

(2017) 03 GUJ CK 0125
In the Gujarat High Court
Case No : 2387 of 2010

KANTIBHAI JOITARAM PATEL & ANR.

APPELLANT

Vs

LAXMANJI BIKHAJI THAKORE & ANR.

RESPONDENT

Date of Decision : 03-03-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 482](#) - Saving of inherent powers of High Court
[Indian Penal Code, 1860](#), [Section 420](#),
[Section 468](#), [Section 471](#), [Section 506](#),
[Section 427](#), [Section 406](#), [Section 120\(b\)](#) -
Cheating and dishonestly inducing delivery of property - Forgery for purpose of
cheating - Using as genuine a forged document - Punishment for criminal ,intimidation
- Mischief causing damage to the amount of fifty rupees - Punishment for Criminal
breach of trust - Concealing design to commit offence punishable with imprisonment

Citation : (2017) 03 GUJ CK 0125

Hon'ble Judges : Biren Vaishnav

Bench : Single Bench

Advocate : Vimal A Purohit, Vivek V Bhamare, Bharat K Dave, Himanshu K Patel

Final Decision : Dismissed

Judgement

1. The applicants have approached this Court under Section 482 of the Code of Criminal Procedure for quashing Criminal Inquiry No. 146 of 2008, pending before the learned Judicial Magistrate First Class, Ahmedabad (Rural), Ahmedabad.

2. Respondent No.1, the original complainant has filed a criminal case against the present applicants and two others before the learned Magistrate, under Sections 120(B), 406, 420, 427, 468, 471, 506(1) of the Indian Penal Code. 2.1 It is the complainant's case that he, along with his sister Kantaben and deceased brother Ramaji Bhikhaji jointly own land admeasuring one acre and nineteen gunthas of Survey No. 215/2 at village Ambli, District: Ahmedabad. According to his version, in the complaint, the accused 1 & 2 (applicants herein) have created

a forged Will dated 20.01.1988 of his father, and under the Will, which is purportedly signed by the accused Nos. 3 and 4 as witnesses, the land in question, is acquired by the accused Nos. 1 and 2.

2.2 In the revenue/mutation proceedings filed for entering their names, in the revenue records, which were challenged by the complainant, the revenue authorities have observed that the Will does not appear to be genuine, particularly when proceedings for registering the Will were taken out after two years and request for mutation was done in 1999, nine years after registration and eleven years after the execution of the purported Will. These observations has possibly prompted the complainant to file the complaint in question alleging that the applicants be tried for the offence under sections, narrated herein above. The complaint is filed on 22.05.2008.

3. Before considering the question whether, the complaint in question, needs to be carried to its logical end or nipped in the bud, by quashing the same, facts as narrated in the quashing petition, which are otherwise not in dispute, regarding various civil / revenue litigations, needs to be seen. 3.1 The applicants before this Court, who are accused Nos. 1 and 2, had approached the Civil Judge (S.D) by filing a Civil Suit No. 142 of 1996. The original complainant of the Criminal Case is the defendant No.1 in the said suit, which was filed on 23.02.1996, as is so evident from the copy of the plaint annexed to the application.

3.2 The applicants before this Court, in the said Civil Suit, as plaintiffs, have prayed for a declaration to the effect that it be so declared that the defendants therein (respondentoriginal complainant before this Court) have no right or title to the land in question, being land survey No. 215/92, (which is the subject matter of the criminal complaint). The claim is based on the Will, which according to the plaintiffs, the defendant's father executed on 20.01.1988, which was registered on 30.06.1990 and public notice of such Will has been published pursuant to probate proceedings initiated at their instance in 1996. The contention, in the civil suit, therefore is, that, the plaintiffs (accusedapplicants herein) are in ownership and possession of the land in question, based on this Will, and/or declaration be accordingly issued.

3.3 The defendant (respondentcomplainant before us) filed a reply to the proceedings, seriously disputing the execution of such a Will and revenue proceedings are also pending where also the genuineness of the Will is under a shadow of doubt.

3.4 As is evident from an Application No. 14/2009 (Annexure "J" to the paper book) the suit so filed by the applicants was dismissed for nonprosecution on 05.02.2009.

