

(2021) 01 J&K CK 0005

In the Jammu And Kashmir High Court

Case No : CRM(M) No. 611 Of 2019, Criminal Miscellaneous No. 1421 Of 2019

Saqib Ali Shah And Others

APPELLANT

Vs

State Of J&K And Another

RESPONDENT

Date of Decision : 27-01-2021

Acts Referred:

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 120B, 420, 465, 467, 468, 471

Indian Succession Act, 1925 — Section 273

Probate And Administration Act, 1977 — Section 50, 59

Code Of Criminal Procedure, 1973 — Section 195(1)(b)(ii), 482

Code Of Criminal Procedure, 1898 — Section 561A

Citation : (2021) 01 J&K CK 0005

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : Virender Bhat, Raman Sharma, Meenakshi Salathia

Final Decision : Allowed

Judgement

1 Through the medium of instant petition, the petitioners have challenged FIR No. 49/2019 dated 14.10.2019 for offences under Sections

420/465/467/468/471/120-B RPC registered with Police Station, Crime Branch, Jammu.

2 Briefly stated the case of the petitioners is that respondent No.2/complainant made a complaint against them before the Court of learned Judicial

Magistrate 1st Class (Munsiff), Jammu alleging therein that the petitioners have fabricated and forged a Will dated 16.10.1998 purported to have been

executed by the father of respondent No.2/complainant. It was further alleged in the said complaint that the mutation has been attested in the revenue

record as per the order of Probate passed by the learned Principal District Judge, Jammu in respect of the said Will, but, in fact, the said Will does not

bear the signature of testator, namely late Wazir Mohd.

3 On the basis of order passed by the learned Judicial Magistrate 1st Class (Munsiff), Jammu and after conducting preliminary verification, the

impugned FIR came to be registered by the Police Station, Crime Branch, Jammu. According to the petitioners, the Will in question has been probated

and on 31.12.2005, the learned Principal District Judge, Jammu has passed an order in this behalf. It is also contended that respondent

No.2/complainant has sworn an affidavit attested by the learned Judicial Magistrate 1st Class, Jammu declaring that the Will in question is genuine. It

is further contended that respondent No.2/complainant has filed a Civil Suit for declaring the Will in question as null and inoperative. The petitioners

have gone on to contend that as per the settled position of law, a Will, after it is probated, becomes a conclusive proof with regard to its genuineness

and it operates in rem. Thus, the question regarding the genuineness of the Will cannot be reopened by way of criminal proceedings.

4 Respondent No.1, Crime Branch, Jammu has filed its response in which it has been averred that as per the written complaint lodged by respondent

No.2/complainant, the father of the complainant had purchased a plot of land measuring 1 kanal, 10 marlas falling under khasra No. 123 min situated

at village Chak Changerwan and in this regard, half of the consideration amount was contributed by the complainant. It was further alleged in the

complaint that the Will dated 16.10.1998 purported to have been executed by the father of respondent No.2/complainant, according to which, the

aforesaid property was bequeathed by the testator in favour of his grandson, namely petitioner No.3 and Mohd Aslam, the son of the testator and

uncle of petitioner No.3 in equal shares, is forged. It was alleged in the complaint that the petitioners hatched a criminal conspiracy, as a consequence

whereof, the aforesaid Will was forged and registered with Notary Public resulting in attestation of mutation in respect of the land in question in favour

of petitioner No.3.

5 According to respondent No.1, a preliminary verification was conducted and on the basis of the verification, the allegations leveled in the complaint

have been substantiated and it has come to fore that late Mohd Aslam Shah, Sakib Ali Shah (petitioner No.1), Sabina Shah (petitioner No.2), Shahzad

Kamran Shah (petitioner No.3) in connivance with witnesses to the Will in

question, namely Nisar Ahmed (petitioner No.4) and Imtiaz Ahmad (petitioner No.5) in order to cause wrongful loss to respondent No.2/complainant on the basis of the Will Deed, forged the said Will Deed and got the land in question mutated in their names. Accordingly, the impugned FIR came to be registered and investigation of the case was set into motion.

During the course of investigation, the original Will Deed was sent to FSL, Jammu for comparison of signatures and expert opinion pertaining to Will

Deed of testator namely Wazir Mohd. As per the expert opinion, the report was found positive in favour of respondent No.2/complainant.

