



**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO.113 OF 2022**

MR. ELEUTERIO SOCORRO MARQUES
ALIAS SOCORRO EL. MARQUES
S/O Estevam Floriano Santana Marques
Aged about 65 years, Indian inhabitant,
Architect, R/o Abhu Dhabi, U.A.E., Postal
Address: C/o Integrated Design Bureau PO
Box No. 4290, Abhu Dhabi, UA GoaPetitioner.
Address: H. No. 407, Bairo Foro, Santo
Estevam, Tiswadi, GOA. 403 106.

Versus

MR. ANTONIO TEODORO MARQUES
Alias Anthony Theodore Marques
S/o Estevam Floriano Santana Marques
Aged about 69 years, Indian inhabitant,
Advocate R/o B-8, Goodwill Mansion Off.
P. Godrej Marg, Vikhroli (East), Mumbai
400 083.
Goa Address:
H. No. 407/1, Bairo Foro, Santo Estevam,
Tiswadi, Goa- 403 106.Respondent

Mr Rohit Bras De Sa, Advocate for the petitioner.
Respondent present in person.

CORAM:

BHARAT P. DESHPANDE, J

Reserved on :
Pronounced on:

19th September 2024.
23rd September 2024.

JUDGMENT

1. Heard Mr Rohit Bras Desa, learned Counsel for the petitioner and respondent in person.

2. Rule was issued vide order dated 19.8.2023 and thereafter matter is taken up for final disposal since the respondent is appearing in person and is resident of Mumbai.

3. Petitioner preferred present petition under Articles 226 and 227 of the Constitution of India read with Section 482 of Cr.P.C. with the following prayers:-

- (A) *The Petitioner by this Petition, seeks a Writ of Certiorari, or any other writ, order or direction in the nature of Certiorari, under Article 226 and 227 of the Constitution of India r/w section 482 of the Criminal Procedure Code, calling for records and proceedings in criminal case IPC/30/2020/C on the file of the Judicial Magistrate First Class at Panaji, and after considering the legality, correctness and propriety of the summons issued to the Petitioner u/s 415, 417, 418 and 420 of the Indian Penal Code, this Hon'ble Court may be pleased to quash and set aside the complaint against the Petitioner in Criminal case no. IPC/30/2020/C on the file of the Judicial Magistrate First Class at Panaji, C Court, and also further be pleased to quash and set aside, the summons issued to the Petitioner u/s 415, 417, 418 and 420 of Indian Penal Code.*
- (B) *Pending hearing and final disposal of this Petition, this Hon'ble Court may be pleased to stay all further proceedings in Criminal Case no. IPC/30/2020/C on the file of the Judicial Magistrate First Class at Panaji, 'C' Court.*

4. Mr De Sa would submit that learned Magistrate while issuing process against the petitioner in Criminal Case No. IPC/30/2020/C, failed to consider that the matter is purely civil in nature and that

ingredients of Sections 415, 417, 418 and 420 of IPC are not at all made out even for taking cognizance and issuance of process.

5. Mr De Sa would submit that petitioner and respondent no.1 are real brothers. A plot along with house exists wherein respondent no.1 filed a Regular Civil suit bearing Regular Civil Suit No. 121/2011/D which was disposed of by filing consent terms and drawing of consent decree on 21.3.2018. Thereafter Deed of Partition was drawn between the parties which was duly registered before Sub Registrar, having a plan showing portion allotted to the petitioner and that of respondent. Thereafter the respondent even filed an application for execution of consent decree. However, suddenly respondent filed a criminal complaint against the petitioner for the offence punishable under Sections 415, 417, 418 and 420 of IPC claiming that the petitioner committed fraud, cheating with regard to plan attached to Deed of Partition and therefore request for issuance of process.

6. Mr De Sa would submit that after verification of the complainant on oath, learned Magistrate mechanically issued process and that too without observing that the matter is of a civil nature and ingredients of section 415 are not made out.

7. Mr De Sa would submit that proceedings filed before the Criminal Court are clearly abuse of process of law and only to pressurized the petitioner to concede to the unnecessary demand of

respondent who himself applied for execution of consent decree and is a signatory to the Deed of Partition executed before the Sub Registrar.

8. Mr De Sa would submit that dispute which is clearly a civil dispute, is being coloured as a criminal matter only to take revenge/vengeance. He would submit that such proceedings are required to be immediately quashed under the extraordinary power of this Court under Section 482 of Cr.P.C.

9. Respondent who is appearing in person would submit that petitioner from the inception had fraudulent intention and in connection with that, petitioner tampered with the plan attached to the Deed of Partition which was registered before the Sub Registrar. He submits that the line of division which was agreed between the parties and shown in the plan annexed to the consent terms is different from the line of partition which is found in the plan attached to the Deed of Partition registered before the Sub Registrar.

10. Respondent would submit that he did not realise this aspect while signing the Deed of Partition before the Sub Registrar. However, when the petitioner was insisting before the Executing Court that the partition has to be carried out as per the plan attached to the Deed of Partition, respondent realise that such plan attached to the Deed of Partition is different by showing more area of the house allotted in favour of the petitioner.

