
(2016) 05 AHC CK 0082

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 17783 of 2010

Rajesh Gandhi

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 30-05-2016

Acts Referred:

Citation : (2016) 95 ACrC 929

Hon'ble Judges : Suneet Kumar, J.

Bench : Single Bench

Advocate : Santosh Srivastava, Karuna Srivastava and Swati Agarwal, Advocates, for the Appellant; Devendra Saini, Govt. Advocate and Pankaj Tiyaagi and Archana Tyagi, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Suneet Kumar, J.—Heard Mrs. Swati Agrawal, learned counsel for the petitioner, Mrs. Archana Tyagi, learned counsel for the second respondent and learned Additional Government Advocate.

2. The complainant is brother of applicant no. 1, whereas, applicant no. 2 is mother and applicant no. 3, 4, 5 and 6 are sisters of applicant no. 1 and complainant. The dispute, inter se, parties pertains to family settlement pertaining to the disputed property. The applicants are assailing the order dated 6 September 2010 passed by the revisional court/Additional Sessions Judge Court No. 3, Saharanpur in Criminal Revision No. 309 of 2010 (Rajesh Gandhi and other v. State of U.P. and others) affirming the order passed by the Chief Judicial Magistrate, Saharanpur, in Complaint Case no. 589 of 2010 (Rohit Gandhi v. Rajesh Gandhi), whereby, the applicants have been summoned in a complaint case for offence under Section 468, 506 IPC.

3. The complainant/opposite party no. 2, filed an application under Section 156(3) Cr.P.C. for offence under Sections 420, 467, 468, 471, 506 IPC which, the learned Magistrate treated as a complaint ; upon recording statements under

Section 200 Cr.P.C. and examining witnesses under Section 202, Magistrate summoned the petitioners herein, for offence under Section 468 and 506. In revision, the order of the Magistrate has been affirmed.

4. The allegations against the petitioners is that on the strength of a registered power of attorney executed by the mother and her daughters (petitioners no. 2 to 6) in favour of her son/brother (petitioner no. 1) in respect of a property being plot no. 2 situated at Jai Prabha Nagar, Village Manakmau, Saharanpur, was being attempted to be sold, despite the petitioners having knowledge that the complainant is a co-owner. It is alleged that father of complainant died in 2003, the property in dispute being ancestral property, not yet partitioned, therefore, the complainant is having a share, which fact is in the knowledge of the other petitioners.

5. The complainant-opposite party no. 2 would not dispute that a suit being Suit No. 145 of 2010 (Rohit Gandhi v. Smt. Ram Pyari and others) was instituted by him before the Civil Judge (Senior Division), Saharanpur seeking permanent injunction restraining the defendant/petitioners from interfering in the peaceful possession of the disput property, further, restraining the petitioners herein, from selling the disput plot on the strength of the power of attorney. It is averred that complainant/plaintiff has 1/7 share in the property. The suit was contested by the petitioner/defendants by filing written statement alleging that their father was the owner of the property, but, during his life time by an oral family settlement partitioned/settled the properties amongst his legal heirs. The complainant is having no share in the disput property, and since partition he is residing separately.

6. In lieu of settlement their father transferred, by a registered sale-deed, a house, duly recorded in municipal records being house no. 2/896, in favour of the complainant, therefore, in view of the settlement effected by their father complainant would have no right or title or share in the disput property.

7. The facts, inter se, parties are not in dispute, the learned counsel for the opposite party would not dispute that the complainant has already instituted a suit in respect of the property in dispute ; that a power of attorney was executed by other co-owners in favour of the petitioner no. 1. The power of attorney would, however, not disclose that the complainant though being a legal heir is having no share in the property. The absence of such an assertion, according to the complainant would amount to forgery.

8. It is in this backdrop, the learned counsel for the petitioner would submit (i) the dispute is purely civil in nature, (ii) the ingredients of offence under Section 468, 506 is not made out on the face value of the complaint, (iii) criminal proceedings cannot become a mode for executing a decree which is yet to see the light of the day, therefore, the criminal complaint being malicious, vexatious, to bring about a settlement in respect of a property.

9. The learned counsel for opposite party no. 2/complainant would submit (i) the

power of attorney executed by the petitioners no. 2 to 6 in favour of the petitioner no. 1 ousted the complainant, who is legal heir and a co-sharer of the property, (ii) the power of attorney has been executed with an intention to transfer the property to a third party, thus would cause loss to the complainant being a co-sharer of 1/7 share in the property, (iii) by excluding the name of the applicant being legal heir and co-owner of the property would show the criminal intent on the part of the petitioners to deprive the complainant of his share.

10. Rival submissions fall for consideration.

11. The question for determination is as to whether the allegations in the complaint constitute an offence under Section 468 and 506 IPC or in the alternative is the dispute, inter se, parties primarily civil in nature.

12. The complainant alleged in his application that his father Hansh Raj Gandhi died seven years ago, he is youngest amongst his siblings, father during his life time had not partitioned the property, the complainant is residing separately, further, it is alleged that in an attempt to deprive the complainant of his right and share in the property, the petitioners conspired, there executing a power of attorney in favour of the petitioner no. 1 to deal with the property. Petitioner no. 1 intends to sell the property to a third party, whereas, the petitioners are aware and having knowledge that the complainant has a share in the property.

