

(2019) 07 GUJ CK 0014

In the Gujarat High Court

Case No : R/Criminal Misc.Application No. 8461 Of 2016

Babiben Dhulajhi Thakore & 2 Other(s) APPELLANT

Vs

State Of Gujarat & 1 Other(s) RESPONDENT

Date of Decision : 19-07-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 114, 406, 420

Citation : (2019) 07 GUJ CK 0014

Hon'ble Judges : A. P. Thaker, J

Bench : Single Bench

Advocate : PY Divyeshvar, HR Prajapati, Moxa Thakkar

Final Decision : Allowed

Judgement

Dr. A. P. Thaker, J

1. RULE. Ms.Moxa Thakkar, learned Additional Public Prosecutor waives service of notice of rule for respondent No.1 and Mr.H. R. Prajapati, learned advocate waives service of notice of rule for respondent No.2.

2. At the request of the learned advocates for the parties, the matter is heard finally.

3. By way of present petition under Section 482 of the Criminal Procedure Code, the petitioners have sought for the relief to quash and set aside the First Information Report (FIR) being C.R.No.I - 23/2016 registered with Santej Police Station, Gandhinagar dated 29.03.2016 for the offences punishable under Sections 406, 420 and 114 of the Indian Penal Code against the petitioners.

4. Brief facts of the present case are that one Arunbhai Hargovinddas Patel has lodged the FIR on 29.03.2016 inter alia stating that originally, the land bearing Block No.100(b) situated at Village : Sherisa total admeasuring 14745 square meters was given to (1) Thakore Bachuji Lalaji; (2) Thakore Ramatuji Lalaji; (3)

Ramiben Shivaji Thakore; (4) Gajiben Shivaji Thakore and on 26.03.1993, by way of registered sale deed No.633, the land was sold to Chandubhai Parshottamdas Patel taking full consideration and in the said sale deed, Thakore Ramiben Shivaji had signed for herself and for her minor grant children namely Dinaji Lalaji, Dhabuben @ Kamiben Lalaji and Jashiben Lalaji. It is also alleged that pursuant to the said sale deed, entry being entry No.3442 dated 21.04.1993 was mutated in the revenue record. However, the name of Chandubhai Patel was not mutated in the revenue record for whatever reason. It is alleged that as the land was shown in the revenue record in the name of original owners (1) Thakore Bachuji Lalaji; (2) Thakore Ramatuji Lalaji; (3) Gajiben Shivaji Thakore; (4) Dinaji Lalaji; (5) Dhabuben @ Kamiben Lalaji; (6) Jashiben Lalaji Thakore, who have executed power of attorney in favour of one Baldevji Dhulaji Thakore and on that basis, the power of attorney holder Baldevji Dhulaji Thakore has sold the land bearing block no.100(b) in the year 1993 to Patel Chandubhai Parshotamdas and this fact was known to them and at the instance of one Dhulaji Punjaji Thakore resident of Village : Sherisa, the said land was resold to his mother Babiben Dhulaji Pujaji and Dhulaji Thakore and Babiben Thakore have sold the said land by registered sale deed No.1858 dated 17.03.2007 to Chandubhai Patel and revenue entry No.4552 dated 23.05.2007 was mutated in the revenue record and, subsequently, thereafter, Babiben Thakore has sold the same land on 03.10.2008 to Badarji Nathaji Thakore, resident of Village : Khodiyar, Taluka: Dascroi by sale deed No.7960 and they have received consideration and the same land came to be sold by Badarji Nathaji Thakore to Patel Abhishek Rahulbhai, Rahul Arunbhai Patel, Pranay Arunbhai Patel and Pujaben Pranaybhai Patel vide registered sale deed No.1562 dated 22.10.2010. It is alleged that in spite of selling of the said land, Babiben Dhulaji Thakore and Dhulaji Punjaji Thakore have sold the said land to Bharatbhai Govindbhai Prajapati vide registered banakhat No.3718 dated 03.05.2013 and have also received the consideration thereof. It is alleged that though the land bearing block No.100(b) was sold by Babitaben and Punjaji, they have obtained the loan from Central Bank of India, Kalol Branch and Bank of India, Kalol Branch showing themselves as owners thereof and regarding this fact, entry Nos.4986, 5637 and 5726 are certified. It is contended that for this purpose, the complainant has also filed R.T.S. Appeal No.99 of 2015 on 01.04.2015 and the same is pending.

