

(2014) 12 AHC CK 0185

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 5935 of 2014

Narendra Mishra and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 204, 397
Penal Code, 1860 (IPC) — Section 120A, 120B, 120-B, 419, 420

Citation : (2015) 6 ADJ 74 : (2015) 2 ALJ 79 : (2015) 90 ALLCC 531

Hon'ble Judges : Kalimullah Khan, J

Bench : Single Bench

Advocate : K.N. Mishra, Advocates for the Appellant; Anil Kumar Tiwari, Advocates for the Respondent

Judgement

Kalimullah Khan, J.—This Criminal Misc. Writ Petition No. 5935 of 2014 under Article 226 of the Constitution of India has been filed by accused petitioners Narendra Mishra, Awadhesh Mishra and Pushpa Devi to issue a writ, order or direction in the nature of certiorari for quashing the summoning order dated 16.11.2012 passed by learned Additional Chief Judicial Magistrate, Court No. 19, Deoria as well as revisional order dated 9.1.2014 passed by learned Additional Sessions Judge/Special Judge, SC/SC Act, Court No. 3, Deoria. Caveat was filed in this matter and learned counsel for the complainant/opposite party No. 2 Prabhu Dutta Tiwari is present throughout. He has already put in his appearance in this matter earlier in this Court.

2. The perusal of the record shows that a criminal complaint was filed before the court of Additional Chief Judicial Magistrate, Court No. 19, Deoria by opposite party No. 2 Prabhu Dutta Tiwari against five accused persons to issue process under Section 204 Cr.P.C. to face trial for the offence punishable under Sections 419, 420, 468, 471, 120-B of I.P.C.

3. The allegation in the complaint was that complainant are three brothers, all

sons of Sri. Mahima Tiwari accused No. 5 aged about 80 years. The aforesaid Mahima Tiwari executed a sale deed of his land Araj No. 337 and 1191 in favour of accused petitioner Smt. Pushpa Devi who is his daughter-in-law. The aforesaid land had already been distributed by Mahima Tiwari amongst his three sons and on the basis of the aforesaid distribution they were cultivating the same and were maintaining their family. The allegation is that the aforesaid sale deed was got executed by Smt. Pushpa Devi in her favour by practicing undue influence, threat and coercion upon Mahima Tiwari. In support of the allegation the complainant Prabhu Dutta Tiwari examined himself under Section 200 Cr.P.C. and his witnesses Manoj Kumar Tiwari, P.W.1 and Aran Kumar Mani Tripathi, P.W.2 under Section 202 Cr.P.C.

4. On the basis of the aforesaid evidence adduced on record, learned Magistrate opined that there is sufficient ground for proceeding against accused hence vide summoning order dated 16.11.2012 he issued process under Section 204 Cr.P.C. against Narendra Mishra, Awadhesh Mishra, Pushpa Mishra, Ashutosh Tiwari and Mahima Tiwari (executant of the sale deed) to face trial under Sections 419, 420, 468, 471, 120-B of I.P.C.

5. Aggrieved by this summoning order, accused Narendra Mishra and others challenged it before the Sessions Judge by way of criminal revision with request to exercise the power contained under Section 397 Cr.P.C. On transfer the said criminal revision No. 16 of 2013 came to the file of Additional Sessions Judge/Special Judge, SC/S.T. Act, Court No. 3, Deoria. Having heard learned counsel for the parties vide judgment and order dated 9.1.2014 he dismissed the criminal revision and upheld the summoning order dated 16.11.2012.

6. Feeling aggrieved, accused petitioners Narendra Mishra and two others have filed this Criminal Misc. Writ Petition to quash both the aforesaid orders.

7. Learned counsel for the petitioners has submitted that from the allegations made in the criminal complaint and the evidence of the complainant and his two witnesses recorded under Sections 200 and 202 Cr.P.C. it is abundantly clear that Mahima Tiwari accused (non-respondent) was the title holder of the land Araj No. 377 and 1191 which is subject matter of the alleged sale deed executed by him in favour of his daughter-in-law Smt. Pushpa Devi respondent No. 3. Mahima Tiwari himself has been arrayed as accused in the criminal complaint. Theory of *res ipsa loquitur* dictates that things speak of itself. Had the sale deed been the outcome of aforesaid threat, coercion and undue influence practiced upon Mahima Tiwari by his daughter-in-law accused Pushpa Devi, the transferee of the sale deed, he would not have been made accused. The complainant and his witnesses do not say that Mahima Tiwari was not the bhumidhar of the aforesaid land with transferable rights, therefore, simply because during his life time he had distributed his lands to all his sons including the complainant, his right of transfer of his land had not ceased to exist. Both the courts below did not apply their judicial mind to the aforesaid facts of the case.