13. The application under Section 156(3) Cr.P.C. was filed on 18 January 2010 and immediately thereafter on 20 January 2010, complainant instituted a suit before the competent civil court on the same allegations, seeking decree for permanent injunction against the petitioners herein.

14. Jurisdiction under Section 482 Cr.P.C. has to be exercised with great care, while exercising jurisdiction, the court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, whether has been given a cloak of criminal offence. The criminal proceedings are not a shortcut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution, for the accused which is a serious matter. The jurisdiction under this section has to be exercised to prevent abuse of the process of the court or otherwise to secure ends of justice. (Vide : G. Sagar Suri and another v. State of U.P. And others 2000 (2) SC 636).

15. In All Cargo Movers (I) Pvt. Ltd. v. Dhanesh Badarmal Jain 2007 (12) SCC 391 Supreme Court held that "for said purpose, allegations in the complaint petition must disclose all necessary ingredients, therefor, It is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is impressible also to look into the admitted documents. Criminal proceedings should not be encroached, when it is found to be mala fide or otherwise an abuse of the process of the court. Superior courts while exercising its power should also strive to serve the ends of justice."

16. In *V.Y. Jose v. State of Gujarat* 2008 (16) Scale 167, wherein the Supreme Court in paragraph 18 observed as follows :

"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 nonexistent. 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 483 of the Code of Criminal Procedure to supervise the functionings of the trial courts.

17. In *State of Madhya Pradesh v. Awadh Kishore Gupta* 2004 Cri.LJ 598 the Supreme Court held as follows :

"In proceedings instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court.

18. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. The substance of complainant is to be seen. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. (Refer : *Dhanalakshmi v. R. Prasanna Kumar* (1990 Supp. SCC 686), *State of Bihar v. P.P. Sharma* (AIR 1996 SC 309), *Rupan Deol Bajaj v. Kanwar Pal Singh Gill* (1995 (6) SCC 194), *State of Kerala v. O.C. Kuttan* (AIR 1999 SC 1044), *State of U.P. v. O.P. Sharma* (1996 (7) SCC 705), *Rashmi Kumar v. Mahesh Kumar Bhada* (1997 (2) SCC 397), *Satvinder Kaur v. State (Govt. of NCT of Delhi)* (AIR 1996 SC 2983) and *Rajesh Bajaj v. State NCT of Delhi* (1999 (3) SCC 259).

19. A given set of facts may make out : (a) purely a civil wrong ; or (b) purely a criminal offence ; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, or dispute pertaining to a property, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction, breach of contract, or property dispute, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

20. In *M. Krishnan v. Vijay Singh* (2001) 8 SCC 645 Supreme Court held that in a case where the accused alleged that the transaction between the parties are of a civil nature and the criminal court cannot proceed with the complaint because the factum of document being forged was pending in the civil court, the Court observed :

"Accepting such a general proposition would be against the provisions of law inasmuch as in all cases of cheating and fraud, in the whole transaction, there is generally some element of civil nature. However, in this case, the allegations were regarding the forging of the documents and acquiring gains on the basis of such forged documents. The proceedings could not be quashed only because the respondents had filed a civil suit with respect to the aforesaid documents. In a criminal court the allegations made in the complaint have to be established independently, notwithstanding the adjudication by a civil court.....If mere pendency of a suit is made a ground for quashing the criminal proceedings, the unscrupulous litigants, apprehending criminal action against them, would be encouraged to frustrate the course of justice and law by filing suits with respect to the documents intended to be used against them after the initiation of criminal proceedings or in anticipation of such proceedings. Such a course cannot be the mandate of law. Civil proceedings, as distinguished from the criminal action, have to be adjudicated and concluded by adopting separate yardsticks. The onus of proving the allegations beyond reasonable doubt, in criminal case, is not applicable in the civil proceedings which can be decided merely on the basis of the probabilities with respect to the acts complained of."

21. Having noticed that the nature and scope of civil and criminal proceedings and the standard of proof required in both matters is different and distinct, whereas in civil proceedings the matter can be decided on the basis of probabilities, the criminal case has to be decided by adopting the standard of proof of "beyond reasonable doubt".

22. Let me first consider whether the complaint averments even assuming to be true make out the ingredients of the offences punishable either under section 468 or section 506 IPC.

23. Section 470 defines a forged document as a false document made by forgery.

The term "forgery" is defined in section 463. Whoever makes any false documents with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into express or implied contract, or with intent to commit fraud or that the fraud may be committed, commits forgery.

24. Section 464 defining "making a false document" is extracted below :

"464. Making a false document. - A person is said to make a false document or false electronic record -

First. - Who dishonestly or fraudulently -

(a) makes, signs, seals or executes a document or part of a document ;

(b) makes or transmits any electronic record or part of any electronic record ;

(c) affixes any digital signature on any electronic record ;

(d) makes any mark denoting the execution of a document or the authenticity of the digital signature, with the intention of causing it to be believed that such document or a part of document, electronic record or digital signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed ; or

Secondly. - Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with digital signature either by himself or by any other person, whether such person be living or dead at the time of such alternation ; or

Thirdly. - Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his digital signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration.