4.1 It is alleged that he has also filed Special Civil Suit No.26 of 2015 on 05.05.2015 before the learned Principal Civil Judge, Kalol, which is still pending. On this basis, it is alleged that the accused named in the FIR have committed the alleged offences. On the basis of the allegations, FIR came to be registered before the Satej Police Station for the offences under Sections 406, 420 and 114 of the Indian Penal Code.

4.2 It is contended by the petitioners that by way of filing the complaint, the allegations of the complainant are that the original land vendors have tried to sell the land twice; first to the complainant and second to the petitioners and the petitioners have also applied to the banks under the government scheme of the

green farming and received the loan after mortgaging the same for crop.

3.2 It is contended by the petitioners that the petitioners are in possession of the land in question and also cropping the same for their livelihood and respondent No.2 has filed Special Civil Suit No.26 of 2015 against seventeen defendants including the present petitioners and also the bank officers of Central Bank of India and Mamlatdar, Kalol on 04.05.2015 before the learned Principal Civil Judge (S.D.), Kalol for land being block No.100(b) with a prayer to declare the first informant / plaintiff as owner of the disputed land and other agreements and banakhat to be declared void. It is contended that the present petitioners had filed their reply below Exhibit 32 in January 2016 declaring and denying the contentions of the suit. It is contended that the respondent has challenged all the banakhat and agreements with both survey numbers being block No.93 and 100 in the different suits. It is contended that the suit being Special Civil Suit No.26 of 2015 was dismissed qua defendants No.9 to 13 on 18.01.2016 and the original plaintiff did not turn up for any hearing of Exhibit 5 application for which the suit is pending and all the contentions of the suit are tried to be converted into criminal complaint.

4.3 It is contended by the petitioners that the first informant i.e. respondent No.2 has also lost before the Revenue Courts. It is contended that the so-called rights of the respondent No.2 by way of registered agreement is not irrevocable but was subject to the conditions of payment of consideration and other conditions which are not complied with by the first informant. It is contended that the first informant having not even aware of the fact that most of the land owners, on whose agreement, he is relying, are expired. That the earlier FIR has been filed in high haste and without any occurrence of offence. It is contended that three accused have expired namely Khodaji Thakore expired in 1996, Navaraj Thakore expired in 2001 and Ramtaji Thakore expired in 2016. It is contended that the first informant / respondent has tried to convert civil disputes into that of criminal nature and, therefore, the FIR is filed with delay of nine years and one month. It is contended that if it is to be considered so called agreement to sale in favour of the complainant and considered agreements to sale allegedly done by Baldevji, there is delay of three years. It is contended by the petitioners that the impugned FIR is required to be quashed and set aside on the ground that two civil suits are pending before the Civil Court, Kalol filed by the respondent along with other proceedings qua the disputed land. It is contended that the complainant has to establish his right first by way of specific relief in the suit against the accused No.1 and 2 and to avoid that, this short cut of criminal prosecution against all the persons who's names are referred in the revenue record are the main accused is initiated.

4.4 It is contended that there is no offence of criminality involved but the same is filed to create pressure. It is contended that the dispute involved in the present complaint is civil in nature and relying on certain decisions by the petitioners, they have prayed to quash and set aside the impugned FIR being

C.R.No.I-23/2016 registered with Satej Police Station qua the present petitioners.