11. Respondent would then submit that complaint filed before the Magistrate discloses all necessary ingredients of the offence of cheating and in fact the Magistrate was satisfied and accordingly process was issued.

12. Respondent would further submit that a full fledged trial is required to be conducted in order to find out the aspect of cheating and this Court should not interfere in the matter at this stage. In this regard he placed reliance on the following decisions:

- 1. M/s Indian Oil Corporation V/s M/s NEPC India Ltd. & ors.¹**
- 2. Md. Allauddin Khan V/s The State of Bihar & ors. ²**
- 3. Som Mittal V/s Government of Karnataka.³**

13. Rival contentions fall for consideration.

14. Complaint filed before the learned Magistrate would go to show that complainant is resident of Mumbai and presently residing in house no. 407/1 at Bairo Foro, Santo Estevam, Tiswadi, Goa whereas accused therein is his young brother and architect by profession. Parents of the complainant and the accused expired leaving behind the complainant and the accused as their only legal heirs. Complainant filed a Regular Civil Suit No. 121/2011/D for declaration and injunction against the accused and for partition. Accused filed

¹ AIR 2006 SC 2780

² (2019) 6 SCC 107

³(2008) 3 SCC 574

counterclaim in the said suit for physical partition of their joint ancestral property i.e. a plot with a house situated therein at Bairo Foro, Santo Estevam bearing survey no. 20/10 of the village Jua (Santo Estevam). The said suit along with counter claim was disposed of vide consent terms dated 22.3.2018.

15. Complaint further shows that subsequent to consent decree, complainant and the accused executed a deed of partition dated 27.4.2018 duly registered on 30.4.2018 before the Sub Registrar of Ilhas Tiswadi.

16. It is the contention of the complainant that as per terms of consent terms/consent decree, the plot/house was supposed to be partitioned in terms of the plan annexed there to. Said plan shows that the plot along with the house was divided into two parts, i.e. Part A allotted to the complainant and part B to the accused. Area of 99 sq. mts of the house was allotted to the complainant whereas an area of 158 sq. mts was allotted to the accused. Since a bigger area was allotted to the accused he monetarily compensated the complainant for the said access built up area.

17. As far as the plot is concerned, the complainant was allotted 241 sq.mts whereas the accused got 249 sq. mts. However, it was then realised that the area of plot is much larger and accordingly in the Deed of Partition, allotment was changed to 252 sq.mts and 259.12 sq. mts for the complainant and the accused respectively.

18. Thus it is the contention of the complainant that the partition was supposed to be carried out mainly in terms of the plan annexed to the consent terms/consent decree. Deed of Partition was purely based on the consent terms/consent decree.

19. Complaint further shows that somewhere in the year 2018 the accused blocked the access of the complainant to the toilet/bathroom which, as per consent terms/decree, was allowed to be used by the complainant for a period of one year. This resulted in filing a Regular Civil Suit by the complainant bearing no.99/2018/D which is pending.

20. Complaint further shows that an Execution Application No. 26/2018/D was filed before the Civil Court for execution of the consent decree as per plan annexed thereto. However, the accused appeared before the Executing Court and was repeatedly referring to the Deed of Partition. Complainant therefore notice that the accused committed cheating/fraud on him by annexing a plan to the Deed of Partition which is different or modified from the one annexed to the consent terms/consent decree. Plan annexed to the consent terms/consent decree shows the line of partition as the best possible line on division, not the center of the plot. Accused was supposed to annexed the same plan to the Deed of Partition however dishonestly and with clear malafide intention of cheating and to have a wrong

gain annexed a different or modified plan to the Deed of Partition by showing the line of partition as line of division (center of the plot).

21. Verification of the complainant was done under Section 200 of Cr.P.C wherein complainant stepped into the witness box and reiterated his contention made in the complaint.

22. Learned Magistrate then issued a process against the petitioner/accused for summons dated 22.9.2021 which is challenged in the present petition.

23. In the case of quashing of a complaint or criminal proceedings under Section 482 of Cr.P.C., clearly depends upon the facts and circumstances of that particular case. The scope and ambit of the power under Section 482 of the Cr.P.C. is considered by the Apex Court in various decisions and a landmark decision in this case is State of Haryana Vs Ch. Bhajan Lal⁴.

24. The Apex Court categorized the cases where powers under Section 482 of Cr.P.C. could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It reads thus:-

(i) 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;

⁴ 1992 Supp. (1) SCC 335

- (ii) 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;
- (iii) 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;
- (iv) 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;
- (v) 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;
- (vi) Where there is an expressed 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;

(vii) 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.

25. These are the possibilities in which FIR/Complaint could be quashed under the inherent powers of the High Court. However, it is not possible to lay down precise and inflexible guidelines or any rigid formula or to give an exhaustive list of the circumstances in which such power could be exercised.

26. Decisions cited by respondents are all referring to the decision of **Bhajan Lal**(supra) and therefore, such decisions need not be referred to individually.