3.5 Having found the records of his earlier suit, being Civil Suit No. 142/1996 missing, the applicantsaccused filed another Civil Suit in 2006, being Civil Suit No. 92/2006 with the same prayers as in the earlier suit. The plaint of the said suit is at Annexure" I". The plaint, para 4, reads that the plaintiffs are not aware

of the stage of their suit, being Civil Suit No. 142/96 and since records are not traceable, the present suit was filed. The reliefs sought are the same as the one sought in Civil Suit no. 142/96. An order dated 06.03.2006 in the said suit, passed below Exh.5, is on record, whereby the parties are ordered to maintain status quo.

3.6 In 2004, the complainantrespondent herein also filed a Civil Suit, in the same Court, being Civil Suit No. 57/2004 against the present applicants. The suit, plaint of which is at, Annexure" E". was to the effect that the suit land was ancestral property, which could not have been bequeathed by way of a Will to the defendants. That the defendants had fraudulently applied and obtained mutation in the revenue records, in their favour in the year 2000, which was pending adjudication before the competent revenue authority. The prayer in the suit therefore is that no right title or interest vests in the defendants by virtue of a Will, which is a purportedly bogus Will.

3.7 The defendantsapplicants herein filed a reply and also prayed that as their suit being Civil Suit No. 142/96 is pending, the suit of the plaintiff, suit No. 57/2004 should be stayed. The Civil Court, in an Exh.5 application, rejected the prayer for the injunction, as, according to the Civil Court, the complainantplaintiff had not disclosed that a Civil Suit No. 142/96 between the same parties was pending. The order was passed on 18.05.2005. As is evident from order at Annexure" H", the suit was dismissed for nonprosecution on 15.02.2008.

3.8 Parallel revenue proceedings initiated pursuant to an application made by the accused, based on the Will, were also pending. Being aggrieved by the Mamlatdar"s action on 15.01.2000 certifying the revenue entry in favour of the original accusedapplicants herein, the respondentcomplainant went before Deputy Collector, who in turn rejected the application. The complainant went up in Revision and the Collector accepted the complainant"s request and reversed the order of the Revenue Authorities of mutating entry in favour of the accused. That order of the Collector stood confirmed in favour of the complainantrespondent before this Court. The order by the State is dated 19.09.2007.

4. The parties therefore were fighting civil as well as revenue entry based litigations, claiming their rights on the basis of a Will dated 20.01.1988, made by the complainant"s father, in favour of the accused Nos. 1 and 2, parties before this Court. The complainant invoking the criminal jurisdiction and investigation is dated 22.05.2008. The complaint was registered and process issued. The original accused Nos. 1 and 2 have challenged initiation of this process by filing this quashing petition on 08.03.2010.

5. Learned advocate for the applicants, Shri Vimal Purohit has challenged the complaint / action of initiation of investigation, at the behest of the respondent No.1 on the following grounds : (A) According to Shri Purohit, the proceedings are grossly belated. For a Will dated 20.01.1988, registered on 30.01.1990,

criminal machinery is moved in 2008, which is nothing but an abuse of process of law.

(B) The accused had filed Civil Suits in 1996 and in 2006, raising their claim based on the Will and even thereafter, the complainant did not come forth, except a Civil Suit in 2004. Having faced with such civil disputes, criminal investigation, is sought to be put into motion, as an after thought.

(C) When dispute, apparently in one being of a civil nature, no criminal complaint can be filed as apparently, no offences, as made out, on the face of the complaint, does exist. No basic ingredients, of the penal sections invoked are satisfied to lend support to a criminal investigation.

(D) There is an apparent abuse of process of law as 20 years have gone by after the execution of the Will and 14 years after the date of their knowledge.

(E) All these put together should persuade this Court and therefore the complaint be quashed, in exercise of powers under Section 482.

(F) Heavy reliance is placed on the case of Sardool Singh & Anr., Vs. Smt. Nasib Kumar reported in (1987) SCC 146 to contend that when the Civil Court is seized of the question as regards the validity of the Will, the respondent cannot be permitted to institute a criminal prosecution. According to Shri Purohit, when the validity of the Will is being tested before a Civil Court, it would not be proper to permit the applicants' prosecution before the Criminal Court.