Explanation 1 - A man's signature of his own name may amount to forgery.

Explanation 2 - The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

[Note : The words "digital signature" wherever it occurs were substituted by the words "electronic signature" by Amendment Act 10 of 2009]."

25. The condition precedent for an offence under sections 467, 468 and 471 is forgery. The condition precedent for forgery is making a false document (or false

electronic record or part thereof). This case does not relate to any false electronic record. Therefore, the question is whether the accused (petitioners), in executing and registering the general power of attorney purporting to sell a property, can be said to have made and executed false document.

26. An analysis of section 464 IPC shows that it divides false documents into three categories :

27. The first is where a person dishonestly or fraudulently makes or executes a document with the intention of causing it to be believed that such document was made or executed by some other person, or by the authority of some other person, by whom or by whose authority he knows it was not made or executed.

28. The second is where a person dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part, without lawful authority, after it has been made or executed by either himself or any other person.

29. The third is where a person dishonestly or fraudulently causes any person to sign, execute or alter a document knowing that such person could not by reason of (a) unsoundness of mind ; or (b) intoxication ; or (c) deception practised upon him, know the contents of the document or the nature of the alteration.

30. In short, a person is said to have made a "false document", if (i) he made or executed a document claiming to be someone else or authorised by someone else ; or (ii) he altered or tampered a document ; or (iii) he obtained a document by practicing deception, or from a person not in control of his senses.

31. In *Mohd. Ibrahim and others v. State of Bihar* (2009) 8 SCC 751 upon examining Section 463, 467 to 471 IPC as noted, herein above, the Court while dealing with sale-deeds executed by the accused held :

"There is a fundamental difference between a person executing a sale deed claiming that the property conveyed is his property, and a person executing a sale deed by impersonating the owner or falsely claiming to be authorised or empowered by the owner, to execute the deed on owner's behalf. When a person executes a document conveying a property describing it as his, there are two possibilities. The first is that he bona fide believes that the property actually belongs to him. The second is that he may be dishonestly or fraudulently claiming it to be his even though he knows that it is not his property. But to fall under first category of "false documents", it is not sufficient that a document has been made or executed dishonestly or fraudulently. There is a further requirement that it should have been made with the intention of causing it to be believed that such document was made or executed by, or by the authority of a person, by whom or by whose authority he knows that it was not made or executed. When a document is executed by a person claiming a property which is not his, he is not claiming that he is someone else nor is he claiming that he is authorised by someone else. Therefore, execution of such document (purporting to convey some property of which he is not the owner) is not execution of a false

document as defined under section 464 of the Code. If what is executed is not a false document, there is no forgery. If there is no forgery, then neither section 467 nor section 471 of the Code are attracted."

32. The term "fraud" is not defined in the Code. The dictionary definition of "fraud" is "deliberate deception, treachery or cheating intended to gain advantage". Section 17 of the Contract Act, 1872 defines "fraud" with reference to a party to a contract. In *Dr. Vimla v. Delhi Administration*, AIR 1963 SC 1572, this Court explained the meaning of the expression "defraud" thus :

"The expression "defraud" involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied."

33. The above definition was in essence reiterated in *State of UP v. Ranjit Singh*, 1999 (2) SCC 617.

34. The Penal Code however defines "fraudulently", an adjective form of the word "fraud", in section 25, as follows : "A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise". The term "fraudulently" is mostly used with the term "dishonestly" which is defined in section 24 as follows : "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing "dishonestly".

35. To "defraud" or do something fraudulently is not by itself made an offence under the Penal Code, but various acts when done fraudulently (or fraudulently and dishonestly) are made offences. These include :

(i) Forgery making or executing a false document (sec. 463 to 471 and 474).

36. In the given facts and allegations made in the complaint would, in my opinion, not make out an offence under Section 468. The complainant would himself allege that the petitioners/accused are co-sharers of the disputed property and in respect thereof, some of the co-sharers (petitioners 2 to 6) executed general power of attorney in favour of the first accused (petitioner no. 1). Merely not disclosing in the deed that the complainant is also a co-sharer would not tantamount to forgery.

37. The allegations in the complaint do not also make out the ingredients of an offence under Section 506 IPC. Section 506 refers to intentional insult with intent to provoke breach of the peace. The allegation in the complaint is that when the complainant enquired with the petitioners about the power of attorney

threatened to kill the complainant. The mother (petitioner no. 2) is aged 86 years, the sisters (petitioner nos. 3 to 6) are in their sixties, all the petitioners reside outside Saharanpur and some outside the State, therefore, the averments in the complaint, if assumed to be true, do not make out an offence under Sections 468 and 506 IPC.

38. For the reasons stated above, petition is allowed. The complaint and the consequent summoning order is, hereby quashed.

39. Cost assessed at Rs. 5,000/- to be paid by opposite party no. 2 to the petitioners.