6 Respondent No.2/complainant has also resisted the petition by filing objections thereto. In its objections, respondent No.2 has reiterated the

allegations made by him in his complaint that is subject matter of investigation before respondent No.1. According to respondent No.2, the Will in

question was prepared by the petitioners in an illegal and unlawful manner. Respondent No.2 has further contended that there are cuttings/insertions

and factual errors in the order whereby the Will in question has been probated by the learned Principal District Judge, Jammu and not only this, even

the notice published by the said Court in the newspaper is self contradictory and the same was published in the newspaper which has very limited

circulation. Respondent No.2 has admitted filing of a civil suit challenging the Will in question which is stated to be pending disposal before the Court

of learned 2nd Additional Munsiff, Jammu.

7 I have heard learned counsel for the parties and perused the record of the case.

8 Learned counsel for the petitioners has vehemently argued that once the Will in question stands probated by the order of learned Principal District

Judge, Jammu, the same becomes conclusive as to the representative title against all persons. The learned counsel has further contended that the

probate of a Will when granted establishes its genuineness and it cannot be questioned except in accordance with the provisions contained in the J&K

Probate and Administration Act, 1977 (1920 AD) (hereinafter referred to as the Act).

According to the learned counsel, the genuineness of a Will cannot be reopened in the criminal proceedings by holding an investigation into the said question.

9 On the other hand, learned AAG for respondent No.1 has submitted that the

civil and criminal proceedings deal with entirely different fields and findings recorded in one proceeding cannot be treated as binding in other. According to the learned counsel, a civil case is decided on the basis of evidence led before the Court in which the civil proceedings are pending, whereas the criminal proceedings with regard to the same fact are decided on the basis of evidence presented in those proceedings. Thus, even if the genuineness of the Will in question has been proved in the probate proceedings, the said question can be reopened in the criminal proceedings. In order to buttress his argument, the learned counsel has relied upon the judgment of Supreme Court in the case of Iqbal Singh Marwah and another vs. Meenakshi Marwah and another, (2005) 4 SCC 370. The learned counsel has further argued that the investigation of the instant case is at its infancy and the same cannot be scuttled at this stage. According to him, it is not open to this Court in these proceedings to examine and analyze the material on record and once the Court finds that the FIR discloses prima facie commission of a cognizable offence, the Court should stay its hand and allow the investigating agency to step in to initiate the probe to unearth the crime in accordance with the procedure prescribed in the Cr.P.C. In this regard, reliance has been placed upon the judgment of Supreme Court in the case of Dineshbhai Chandubhai Patel vs. State of Gujarat and others, (2018) 3 SCC 104.

10 Learned counsel for respondent No.2, while supporting the arguments of learned counsel for respondent No.1 has contended that there are certain overwritings, cuttings and factual errors in the order of probate passed by the learned Principal District Judge, Jammu and there are certain contradictions in the notice published in the newspaper during the probate proceedings. According to her, these corrections, overwritings and factual errors cast a grave doubt about the entire proceedings and, as such, the investigating agency should be allowed to probe the matter. While supporting the submission of learned counsel for respondent No.1 that scope of criminal and civil proceedings is distinct from each other and that the finding of a Civil Court is not binding upon criminal proceedings, the learned counsel for respondent No.2 relied upon the judgments of the Supreme Court in Indian Oil Corporation vs. NEPC India Ltd and ors, 2006 (6) 736 and of this Court in CRMC No. 264/2018, decided on 21.12.2018. The learned counsel has

further contended that a judgment/decree obtained by fraud is a nullity. She has relied upon the judgments of the Supreme Court in S.P.Chengalvaraya

Naidu vs. Jagannath, AIR 1994 SC 853, Dalip Singh vs. State of U.P., 2010 (2) SCC 114 and State of Telengana vs. Habib Abdullah Jeelani and ors, 2017 (2) SCC 779

11 There is no dispute to the fact that the Will dated 16.10.1998 registered with Notary Public on 25.11.1998 purported to have been executed by late

Wazir Mohd has been probated vide order dated 31.12.2003 passed by the learned Principal District Judge, Jammu and, consequently, the letter of

probate dated 06.05.2004 has been issued by the said Court whereby the petitioner Shahzad Kamran Shah has been appointed as the Administrator of

the Will in respect of part of the property contained therein. It is an admitted fact that respondent No.2/complainant has challenged the Will in question

by way of a civil suit which is pending disposal before the 2nd Additional Munsiff, Jammu. The question arises, whether, on the facts and

circumstances of the case in view of the probate of the Will having been granted by the Principal District Judge, Jammu, it was competent for

respondent No.1 to go into the question as to the genuineness of Will of the deceased namely Wazir Mohd.

