view to pressurize the present petitioner, criminal case has been filed. Learned advocate for the petitioner drew attention of the court to the impugned order wherein it is observed by the learned Magistrate that there is no pleading as to the landmark fixed by the public authority. Thus, it is submitted that, once such a finding is recorded, it was not open for the learned Magistrate to issue process when the offence is punishable under Section 489 of the IPC.

4. Learned APP supported the impugned order.

5. Perusal of the record indicates that the respondent no. 2 had filed suit before the competent court being R.C.S. No. 15 of 2017 seeking mandatory injunction in respect of the wall which is subject matter of the complaint lodged before the Judicial Magistrate First Class. Perusal of copy of the suit clearly indicates that in respect of

the alleged demolition of wall of respondent no. 2 on 08.07.2017, the civil suit is filed. It is thus clear that in respect of the same cause of action, now a criminal complaint is sought to be filed by the respondent no. 2. In order to attract the provisions of Section 489 of IPC, there has to be tampering with property mark with intent to cause injury. Section 489 of IPC reads thus :

489. Tampering with property mark with intent to cause injury.—Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

6. Perusal of Section 489 of IPC clearly shows that, whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, amounts to an offence. Needless to state that this offence cannot be attracted in a case wherein there is a civil dispute between the parties over the boundaries / compound wall. Having regard to the fact that the respondent no. 2 had already initiated civil proceedings in respect of the said cause of action, unless clear case was made out that the act of the petitioner is covered under Section

489 of IPC, it was not open for the learned Magistrate to issue process. More particularly, when there is a finding recorded by him to the extent that there is no pleading as to the landmark fixed by any public authority, the cognizance could not have been taken by the learned Magistrate. Even otherwise, having regard to the fact that dispute between parties is essentially in the nature of civil dispute and suit is pending, it cannot be said that there is intention of Accused to commit offence by removal of the wall between two properties. Hence, case is made out for causing interference in the impugned order.

7. Having regard to the aforesaid facts, **petition deserves to be allowed**. The impugned orders dated 19.10.2018 passed by learned Judicial Magistrate First Class, Shrirampur, in R.C.C. No. 193/2017 and 20.04.2022 passed by the learned Additional Sessions Judge, Shrirampur in Criminal Revision Application No. 8 of 2019, are set aside.

[R. M. JOSHI]
JUDGE

SG Punde