

Allahabad High Court

Bhule Singh & Others vs State Of U.P. & Another on 29 November, 2018

Bench: Neeraj Tiwari

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Court No. - 12

Case :- APPLICATION U/S 482 No. - 16403 of 2008

Applicant :- Bhule Singh & Others

Opposite Party :- State Of U.P. & Another

Counsel for Applicant :- Rajesh Singh

Counsel for Opposite Party :- Govt. Advocate, Vivek Kumar Singh

Hon'ble Neeraj Tiwari, J.

Heard Sri Ranvijay Chaubey, Advocate holding brief of Sri Anurag Kumar Mishra, learned counsel for the applicants, learned A.G.A. for the State and Sri Vivek Kumar Singh, learned counsel for the opposite party no.2.

The present application under section 482 Cr.P.C. has been filed for quashing the charge sheet as well as entire proceedings in Criminal Case No.2264 of 2008 (State Vs. Bhule) arising out of the Case Crime No.1172 of 2007, under Sections 420, 467, 468 and 471 IPC, Police Station Dadri, District Gautam Budh Nagar.

Learned counsel for the applicants submitted that with regard to ownership of land in dispute, one Civil Misc. Writ Petition No.32629 of 2003 is pending before this Court, in which Court has passed order of status quo. He further submitted that the title of land is still not decided and he has sold out his share of land to one Raj Dhari Maurya son of Muneshwar Maurya. He further submitted that at this stage, the opposite party no.2 has filed an application under Section 156(3) Cr.P.C. for lodging an FIR against the applicants. The said application was ultimately rejected by Ist Additional Chief Judicial Magistrate, Gautam Budh Nagar vide order dated 04.12.2006 on the ground that even if the

land was sold in violation of order of High Court, High Court may itself take action in accordance with law and prima facie no cognizable offence is made out.

He further submitted that after dismissal of said application for the very same cause of action, opposite party no.2 has lodged an FIR dated 17.11.2007, under Sections 420, 467, 468, 471 IPC, Police Station-Dadri, District-Gautam Budh Nagar, in which charge sheet was submitted and summoning order dated 27.2.2008 has been passed. He placed reliance upon Section 362 Cr.P.C. and in light of that submitted that once the Magistrate had rejected the application filed by opposite party no.2, no summoning order can be passed again by the Magistrate in another charge sheet which was based on the same facts.

In support of his contention, he has placed reliance upon the judgment of the Apex Court in the cases of Lalta and others Vs. State of U.P. and others reported in (1969) 2 SCR 526 and Amritlal Ratilal Mehta and Another Vs. State of Gujarat reported in (1980) 1 Supreme Court Cases 121.

He further submitted that in all eventuality even after executing the sale deed, no case of forgery is made out against the applicants for the reason that as on date dispute of title has not been decided and the matter is pending before this Court.

He further submitted that for cancellation of sale deed executed by applicant, the opposite party no.2 has also filed Suit No.257 of 2006 for cancellation of sale deed, which is still pending. In support of his contention, learned counsel for the applicants has placed reliance upon the judgment of Apex Court in the cases of Mohammed Ibrahim Vs. State of Bihar reported in (2009) 8 Supreme Court Cases 751 decided 4th September, 2009 and Devendra Vs. State of U.P. reported in (2009) Supreme Court Cases 495 decided on 6th May, 2009 and submitted that the Apex Court has clearly held that when a document is executed by a person claiming to be owner of the property and document executed is not the false document, no case of fraud is made out.

Sri Vivek Kumar Singh, learned counsel for the opposite party no.2 has confronted the argument raised by the learned counsel for the applicants and submitted that though the application under Section 156(3) Cr.P.C. was rejected by the Magistrate vide order dated 04.12.2006, but after lodging the FIR, the Magistrate has passed summoning order with full application of mind.

He further submitted that until decision is not given by the High Court and title is disputed, any instrument of transfer of property amounts to fraud, therefore, the Court has rightly proceeded for passing the summoning order. In support of his case, he has placed reliance upon the judgment of Apex Court in the case Jairam, S/O Nathu Salunke Vs. State of Maharashtra and another reported in (2017) 2 Supreme Court Cases 371.