5. The respondent No.2 has filed the affidavit-in-reply wherein he has opposed the present petition and has stated that the original land owners have tried to sell the same land twice which was earlier sold to one Chandubhai Patel who is residing at Canada and, thereafter, by creating power of attorney has tried to sell it to another persons. While referring to the contents of the FIR, it is stated that in the sale deed dated 26.03.1993, the accused No.5 - Dhulaji Punaji Thakore is signed as witness and thus, he was aware of the sale deed dated 26.03.1993 and the declaration and aware of kachcha entry. It is stated that the so-called power of attorney was forged by the family members of Dhulaji Punjaji Thakore whereby Baldevji Dhulaji Thakore got the power from some of the land owners. It is stated that such power of attorney has not been produced nor the date of power of attorney is disclosed before the Civil Court as well as revenue authority. It is stated that in absence of production of such power of attorney, entire transaction with respect to execution of sale deed dated 17.03.2007 is sham and bogus. It is stated that in pursuance of such forged power of attorney, a sale deed dated 17.03.2007 came to be executed by accused Baldevji Dhulaji Thakore as a power of attorney holder of original land owners in favour of his own mother Babiben Dhulaji Thakore without consideration. It is stated that accused Dhulaji Punjaji Thakore is the father of Baldevji Dhulaji Thakore and husband of Babiben Dhulaji Thakore who was the witness of the sale deed dated 26.03.1993 as well as the declaration executed in favour of complainant Chandubhai Patel. It is stated that it was within the knowledge of the accused Dhulaji Thakore that the land in question has already been sold by registered sale deed in favour of Chandubhai Patel. It is stated that the accused were very well knew that the purchaser of the land in question Chandubhai Patel is residing at Canada and there is nobody to look after the land in question. It is stated that accused was also witness in the sale deed dated 17.03.2007.

5.1 It is stated in the affidavit-in-reply that Babiben Dhulaji Thakore has sold out some parcel of very land admeasuring 7284 square meters to one Badarji Nathaji Thakore by executing sale deed dated 03.10.2008 wherein Dhulaji Punjaji Thakore is shown as witness and on that land, Babiben Dhulaji Thakore had taken loan from the Central Bank of India, Kalol Branch and because of that reason, charge was created by the Bank upon the said land for which mutation entries being entry No.4968 dated 13.12.2008 and entry No.5726 dated 09.12.2011 were mutated in the revenue record.

5.2 It is stated by the complainant in the affidavit-in-reply that Babiben Dhulaji Thakore has also executed agreement to sale dated 03.05.2013 for the remaining parcel of land admeasuring 7471 square meters in favour of Bharatkumar Govindlal Prajapati. It is stated that Badarji Nathaji Thakore, who purchased the land admeasuring 7284 square meters by registered sale deed dated 03.10.2008 from Babiben Dhulaji Thakore, has lodged written complaint dated 02.04.2016 to the competent authority against Babiben Dhulaji Thakore

and Dhulaji Punjaji Thakore.

5.3 It is stated by the complainant in the affidavit-in-reply that though the accused were not the real owner of the land in question, by making false representations, they obtained the loan from different banks and despite the charge of the bank on the said land, the accused sold out the land for huge consideration without informing the bank and they are in habit of committing the offence of cheating. It is stated that pendency of civil proceedings is all together for different cause of action whereas filing of FIR is with a view to see that the accused are punished for wrong done by them. It is stated that it is not a straitjacket formula that in each and every case where civil suit is filed, the FIR / complaint is required to be quashed. According to him, prima facie case against the petitioners of commission of the offence is made out by him in the FIR itself and, therefore, the present petition may be dismissed with cost.

6. Heard Mr.P. Y. Divyeshvar, learned advocate for the petitioners, Ms.Moxa Thakkar, learned Additional Public Prosecutor for respondent No.1 - State and Mr.H. R. Prajapati, learned advocate for respondent No.2 - original complainant.