8. On the other hand, learned A.G.A. appearing for the State of U.P. respondent No. 1 and Sri. Anil Kumar Tiwari, learned counsel for the respondent No. 2 Prabhu Dutta Tiwari has submitted that the property was ancestral one and number of litigation are pending in between the parties including the criminal prosecution of Domestic Violence launched by Pushpa Devi against the complainant and others including the aforesaid Mahima Tiwari who is now dead and now by mounting pressure upon Mahima Tiwari accused petitioner Pushpa Devi succeeded in getting the alleged sale deed executed in her favour.

9. I have given my anxious judicial thoughts over the entire facts and circumstances of the case. Considering the fact that the bhumidhari right of Mahima Tiwari has never been challenged in the criminal complaint or in the evidence led in support of the allegations made therein and there is no allegation or evidence on record that the sale property was ancestral property or the complainant had any right by birth therein, Mahima Tiwari (accused No. 5) was fully entitled to transfer his land in favour of Pushpa Devi and if he has executed the sale deed in question in her favour, neither he nor Pushpa Devi nor any other person can be held liable for criminal offence punishable under Sections 419, 420, 468, 471, 120-B of I.P.C. The court of learned Magistrate and learned revisional court are not supposed to shut their eyes to the transferable right of a Bhumidhar. They are not bound in all the circumstances to take it for granted that if the oral evidence under Sections 200 and 202 Cr.P.C. has been led in support of the allegations made in the criminal complaint, their hands are fettered upto the extent that except issuing the process under Section 204 Cr.P.C. they would not pass any other order including the order of dismissal of the criminal complaint, if at all it appears to the Magistrate that accused have not committed any criminal offence. If there is any grievance to the complainant he is well within his right to agitate the matter before the civil court in a suit for cancellation of the sale deed. The criminal jurisdiction of the court cannot be invoked to settle the dispute purely of civil nature.

10. Section 419 I.P.C. reads as under:--

"419. Punishment for cheating by personation.--Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

No allegation whatsoever has been made in the criminal complaint or in the evidence of the witnesses recorded by the trial court that either of the accused has cheated by personation to anyone, therefore, Section 419 I.P.C. is not attracted at all.

11. Section 420 I.P.C. reads as under:--

"420. Cheating and dishonestly inducing delivery of property.--Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being

converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

Since the element of dishonesty is lacking in the allegations made in the complaint and evidence adduced by the complainant, therefore, Section 420 is also not attracted.

12. Section 468 I.P.C. reads as under:--

"468. Forgery for purpose of cheating.--Whoever commits forgery, intending that the [document or electronic record forged] shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

No forgery whatsoever appears to have committed by either of the accused in the facts and circumstances of the case, therefore, Section 468 I.P.C. is also not attracted.

13. Section 471 I.P.C. reads as under:--

"471. Using as genuine a forged [document or electronic record].--Whoever fraudulently or dishonestly uses as genuine any [document or electronic record] which he knows or has reason to believe to be a forged [document or electronic record], shall be punished in the same manner as if he had forged such [document or electronic record]."

There is nothing on record constituting the offence punishable under Section 471 I.P.C., therefore, this provision is also not attracted in the facts and circumstances of the case.

14. Section 120B I.P.C. provides punishment for criminal conspiracy and criminal conspiracy has been defined in Chapter V-A of the Indian Penal Code. Under Section 120A which reads as under:--

"[120A. Definition of criminal conspiracy.--When two or more persons agree to do, or cause to be done,--

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.--It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.]"

Since none of the accused inter se have agreed to do, or caused to be done (1) an illegal act, or (2) an act which is not illegal by illegal means, therefore, they

cannot be punished under Section 120B I.P.C.

15. Learned Magistrate appears to have not applied his judicial mind to the allegation of criminal complaint and material available on record in the light of these provisions of Indian Penal Code and arbitrarily summoned the accused persons to face trial for the offence punishable in the aforesaid Sections of I.P.C. Even the learned revisional court also overlooked the aforesaid provisions of Indian Penal Code and dismissed the revision without meeting out the constituents/ingredients of the offence punishable under Sections 419, 420, 468, 471 and 120B I.P.C.

16. In Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, , it was held as under:--

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course, it is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

17. The summoning order dated 16.11.2012 and the order of revisional court dated 9.1.2014 are bad in law and they deserve to be quashed.

18. Accordingly the present writ petition is allowed and both the aforesaid orders dated 16.11.2012 and 9.1.2014 are hereby set aside. Registry is directed to send a copy of this judgment to both the courts below for future guidance and the needful.