

(1994) 06 BOM CK 0011

In the Bombay High Court

Case No : Criminal Application No. 725 of 1993

Ahshru Gaiwal and Others

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 09-06-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 204, 482

Citation : (1994) 4 BomCR 483

Hon'ble Judges : A.D. Mane, J

Bench : Single Bench

Advocate : S.B. Talekar, for the Appellant; S.K. Kadam, Assistant Public Prosecutor for Respondent No. 1 and Charutha S. Deshmukh, for the Respondent

Judgement

A.D. Mane, J.—This criminal application is for quashing the criminal proceedings instituted on a private complaint being Criminal Case No. RTC 75 of 1992 on the file of Court of Judicial Magistrate, First Class, Jamkhed, for offences under sections 392, 395 and 447 read with section 34 of the Indian Penal Code.

2. In order to appreciate the question whether the allegations made in the complaint do or do not constitute offences complained of, regard may be had to few facts which are either admitted or not seriously disputed between the parties. There is land Survey No. 131/1 admeasuring 3 acres situated at village Songaon Taluka district Ahmednagar. This land claims to be of the ownership of the complainant but the said fact has been seriously disputed by the petitioners. It is the case of the complainant that on 7-2-1992 in the night the petitioners-accused harvested the crops standing on the disputed land. At the time of harvesting they were armed with deadly weapons. It was therefore alleged that they are liable to be punished for offences under sections 392, 395 and 447 read with section 34 of the Indian Penal Code.

3. The learned Magistrate in his impugned order referred to the litigation between the parties clearly making out an undisputed fact that there exist a bona fide dispute between the parties over the possession of the land. For

instance, the father of the complainant had filed Regular Civil Suit No. 157 of 1988 against the accused for injunction claiming exclusive possession based upon partition. That suit was dismissed holding that the land was owned jointly by the complainant's father and the accused persons. That means that the land in dispute was held to be in joint possession. It appears that another suit came to be filed in which the complainant claimed his exclusive possession. Pending that dispute, the incident has taken place and the learned Magistrate after referring to the material evidence adduced by the complainant, observed that "the evidence shows that the accused Nos. 1 to 11 have cut Jawar from the land Survey No. 131 even though their possession and the possession of the complainant is joint. As per own showing of the accused the complainant has ten annas share in the land Survey No. 131. The accused persons have cut the crops including the share of the complainant." It is in that view of the matter, according to the learned Magistrate, the offences under sections 392, 395 and 447 read with section 34 of the Indian Penal Code have been made out. The learned Magistrate, therefore, issued the process by the impugned order.

4. It is well established that the High Court can exercise its inherent powers for quashing the criminal proceedings only when the allegations made in the complaint do not constitute an offence or that the exercise of power is necessary either to prevent abuse of process of the Court or otherwise to secure ends of justice. No flexible guidelines or rigid formula can be set out and it depends upon facts and circumstances of each case where such power could be exercised. (See Smt. Chand Dhawan Vs. Jawahar Lal and others, .

5. The learned Counsel for the respondent No. 2 does not dispute the proposition that where the property is removed in the assertion of a contesting claim of a right, however, ill founded that claim may be, removal thereof does not constitute theft. In other words, a claim of right in good faith in bona fide belief takes away the act of taking away the property from theft and it is mainly a question of fact whether such belief exists or not. Such an act of taking the property does not amount to theft unless there is not only no legal right but no appearance or colour of a legal right. The expression "colour of a legal right", it has been observed, is meant not a pretence but a fair pretence not a complete absence of obligation but a bona fide claim, however, weak. The question whether the accused persons removed the harvested crops in assertion of a contested claim of their right under bona fide belief or not, the observations made by the learned Magistrate assumes importance. The learned Magistrate has, in clear words observed that there exists a bona fide dispute between the parties over the possession of the land and one of parties forcibly harvested the crops standing on the suit land. Therefore, the question is whether the harvesting party would be convicted for theft. The answer could be found in the decision of the Supreme Court in the case of Ram Ekbal Rai and Others Vs. Jaldhari Pandey, . The Supreme Court upsetting the conviction of two subordinate courts held that where the documents indicate that there was from the inception a dispute about the land between the parties and the harvesting party was under

the bona fide belief that it was entitled to possession of the land, there was, therefore, no question of having them trespassed the said land.

The learned Counsel, Mrs. Deshmukh, for the respondent No. 2, however, points out that the dispute u/s 145 of the Code of Criminal Procedure has been terminated and the Executive Magistrate by his judgment dated 11-4-1991 held that the complainant is having independent possession in respect of the land survey No. 131/1, whereas, the respondent No. 1 has his independent share in respect of the land survey No. 131/12.

Mr. Talekar, learned Counsel appearing for the petitioner, however, disputing this fact of the case, points out that no reliance can be placed on the decision of the learned Executive Magistrate in the proceedings u/s 145 of the Code of Criminal Procedure inasmuch as the Civil Court in appeal discarding the mutation entry by its order dated 23-3-1990 has held that the entire land is jointly possessed by the parties. It has been submitted that the Executive Magistrate has improperly discarded the decision of the Civil Court and in keeping reliance on the mutation entry showing that there was division of the land in survey No. 131/1 and survey No. 131/2. Referring to the finding of the learned Magistrate in para 5 of the judgment it has been pointed out that the learned Magistrate in clear terms has held that "all this documentary evidence shows that the complainant is not in possession of the property in dispute of survey No. 131/1."