12 The law governing the probate of Wills at the relevant time was governed by the J&K Probate and Administration Act 1977 (1920 AD). Chapter

II of the said Act deals with grant of probate and Letters of Administration and Section 12, which is contained in the said Chapter, deals with the

effect of probate. It reads as under:

“Effect of probate-Probate of a will when granted establishes the will from the date of the testator and renders valid all intermediate acts

of the executor as such.”

13 Section 59 of the Act provides for conclusiveness of probate or letters of administration. It reads as under:

“Conclusiveness of probate or letters of administration- Probate or letters of administrator shall have effect over all the property,

movable or immovable of the deceased throughout the Province in which the same is or are granted and shall be conclusive as to the

representative title against all debtors of the deceased, and all persons holding property which belongs to him and shall afford full

indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administrator shall have been grantedâ??.

14 From a perusal of the aforequoted provisions, it becomes clear that the probate of a Will when granted establishes the Will from the death of the testator and the effect of probate of Will over the property contained therein has conclusiveness attached to it.

15 The law regarding the grant of probate or letters of administration has been subject matter of discussion before the Supreme Court in the case of

Surinder Kumar and ors vs. Gian Chand and ors, AIR 1957 SC 875. The Court in the said judgment observed as under:

â??The judgment of the Probate Court must be presumed to have been obtained in accordance with the procedure prescribed by law and it

is a judgment in rem. The objection that the respondents were not parties to it is thus unsustainable because of the nature of the judgment

itselfâ??.

16 Similarly, in Syed Askari Hadi Ali Augustine vs. State (Delhi Administrator) and another, (2009) 5 SCC 528, the Supreme Court observed as under:

â??It is beyond any cavil that a Judgment rendered by a Probate Court is a Judgment in rem. It is binding on all Courts and authorities. A

judgment in rem indisputably is conclusive in criminal as well as in a civil proceedingâ??

17 In Smt. Rukmani Devi And Ors. vs Narendra Lal Gupta (1985) 1 SCC 144, the Supreme Court, while interpreting the provisions contained in

Section 273 of Indian Succession Act which is in pari materia with Section 59 of J&K Probate and Administration Act held that a probate granted by

a competent court is conclusive of the validity of such will until it is revoked and no evidence can be admitted to impeach it except in a proceeding

taken for revoking the probate. The Court went on to hold that that a decision of the probate court being a judgment in rem would not only be binding

on the parties to the probate proceedings, but would be binding on the whole world.

18 In Satya Charan Das and ors. vs Hrishikesh Karar and ors, AIR 1959 Cal 795, the Supreme Court observed that the grant of probate establishes

conclusively the legal character of the person to whom the grant is made.

Further, the grant is not only relevant but conclusive evidence against all. It is conclusive evidence of the validity and the execution of the Will and of the testamentary capacity of the testator.

19 The same principle was reiterated and reaffirmed by the High Court of Calcutta in *Gopichand Gupta vs Commissioner Of Wealth-Tax, West*

Bengal, 1980 SCC Online, Cal 332. While answering the question as to whether the Income Tax Appellate Tribunal was justified to go into the

question as to the genuineness of the Will regarding which the probate had already been granted by the High Court, the Court held that it was not open

to the Tribunal to do so and to impose penalties on the ground that the Will was not genuine.

20 It is, thus, absolutely clear that once a Will has been probated, it is conclusive as to the execution and validity of the Will not only upon all the

parties who might be before the Court but also upon all other persons whatever in all proceedings arising of the Will or claims under or connected

therewith. The only remedy available to a person aggrieved of the order of probate is to approach the same Court by way of an application for

revocation of the probate.

Chapter IV of the aforesaid Act provides the remedy in this regard.

21 It is not open to an aggrieved person to question the genuineness of the Will which has been probated by resorting to criminal proceedings. The

High Court of Calcutta in *Kailash Chandra vs Nanda Kumar* on 20 March, 1944, AIR 1944 Cal 385 while observing that the judgment in a civil suit is

operative only between the parties to the suit, whereas a judgment relating to probate of a will being a Judgment in rem, could not be revoked and set

aside by a judgment which was only conclusive inter parties. The Court went on to hold that even when there is allegation of forgery, the proper

remedy of the party was to apply to the Probate Court and not to file a civil Court.

22 From the forgoing discussion of the legal position regarding the validity of a will which has been probated by a competent Court, it can safely be

stated that the genuineness of the will which is subject matter of the impugned FIR having been established in the probate proceedings, the same

cannot again be called into question in criminal proceedings.

