

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

CRMC No. 537/2018
IA No. 01/2018

Pronounced on:- 12.06.2020

Ab. Gaffar Naik and othersPetitioner(s)

Through: Mr. R. K. S. Thakur, Advocate

vs.

Bashir AhmedRespondent(s)

Through: Mr. M. R. Daing, Advocate

CORAM: HON'BLE MRS. JUSTICE SINDHU SHARMA, JUDGE

JUDGMENT

01. Petitioners seek quashing of order dated 01.08.2018 passed by the Judicial Magistrate 1st Class (Munsiff), Banihal whereby, he has directed issue of process against the accused under sections 447/379/506 RPC. The facts of the case in brief are these; both the parties are residents of Village Senigam Neel, Revenue Village Dhanmasta, Tehsil Pogal Paristan (Ukhral) District, Ramban, while the landed property of the petitioner is in Village Dhanmasta. The land of the respondent is in village Neel but land in Khasra No. 417 has been purchased by the respondent in village Bohardar.

02. Petitioners are in possession of land measuring 14 kanals, 2 Marlas in Khasra No. 991 situated at Village Dhanmasta. It is admitted fact that the land comprising of Khasra No. 991 and land comprising of Khasra No. 417 are contiguous and have common boundary. The respondent himself filed an application under section 156(3) Cr. P.C on 18.08.2017 in the Court of learned Munsiff, Banihal alleging that on 07.08.2017, the petitioners have

encroached upon the land comprising Khasra No. 417 and also took away ten bundles of grass.

03. The learned Magistrate (Munsiff), Banihal on 18.08.2017, forwarded the said application to Incharge Police Post, Neel for proceeding under law and to submit a compliance report before 31.08.2017 and kept the complaint on board. The Incharge Police Post, Neel submitted the report dated 27.08.2017, which is on the file. He has confirmed the allegations made by the complainant in the application but without recording any evidence according to him while Khasra No. 991 is in Tehsil Pogal Paristan, and Khasra No. 417 is in Tehsil Banihal.

04. In his report dated 27.08.2017, Incharge Police Post, Neel says that the dispute between the parties cannot be resolved unless Patwari of Village Bohardar and Patwari of Village Dhanmasta visit the spot and demarcate the boundary of the two Khasra numbers by Nishandehi. There is another report of Incharge Police Post, Neel dated 19.11.2017 in which it has been suggested that both the parties were asked to get copies of latha from the record room i.e Muhafiz Khana, Jammu to facilitate the resolution of the dispute.

05. There is another report of Incharge Police Post, Neel dated 06.12.2017, on record, and as per the report of Patwar Halqa, Dhanmasta neither *Aks Masavi* nor field book of the villages is available, as such, it is not possible to demarcate Khasra No. 991, as the same is the case regarding Khasra No. 417. Minutes of the proceedings indicate that w.e.f 18.08.2017, the case was regularly being adjourned for more than twelve hearings without taking cognizance for ensuring the presence of the complainant and also calling for the police report. However, on 01.08.2018, the learned

Magistrate issued process under sections 447/379/506 RPC and took cognizance of the offences.

06. The question involved in this petition is what is the basis of taking cognizance and issue of process or taking cognizance. In report dated 27.08.2017, the Incharge Police Post, Neel has reported the allegations made in the application filed by the complainant as correct as the accused have extracted some stones from the disputed area. According to him the accused are more dangerous persons, who are ready to do or die. They always threatened the complainant but all this is without any evidence as he appears to have translated the application. The source of dispute is not based on any evidence recorded by him, therefore, the learned Magistrate did not take cognizance on 31.08.2017 and adjourned the application to 14.09.2017. On 14.10.2017, he sought fresh report from the police which was received on 20.11.2017 but according to learned Magistrate it was not complete. He asked Investigating Officer, concerned to get a detailed report and as no report was received on 07.08.2017 or on 28.12.2017 when the Court directed the Incharge Police Post Neel to file reply by the next date and file was adjourned to 20.01.2017 when the report dated 19.11.2017 was produced but no action was taken on the complaint.

07. It was on 16.05.2018, Incharge Police Post, Neel was directed to appear in person and to explain filing of incomplete report after adjourning the case to 05.06.2018 and 12.07.2018, the Court took cognizance on 01.08.2018 and issued process without disclosing the evidence in support of the complaint. The learned Magistrate took cognizance and issued process to all the accused. There is nothing on record to justify the police report dated 19.11.2017 for the issuance of process against the accused, as the report only says that the dispute between the parties is about the boundry of Khasra No.

991 and Khasra No. 417 and it can be settled only by demarcation of the boundaries. Whether the disputed portion is part of Khasra No. 991 or 417 can be determined only by Nishandehi and not otherwise. There is no evidence regarding the allegation of theft of ten bundles of grass or digging of the portion.

08. There is thus a *bona fide* dispute between two parties and both are asserting the possession but unless there is evidence to ascertain the fact as to whether the disputed portion is part of which of two Khasra Nos. 991 and 417, no process could be issued and taking of cognizance of the offences is without jurisdiction and abuse of the process of law.

09. The application of mind to the facts of the case is not for non taking cognizance as held by their lordship in case titled, **Gopal Das Sindhi and others V. State of Assam and another**”, reported in AIR 1961 SC 986, held in AIR 1950 Calcutta 437, which reads as under:

“The following observations of Mr. Justice Das Gupta in the case of **Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee AIR 1950 Calcutta 437**:

“What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under Section 190(1)(a) Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter - proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section

156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence”.

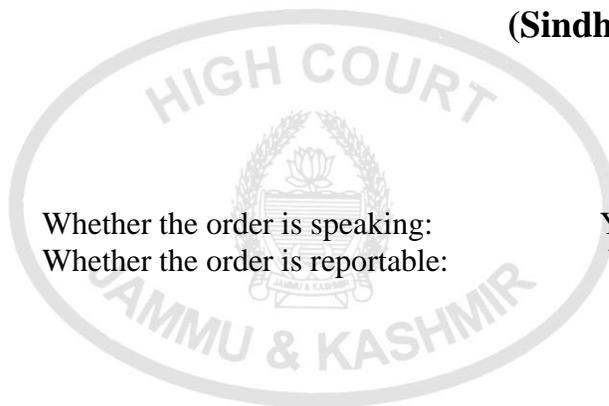
10. The order of Trial Court is, thus, abuse of process of Court as the disputes are purely of civil nature, which should be resolved only by the Revenue Officers after proper demarcation.

11. In view of the aforesaid discussion, the order impugned is illegal on the admitted facts of the case and the same is, accordingly, quashed.

12. Disposed of.

13. Let the original record of the court below be remitted back forthwith.

Jammu
12.06.2020
SUNIL-II



(Sindhu Sharma)
Judge

Whether the order is speaking:
Whether the order is reportable:

Yes
Yes