Mrs. Deshmukh, learned Counsel for the respondent, however, relies on the concluding sentence of the impugned order wherein the learned Magistrate has observed that "as per own showing of the accused persons the complainant has 10 annas share in the land survey No. 131/2. The learned Counsel for the respondent therefore makes a point that the complainant is in possession of a defined share. In this context, the learned Counsel Mrs. Deshmukh invites my attention to the decision in the case of Ramsharnagat Singh and Others Vs. State of Bihar, . In that case the prosecution party and the accused party were co-owners of a Shisham tree, each having 1/3 rd share in tree. The tree was cut by the prosecution party but in the dispute relating to the plot, the panch had directed the prosecution party not to remove the logs of wood. Thereafter, the accused party tried to remove the logs surreptitiously at about 6 in the evening and would not leave the logs even when the prosecution party objected to the removal. It was held that the main element of theft consists of removal even without implied consent, of moveable property from the possession of another with a dishonest intention. Dishonest intention consists as defined in section 24 in causing wrongful gain or wrongful loss. Therefore, even a co-owner of a moveable property with another, if his share is defined, can be guilty of theft, if he is found to remove the joint property without any implied consent of the co-owner with dishonest intention, that is, with a view to cause wrongful loss to the co-owner and consequently gain to himself or anybody else.

6. In order to appreciate these rival contentions raised by the learned Counsel for the petitioners, in my opinion, it would be desirable to consider the following

questions.

(i) Whether in a given case removal of harvested crop by the accused in assertion of a contested claim of right in good faith constitutes theft?

(ii) Whether the bona fide dispute exists between the parties over the possession of the land when the complainant harvested the crop and it was removed by the accused without the consent of the complainant?

(iii) Whether there is definite share allotted to the complainant in the land in dispute and the accused harvested the crops of that portion of the land of the complainant without his consent.

These questions are necessary to be kept in view in the light of the legal propositions, namely; that where the property is removed in assertion of a contested claim, however, ill founded that claim may be, removal does not constitute theft. Secondly, where bona fide dispute exists between the parties over the possession of the land and one of the parties forcibly cultivated and harvested the crops, the harvesting party could not be convicted for theft. Thirdly, that in case of joint, ownership if there is definite share between co-owners, the co-owner can be guilty of theft if he is found to have removed the joint property without implied consent of the co-owner and with dishonest intention, that is, with a view to cause wrongful loss to the co-owner and consequently gain to himself or anybody else.

7. On reading the complaint it is quite clear that the complainant asserts his right to the land survey No. 131/1 admeasuring 8 acres. In the complaint it has been averred that in that area of 8 acres the complainant has grown Jawar. The said crops have been removed by the accused unauthorisedly. It is nowhere stated in the complaint that the accused have not cultivated or grown crops in any portions of the land survey No. 131/1. It cannot be forgotten that the decision of the Civil Court is prior to the date of the complaint and it leaves no room for doubt that there was no division of survey No. 131 and the mutation entry dividing the land survey No. 131 into survey No. 131/1 and 131/2 was held to be illegal. The Civil Court, therefore, found that both the parties are joint in possession of the land in dispute. There is absolutely no evidence on record to show whether the ownership of survey No. 131 of either of the party was in respect of any defined share. Therefore, no shares were defined. No advantage can be had from the finding recorded by the Executive Magistrate in the proceedings u/s 145 of the Code of Criminal Procedure in view of the decision of the Civil Court. It is therefore simply a case of joint possession. In the absence of any definite share in favour of the complainant it is not possible to place any reliance on the decision in Ramsharnagat Singh's case (Cited supra) to which reference is made by the learned Counsel for the respondent No. 2. It is clear that even a co-owner of movable property with another removes the property can be guilty of theft, provided if his share is definite. In the present case the complaint is totally silent as to the particular share in the land. In other words,

the share of the complainant is not at all defined. As pointed out earlier there is also no evidence worth the name either in the complaint or in evidence of the complainant that he alone had grown the crops in the entire area of land survey No. 131. His claim that he has grown the crop in part of the land survey No. 131 i.e. survey No. 131/1 cannot be accepted in the face of decision of the Civil Court declaring the mutation entry dividing survey No. 131 in two divisions i.e. survey Nos. 131/1 and 131/2 as illegal. Therefore it is also not possible to visualise the case of the complainant that in case of removal of the crops the crops were grown by the complainant alone. It is rightly pointed out by Mr. Talekar, learned Counsel for the petitioner, that had it been the case that the complainant had grown the crops, nothing prevented the complainant to mention it in the complaint that the accused have also grown crops in other portion of the land. It is therefore clear that the disputed land is in joint possession and cultivation must also be presumed to be joint and in the absence of any defined share between the parties it is simply a case where bona fide dispute existed between the parties over the possession of the land. In that case, one of the parties forcibly harvested the crops standing on the land cannot be held liable for theft. As observed by the Supreme Court in the case cited supra, the harvesting party was under a bona fide belief that it was entitled to possession of the land and therefore, there was no question of their having trespassed on the said land committed the offence of theft. The complaint filed by the respondent No. 2, therefore does not establish prima facie the ingredients of the offences charged.

It is in that view of the matter that the learned Magistrate seems to have wrongly exercised his discretion in issuing the process against the petitioners.

8. In conclusion, the criminal proceedings against the petitioners requires to be quashed. The criminal revision application is allowed. Rule is made absolute. The impugned order is quashed and set-aside.