7. Mr.P. Y. Divyeshvar, learned advocate for the petitioners has vehemently submitted the same facts which are narrated in the memo of petition and has submitted that there is civil dispute between the parties regarding the land in question and the complainant has, initially, filed the civil suit in the year 2015 and, thereafter, he has filed the complaint in the year 2016. While referring to the documentary evidence, he has submitted that the FIR has been filed without any explanation of delay. It is submitted that the complainant has never in possession of the land in question and the original owners have in possession of the land. He has referred to the documentary evidence and submitted that the complainant has prayed for relief of specific performance in the suit and, thereafter, belated stage, he has filed the FIR to pressurize the parties. He has submitted that the FIR has not been filed by the original complainant, but the same has been filed by the power of attorney. However, he has narrated the facts as like a person being personal knowledge. He has submitted that the case between the parties are merely civil in nature and to pressurize for settlement of the dispute, this FIR has been filed with an ulterior motive. By relying on the following decisions, he has prayed to allow the present petition.

(1) In the case of V. Y. Jose and another Vs. State of Gujarat and another, for his proposition that a matter which essentially involves dispute of civil nature should not be allowed to become subject-matter of criminal proceedings which may resorted to as a short cut to execution of a non-existent decree as well as for proposition that mere breach of contract does not involve cheating;

(2) In the case of Vesa Holdings Private Limited and another Vs. State of Kerala and others reported in

(2015) 8 SCC 293, for his proposition that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract

would amount to cheating where there was any deception played at the very inception and with an intention to cheat as developed later on the same cannot amount to cheating.

(3) In the case of Savitri Pandey and another Vs. State of Uttar Pradesh and others, reported in (2015) 13 SCC 95, for his proposition that if there is abuse of process of law, the FIR in question may be quashed and set aside.

(4) In the case of Sarabjit Singh Vs. State of Punjab and others reported in (2013) 6 SCC 800, for his proposition that the FIR has been lodged merely for pressurizing the accused persons and in absence of any material to support in any case in FIR, the FIR may be quashed and set aside.

8. Per contra, Ms.Moxa Thakkar, learned Additional Public Prosecutor for respondent No.1 - State has opposed the present petition and submitted that the sale deed was executed in favour of Chandubhai Patel on 26.03.1993 and one witness Dhulaji Punjaji Thakore to whom the power of attorney has been given by his own son Baldevji and who has signed as witness thereof. She has submitted that the son has executed sale deed in favour of Babiben Thakore wherein Dhulaji Thakore has witnessed. It is stated that thereafter, the land has been sold to Badarji Nathaji Thakore. She has submitted that there are statements of witnesses and investigation is yet not completed and, therefore, the complaint may not be quashed and set aside. She has submitted that the decisions cited by the learned advocate for the petitioners are factually not applicable to the facts of the present case. She has prayed to dismiss the petition.

9. Mr.H. R. Prajapati, learned advocate for respondent No.2 has submitted that, initially, the land was sold to the complainant on 26.03.1993 and Dhulaji Punjaji Thakore is the witness of the said transaction wherein Dhulaji Thakore has also signed and now, Dhulaji Thakore has known the fact of selling of the land. He has submitted that consideration has been received as per the recital in the documents itself. He has submitted that before selling the land two others transactions were made and no public notice was issued and no title clearance was made. According to him, as Chandubhai Patel was not agriculturist revenue entry could not be mutated in his favour and, thereafter, Dhulaji Thakore sold the land to one Babiben Thakore. It is submitted that, thereafter, in the year 2010, another sale deed was executed by the same land owner. It is submitted that the suit was filed on

4. 05.2015 and the complaint before the SIT was lodged on the next day after filing of the suit and, thereafter, the FIR has been registered on 29.03.2016 and, therefore, there is no delay on the part of the complainant in filing the impugned complaint. He has submitted that another FIR has been lodged by Girishbhai against the present petitioners of cheating. According to him, the entire family is in habit of committing the offence and there is criminal antecedent of the petitioners. While relying on the decision in the case Mosiruddin Munshi Vs. Md. Siraj reported in 2014 (14) SCC 29, for his proposition that considering the facts

of the present case, this Court may not quash the FIR and investigation may be permitted to be carried out. He has also relied on the decision in the case of *Sau Saraswatibai Vs. Lalitabai*, reported in 2019 (1) Scale 583, for his proposition that since, there is dispute and there are criminal offences, the FIR may not be quashed and set aside. He has prayed to dismiss the present petition.