27. Matter in hand and as disclosed in the complaint itself would go to show that the petitioner and the respondent are real brothers who inherited the property from their parents. Civil proceeding by way of civil suit was filed by the respondent wherein counterclaim was filed by the petitioner. Finally said civil proceedings were disposed of on the basis of consent terms filed along with the plan for partition of the said property.

28. Complaint itself shows that the property was not divided equally amongst the petitioner and the respondents. It is also a fact that the house was also not divided equally amongst them. Larger portion of the house along with plot was allotted to the petitioner

whereas a smaller portion was allotted to the respondent. Consent terms itself shows that respondent was compensated monetarily for accepting a smaller portion of the house and the plot. It is not disputed that the petitioner paid such compensation to the respondent. Consent terms along with plan for partition was signed by both the parties and only on that basis, civil suit filed between the parties was disposed of by drawing a consent decree.

29. It is a matter of record and fact that after drawing the consent decree, it was realised that the area of the said plot is bigger than the one which is mentioned in the consent terms. Complaint and more specifically in paragraph 2 would go to show that parties realised that the area of the plot was larger than the one mentioned in the plan of the consent terms it was corrected in a deed of partition and the allotment was changed accordingly. Earlier the complainant was allotted an area of 241 sq.mts of the plot but in the Partition Deed it was changed to 252 sq. mts. Petitioner was initially allotted an area of 249 sq. mts which was changed in the Deed of Partition as 259.12 sq.mts.

30. It is the fact that the Deed of Partition was drawn and executed by the petitioner and the respondent and thereafter it was registered before the Sub Registrar in the year 2018 itself.

31. Besides, such Deed of Partition along with a plan annexed to it is not challenged till date by the respondent in any Court of law. He

simply claims in the present complaint that the plan attached to the Deed of Partition is different than the plan attached to the consent terms. However, plaintiff/respondent admitted that the plan attached to the consent terms was showing less area and when parties realised about the larger area, they decided it to show the same in the Deed of Partition, therefore at one place respondent/complainant admits that plan attached to the consent terms is showing less area and therefore both decided to correct it while executing Deed of Partition.

32. Since the Deed of Partition is having a plan annexed to it duly signed by both the parties and registered before the Sub Registrar, such documents cannot be termed as executed by cheating and fraud. The very contention of the complainant that the plan annexed to the Partition Deed shows a larger area would itself show that it has to be different from the consent terms and decree drawn thereon. Without challenging the Deed of Partition and the plan annexed to it, it would not lie in the mouth of the complainant to say that such a plan attached to the Deed of Partition is different one. Even otherwise the complainant himself admits that the plan attached to the Deed of Partition is different since a larger area is shown therein in which the party realised only after consent terms and consent decree was drawn.

33. Besides, the complainant failed to produce any material before the learned Magistrate to show that the line of Partition

Deed/Division shown in the plan attached to the consent terms/consent decree and the plan attached to the Deed of Partition is different.

34. The main thrust of the complainant is on the line of the division shown in both plans. Admittedly these plans were drawn by an expert showing the dimensions. Thus any difference in the line of division could be certified by experts only. Even otherwise perusal of both the plans and basically the line of division, it cannot be said that there is any difference. This observation is drawn *prima facie* only for the purpose of considering the complaint of cheating.

35. The dispute which is found in the complaint filed before the Magistrate is only when the petitioner insisted that partition during the execution proceedings shall be carried out as per plan attached to the Deed of Partition. Since such a document is executed by the parties voluntarily and registered before the Sub Registrar that too subsequent to the drawing of decree is required to be considered by the Court for the purpose of partitioning the said property. Thus it is purely a civil dispute. Only because petitioner insisted that division shall be effected as per plan annexed to the Deed of Partition, which is in fact showing a larger area cannot by any stretch of imagination prove ingredients of Section 415 of IPC.

36. Deed of Partition along with plan annexed to it is duly signed by the complainant and same is registered before the Sub Registrar.

Without challenging such Deed of Partition and the plan annexed to it, the complainant cannot be allowed to say that such a plan was inserted by the petitioner/accused only by fraud and cheating. It is a registered document duly executed by both the parties without any undue influence/coercion or fraud at the time of such execution. Having said so, the order of the Magistrate of the issuing process is clearly found to be mechanical, applying its mind to the facts and the documents placed on record. It is clearly a civil dispute between two brothers. Respondent by filing such complaint is clearly trying to give a different colour to civil dispute. Observations of the Apex Court in the case of **Bhajan Lal**(supra) as quoted earlier would clearly apply to the matter in hand and more particularly paragraphs nos. 1,3 and 7.

37. For all the above reasons, impugned order of issuing the process needs to be quashed and set aside. Accordingly, the impugned order of issuance of process is hereby quashed and set aside. Complaint filed by the respondent before the concerned Magistrate is accordingly dismissed.

38. Rule is made absolute in the above terms.

39. Petition stands disposed of.

BHARAT P. DESHPANDE, J.