23 So far as the contention of learned counsel for respondent No.1 that the civil and criminal proceedings are two separate fields and that there is no

legal principle that the findings recorded in one proceeding may be treated as final and binding in the other, is concerned, there can be no dispute with regard to the said proposition, but in probate proceedings, once the marginal witnesses to a will depose about the genuineness of the Will and a finding is recorded with regard to the same by the Probate Court, it will not be legally permissible to reopen the said issue in criminal proceedings. If the witnesses have deposed falsely before the Probate Court, the proper course is to seek revocation of the probate and if it is established before the Probate Court that the witnesses have deposed falsely criminal prosecution can be launched not only against the witnesses, but also against the propounders of the Will. The same, however, has to be in accordance with the relevant provisions contained in the Cr.PC in this regard.

24 The ratio laid down by the Supreme Court in Iqbal Marwah case which has been relied upon by the learned counsel for respondent No.1 is not applicable to the facts of the instant case, the same being distinguishable on facts. In the case before the Supreme Court, the probate proceedings were still in progress when one of the parties to the proceedings claimed that the will of which probate was being sought is forged, which in other words, means that the Probate Court had not returned any finding with regard to the validity of the will. The Supreme Court while answering the question, whether the provisions contained in Section 195 (1)(b)(ii) of CrPC would be attracted when offences enumerated in the said provision have been committed with respect to a document before it has been produced or given in evidence in a proceeding in any Court, held that in such cases, the aforesaid provisions would not be attracted and that the same would get attracted only during the time when the document was in custodia legis.

25 In the instant case, the genuineness of the document i.e. Will has already been established in the probate proceedings and the same is sought to be reopened by way of criminal proceedings. Therefore, the provisions of Section 59 of Probate and Administration Act would come into play, which accords status of conclusiveness to the genuineness of the will unless revoked in terms of the provisions contained in Chapter IV of the said Act. The ratio laid down by the Supreme Court in the case of Iqbal Marwah (supra) would, therefore, not apply to this case. On the same analogy, the ratio laid down by the Courts in the cases referred to by learned counsel for respondent No.2 would not apply to this case, as in none of those cases, the

Judgment of a Probate Court, which operates as a Judgment in rem, was in issue.

26 The proper course for the respondent No.2/complainant in the instant case was to apply for revocation of the probate in terms of Section 50 of the Probate and Administration Act. In fact, illustration (c) to the explanation to Section 50 of the Act, provides that probate of a will, which is shown to be forged, can be revoked. If the respondent No.2 herein would have succeeded in proceedings for revocation of the probate, the question of launching of criminal prosecution against propounders of Will and witnesses would have arisen. Respondent No.2/complainant, instead of choosing this method, it appears, has jumped the gun and directly launched the criminal proceedings against the petitioners without first seeking the revocation of the probate, which is impermissible in law.

27 So far as the contention of learned counsel for respondent Nno.2/complainant that there are insertions, overwritings and factual errors in the order of probate passed by learned Principal District Judge Jammu as also in the notice published in the newspaper is concerned, the same is not subject matter either of the investigation or of the complaint lodged by him against the petitioners. In any case, respondent No.2/complainant is at liberty to examine the original record of the Probate Court and, if at all, there is any unauthorized insertion/overwriting in the order of the Court, the complainant is at liberty to bring the same to the notice of the learned Principal District Judge, Jammu and to seek action in accordance with law.

28 For what has been discussed hereinbefore, it becomes clear that it is not legally permissible for respondent No.1 to undertake investigation with regard to genuineness of the Will in question which has been proved to be genuine by the competent Court, particularly when the probate granted by the competent Court in respect of the Will in question has not been revoked or altered till date. The judgment of the Probate Court in respect of the validity of the will being conclusive and binding on all persons, it is not open to respondent No.1 to go behind it in these proceedings. Merely because, during the preliminary verification of the case, handwriting expert has rendered his opinion that the signatures of the testator on the Will in question appear to be not genuine, is not a reason good enough to register the FIR, particularly when the marginal witnesses to the Will in question have deposed with regard to the genuineness of the Will before the Probate Court and

a finding regarding genuineness of the will has been recorded by the said Court.

29 For the forgoing reasons, continuance of criminal proceedings against the petitioners in the facts and circumstances of the case would amount to an abuse of process of law because the same would militate against the legal status of conclusiveness of genuineness of the will which stands probated by the orders of a competent Court. The case at hand is, therefore, fit one where this Court should exercise its inherent powers under Section 561-A of J&K Cr.P.C, which is in pari materia with Section 482 of Central Cr.P.C to quash the impugned FIR. Accordingly, the petition is allowed and the impugned F.I.R as well as the proceedings emanating therefrom are quashed.