9.1 Mr.Prajapati, learned advocate for respondent No.2 has submitted that there is need of thorough investigation and let the investigating officer examine the documentary evidence and collect the necessary evidence. According to him, SIT has, prima facie, investigated the material and, thereafter, the FIR has been registered. He has submitted that there is no case of bona fide purchaser. He has submitted that how the complainant could know about the death of the original owners and, therefore, even if the complaint is lodged against the deceased person, it may not be a ground to quash the complaint. It is submitted that there is no mala fide intention on the part of the complainant in lodging the complaint and subsequent document of power of attorney and sale deed are sham documents and there is allegation of criminal transactions carried out by the original owners. Regarding the decisions cited by learned advocate for the petitioners, he has submitted that those are different on factual aspects of the case and they are not applicable to the facts of the present case.

10. In rejoinder, Mr.Divyeshvar, learned advocate for the petitioners has submitted that merely signing as witness in a document, a person cannot be made an accused when the bank is granting loan after due verification and bank has granted loan on the land itself may not be treated of any point for commission of any offence. He has submitted that unless rights are crystallize, no one can challenge the civil transaction by connecting it into criminal proceedings. He has submitted that the civil rights being agitated before the Civil Court and still it is not crystallized and, therefore, in the present case, the factual aspect reveals that this is a civil dispute. He has submitted that the decisions cited by learned advocate for respondent No.2 are different on factual aspect and, therefore, they are not applicable to the facts of the present case and considering the fact that the civil suits are pending before the trial Court, the FIR may be quashed and set aside.

11. In the case of *V. Y. Jose Vs. State of Gujarat* (supra), the Apex Court has held and observed in paras - 28, 29 and 30 as under:-

28. A matter which essentially involves dispute of a civil nature should not be allowed to be the subject matter of a criminal offence, the latter being not a shortcut of executing a decree which is non-existent. The Superior Courts, with a view to maintain purity in the administration of justice, should not allow abuse of the process of court. It has a duty in terms of Section 482 of the Code of Criminal Procedure to supervise the functioning of the trial courts.

29. An offence of cheating may consist of two classes of cases :

(1) where the complainant has been induced fraudulently or dishonestly. Such is

not the case here;

(2) When by reason of such deception, the complainant has not done or omitted to do anything which he would not do or omit to do if he was not deceived or induced by the accused.

30. It is in that sense, a distinction between a mere breach of contract and the offence of cheating should be borne in mind. We, having regard to the facts and circumstances of the case, are of the opinion that no case has been made out and against the appellant so as to hold that he should face the criminal trial.

11.1 In the case of Vesa Holdings Private Limited Vs. State of Kerala (supra), the Apex Court has held and observed in paras-12 and 13 as under:-

12. From the decisions cited by the appellant, the settled proposition of law is that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In other words for the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out.

13. It is true that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may be available to the complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not. In the present case there is nothing to show that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC. In our view the complaint does not disclose any criminal offence at all. Criminal proceedings should not be encouraged when it is found to be malafide or otherwise an abuse of the process of the court. Superior courts while exercising this power should also strive to serve the ends of justice. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of court and the High Court committed an error in refusing to exercise the power under Section 482 Criminal Procedure Code to quash the proceedings.

11.2 In the case of Savitri Pandey Vs. State of Uttar Pradesh (supra), the fact of the case was that the sale deed was executed in the year 1994 and the FIR was lodged in the year 2014 against 15 accused and no sale consideration for the sale deed has been received and the parties were close relatives and no specific role has been assigned to the appellant. Under these circumstances, the Apex Court has quashed and set aside the FIR against the appellant.'