6. Mr. Bharat Dave, who has appeared for the original complainant has supported initiation of proceedings before the Magistrate's Court. According to Shri Dave, that the Will is forged, becomes apparent from the fact that, the same was registered two years after it was purportedly executed. Mutation, based on the Will was sought in 1999, nine years after registration. Mr. Dave has invited my attention to the order of the Collector and the observations therein, which led to cancelling the recording of the entry in the accused's favour. Prima facie, these observations, evidently are eloquent, according to Shri Dave, to show that the Will is not genuine. 6.1 As far as the delay in lodging the FIR is concerned, according to Shri Dave, no limitation is prescribed in setting into motion a criminal investigation. He submitted that this Court, in its exercise of jurisdiction under Section 482 of the Code, should not, set aside / quash a complaint, as the same is filed to set into motion, investigation regarding the genuineness of the document, which is best done by the police machinery. Filing of such a complaint is not an abuse of process. 6.2 Mr. Dave submitted that pendency of a civil dispute cannot be a deterrent to initiation of a criminal complaint.

7. The question therefore that needs to be decided is whether the complaint filed at the instance of the respondent, should be permitted to proceed further to come to a logical end or whether, in exercise of jurisdiction under Section 482 of the Code, should this Court, quash the same. 7.1 The parties to the dispute are claiming ownership and title to a piece of land. The applicants, who are accused,

had initially filed Civil Suit No. 142 of 1996 claiming a declaration of title and ownership. That suit being dismissed for nonprosecution in 2009 did not deter them from filing another Suit being Civil Suit No. 92 of 2006.

7.2 Even the complainant filed a Civil Suit No. 57 of 2004 claiming that the title, ownership of the accused, was based on a Will, which was not genuine. That suit, however, was dismissed for nonprosecution on 15.04.2008.

7.3 Revenue proceedings before the Mamlatdar were triggered by the Mamlatdar, certifying on 15.01.2000 a mutation entry, in favour of the accused, at the behest of the accusedappellants herein in 1999.

7.4 On a challenge before the Collector, the complainantrespondent No. 1 herein, succeeded and the mutation in favour of the applicants was reversed. This was on 29.10.2005. The applicants' challenge to the order before the State failed and even the Revenue Department by an order of 19.09.2000 agreed that the mutation in favour of accusedapplicants was rightly reversed. Prima facie, observations have been made in the orders as to why a Will of 20.01.1988 gave rise to mutation proceedings after 11 years, in 1999, and 9 years after registration of the Will in 1990. However, being beyond their powers, these observations are only prima facie.

8. The arguments at the hands of Shri Purohit that as a Civil dispute , as regards, the validity of the Will is pending, prosecution should not be permitted, in an argument, though attractive, at the first blush, needs to be negated on the following counts: (A) Assertions by the accusedplaintiff in Civil Suit No. 92/2006, claiming title to property are based on the Will executed on 20.1.1988.

(B) Even earlier in 1996, a Civil Suit 142 / 96 , for the same relief, as claimed in 92/2006, was filed, which, according to the applicant, stood dismissed in 2009, and a restoration is filed being Misc. Application No. 14 of 2009.

(C) The Complainant's Civil Suit No. 54/2006, did not see the light of the day as it stood dismissed for nonprosecution on 15.04.2008.

(D) In the interregnum, revenue authorities reversed the mutations in favour of the accusedapplicants herein on 29.10.2005, which stood confirmed on 19.09.2000.

(E) Criminal Complaint, the root of the present proceedings has been filed on 22.05.2008.

(F) All these circumstances taken together show that, the entire controversy at large, in Civil as well as Revenue Proceedings is the Will of 1988, genuineness, directly or indirectly, is an issue before such authorities.

(G) Such adjudication, initiated in 1996, is still at large, in Civil and Revenue proceedings, as nothing is brought on record to show that the competent Civil Courts have finally adjudicated on the issue of the Will. Revenue authorities naturally may not take a final call unless the issue of the validity of the Will is set

at rest.

(H) In case of Syed Askari Hadi Ali Augustine Imam vs. State (Delhi Admn.) reported in (2009) 5 SCC 528, the Supreme Court has categorically held that the case of Sardool Singh (supra) does not lay down any ratio. In the aforesaid judgement of Syed Askari, by placing reliance on the case of M.S.Sheriff reported in (AIR 1954 SC 397) and Iqbal Singh Marwah's case reported in (2005 (4) SCC 370), the Supreme Court reproduced the ratio in para 28, which is as under:

" 28 Relying inter alia on M.S. Sheriff, it was furthermore held: (Iqbal Singh Marwah Case, SCC pp 389390, para 32)

"32. Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein."