11.3 In the case of *Sarabji Singh Vs. State of Punjab* (supra), considering the factual aspects that there was no mention in FIR about any of the important ingredients of agreement, purchase price, date on which sale was to be concluded etc. and the said agreement to sell or details thereof not placed on record. It was observed therein that the FIR was solely aimed to pressurize accused persons and in absence of any material to support the charges levelled by the complainant, the order for quashing of FIR was justified.

11.4 In the case of *Mosiruddin Munshi Vs. Md. Siraj* (supra), the fact of the case was that the arraigned accused does not have title over the property and even though, arraigned accused entered into criminal conspiracy and they fraudulently induced the complainant to deliver the amount with intention to complete the sale deed and the accused have also obtained necessary title clear documents with the complainant which led to issuance of the legal notice by the complainant.

11.5 In the case of *Sau Saraswatibai Vs. Lalitabai* (supra), the facts was that the original accused has sold the plot no.1 by registered sale deed to the complainant in the year 2005 and, thereafter, by re-designating the same plot resold it in favour of accused No.2 in the year 2010. It was also found that respondent No.2 was none other than the husband of the accused No.1. Thereafter, the very plot was sold to accused No.3. Before filing of the petition, the investigating officer completed the investigation and prima facie found the material against the accused. The High Court has , while hearing the accused quashed the FIR without discussing the merits and final report submitted by the investigating officer. It was observed by the Apex Court that in view of the facts and circumstances of the case, once the investigating officer submitted the final report on conclusion of the investigation, the High Court was not justified in interfering with the criminal proceedings in exercise of power under Section 482 of the Criminal Procedure Code and particularly when in the final report it was specifically concluded on the basis of the material on record that a prima facie case is made out for the offences alleged against the accused persons and resultantly, quashed and set aside the order of the High Court and permitted the prosecution to proceed further in accordance with law and on its own merits.

12. In view of the aforesaid decisions, it is settled proposition of law that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. For the purpose of constituting an offence of cheating, at the same time, it is also settled that in a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy would be available to the complainant that itself cannot be a ground to quash a criminal proceedings.

13. Now, considering the legal proposition and on perusal of the material placed on record, it clearly transpires that the original land owners Babiben and others have granted power of attorney and possession to one Baldevbhai in the year

1996 and the original land owners have not disclosed that earlier they have sold the same land in the year 1993 to some other persons. It appears that the revenue record stands in the name of original vendors and, thereafter, the name of Babiben has been shown and it is still continued. It also appears from the record that the petitioners herein have mutated entry in their names in Village Form No.7-12 which is revealed from the extract of revenue record. It is found that there is some dispute pending before the revenue authority. It also reveals that Special Civil Suit No.26 of 2015 is also pending before the Civil Court and in both the proceedings the complainant has not been able to get any injunction and, thereafter, he has filed the complaint. It is not the case of the complainant that from the very inception, there was intention of cheating on the part of the land owners and the present petitioners were also taken part to the said transaction of cheating. Considering the material placed on record, it appears that the complainant is a power of attorney and the civil right is yet to be decided by the Civil Court. It appears from the material placed on record that this is a clear cut dispute of civil nature and the complainant has tried to give colour of criminal nature to it. Under these circumstances, with regard to the facts and circumstances of the case, it appears that to pressurize the parties to the civil suit for getting necessary order in his favour, the complainant has put the criminal law in motion. It is nothing but an abuse of process of law.

14. In view of the aforesaid circumstances, this Court is of the view that the present complaint and consequential proceedings qua the present petitioners are required to be quashed and set aside.

15. For the foregoing reasons, the present petition is allowed. The First Information Report (FIR) being C.R.No.I - 23/2016 registered with Santej Police Station, Gandhinagar dated 29.03.2016 and other consequential proceedings are hereby quashed and set aside qua the present petitioners. Rule is made absolute to the aforesaid extent. Direct service is permitted.