29 The question yet again came up for consideration in P. Swaroopa Rani v. M.Hari Narayana, wherein it was categorically held: (SCC p. 769 para 11)

"11. It is, however, well settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case."

Keeping these parameters in mind, even when probate proceedings in the present case, and civil proceedings, are pending, merely on that account, the proceedings of the complaint filed by the respondent, need not be short circuited.

(I) It can safely be presumed, that after having failed in civil suit, initiated by him which stood dismissed for default on 15.04.2008, and having succeeded, in the interregnum, in 2007 in revenue courts, it is in May 2008 that the complaint was filed. That choice, cannot be said to be one made with a view to abuse the process of law. Even otherwise if the findings of the civil courts had by then been crystallized, it could not have deterred the complainant, as is evident from the judgement in the case of Kishan Singh vs. Gurpal Singh reported in (2010) 8 SCC 775

"18 Thus, in view of the above, the law on the issue stands crystallised to the effect that the findings of fact recorded by the civil court do not have any bearing so far as the criminal case is concerned and vice versa. Standard of proof is different in civil and criminal cases. In civil cases it is preponderance of probabilities while in criminal cases it is proof beyond reasonable doubt. There is neither any statutory nor any legal principle that findings recorded by the court

either in civil or criminal proceedings shall be binding between the same parties while dealing with the same subjectmatter and both the cases have to be decided on the basis of the evidence adduced therein. However, there may be cases where the provisions of Sections 41 to 43 of the Evidence Act, 1872, dealing with the relevance of previous judgments in subsequent cases may be taken into consideration."

(J) It would be worthwhile to refer to the judgment of the Supreme Court in the case of Amit Kapoor vs. Ramesh Chander and Another :

"26 This further raises a question as to the wrongs which become actionable in accordance with law. It may be purely a civil wrong or purely a criminal offence or a civil wrong as also a criminal offence constituting both on the same set of facts. But if the records disclose commission of a criminal offence and the ingredients of the offence are satisfied, then such criminal proceedings cannot be quashed merely because a civil wrong has also been committed. The power cannot be invoked to stifle or scuttle a legitimate prosecution. The factual foundation and ingredients of an offence being satisfied, the court will not either dismiss a complaint or quash such proceedings in exercise of its inherent or original jurisdiction. In Indian Oil Corpn. V. NEPC India Ltd., this Court took the similar view and upheld the order of the High Court declining to quash the criminal proceedings because a civil contract between the parties was pending.

27 Having discussed the scope of jurisdiction under these two provisions i.e. section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

27.1 Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2 The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3 The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4 Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5 Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6 The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7 The process of the court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8 Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a "civil wrong" with no "element of criminality" and does not satisfy the basic ingredients of a criminal offence, the court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

27.9 Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10 It is neither necessary nor is the court called upon to hold a fullfledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11 Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12 In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.

27.13 Quashing of a charge is an exception to the rule of continuous prosecution.

Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed *prima facie*.

27.14 Where the chargesheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

27.15 Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that the interest of justice favours, otherwise it may quash the charge. The power is to be exercised *ex debito justitiae* i.e. to do real and substantial justice for administration of which alone, the courts exist.

27.16 These are the principles which individually and preferably cumulatively (one or two) be taken into consideration as percepts to exercise of extraordinary and wide plenitude and jurisdiction under section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance with the requirements of the offence."

9. Looking to these facts and circumstances and the position of law, merely because civil proceedings are pending, it cannot be a ground to truncate the right of a complainant, who has, *prima facie*, made out, on the basis of reading out the complaint, a case to set the investigation in motion. As between civil and criminal proceedings, criminal matters must be given precedence. In the facts of the present case, the criminal complaint need not be stayed. This is not a case where the process is being used to abuse the process or for oblique purpose. On a reading of the complaint it cannot be said that the allegations are patently absurd or inherently improbable not to *prima facie* make out an offence.

10. This Court therefore, would not think it fit, in the facts of the present case, to quash the complaint so filed by the respondent No.1 herein. Exercise of powers under Sec. 482 of the Code of Criminal Procedure, do not warrant quashing of the complaint in question. Criminal Misc. Application in question is therefore dismissed. Rule discharged. Interim relief, if any, stands vacated.