I have perused the record as well as judgment of Apex Court and considered the submission of counsel for the parties.

I have perused the complaint filed under Section 156(3) Cr.P.C. as well as order dated 4.12.2006 passed by the learned A.C.J.M. rejecting the said complaint. In fact, the complaint is only based on

the fact that because Civil Misc. Writ Petition No.32629 of 2003 is pending for disposal and this Court has passed an order dated 1.8.2003 for not selling the land and applicants were well known about this fact, but even though they have sold the property to cause damage to the opposite party no.2. Learned C.J.M. has rightly rejected the application under Section 156(3) Cr.PC. on the ground that in case there is violation of order of High Court, High Court itself may take action in accordance with law, therefore, no cognizable offence is made out against the applicants.

I have also perused the FIR dated 17.11.2007. The said FIR is also based on the almost same facts. In this FIR, same dispute, which was mentioned in complaint under Section 156(3) Cr.P.C. has again given in detail, in which ultimately charge sheet was submitted and summoning order has been passed.

After perusal of the facts of FIR as well as complaint under Section 156(3) Cr.P.C. I am of the firm view that there is no dispute between the both. Once the Magistrate has rejected the complaint filed under Section 156(3) Cr.P.C. vide order dated 4.12.2006, no case is made out without having any fresh facts and cause of action to issue summoning order for initiating criminal proceeding. This proposition of fact is also getting support from decisions of Apex Court in the cases of Lalta and Amritlal Ratilal Mehta (supra).

Second argument of learned counsel for the applicants are more relevant. There is no dispute between the parties that the title of land is subjudice before this Court in Civil Misc. Writ Petition No.32629 of 2003 and the applicant has sold out the land to third person. In such cases, the issue is as to whether any fraud has been played or not. This similar issue was before the Apex Court in the matter of Mohammed Ibrahim and Devendra (supra) and the Court has held that even in cases title is disputed by selling of land, no case of fraud is made out against the applicants.

Relevant paragraph Nos. 2 & 11 to 26 of the judgment of Mohammed Ibrahim (supra) are quoted hereinbelow:-

"2. The second respondent herein filed a complaint against appellants 1 to 3 (accused 1 to 3) and two others before the Chief Judicial Magistrate, Madhubani, alleging that he was the owner of Katha No. 715 Khasra No.1971 and 1973 admeasuring 1 bigha, 5 Katha and 18 Dhurs; that the first accused who had no connection with the said land and who had no title thereto, had executed two registered sale deeds dated 2.6.2003 in favour of the second accused in respect of a portion of the said land measuring - 8 Khatas and 13 Dhurs; and that the third, fourth and fifth accused being respectively the witness, scribe and stamp vendor in regard to the sale deeds had conspired with accused 1 and 2 to forge the said documents; and that when he confronted accused 1 and 2 about the said forgery, they abused him and hit him with fists and told him that he can do what he wanted, but they will get possession of the land on the basis of the said documents.

11.....

The term "forgery" used in these two sections 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.

12. 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]."

13. The condition precedent for an offence under sections 467 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 first accused, in executing and registering the two sale deeds purporting to sell a property (even if it is

assumed that it did not belong to him), can be said to have made and executed false documents, in collusion with the other accused.

14. An analysis of section 464 of Penal Code shows that it divides false documents into three categories:

1. 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.

2. 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.

3. 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.

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.

15. The sale deeds executed by first appellant, clearly and obviously do not fall under the second and third categories of 'false documents'. It therefore remains to be seen whether the claim of the complainant that the execution of sale deeds by the first accused, who was in no way connected with the land, amounted to committing forgery of the documents with the intention of taking possession of complainant's land (and that accused 2 to 5 as the purchaser, witness, scribe and stamp vendor colluded with first accused in execution and registration of the said sale deeds) would bring the case under the first category.

16. 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 bonafide 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.

17. 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.

Section 420 IPC

18. Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows:

(i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission;

(ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.

19. To constitute an offence under section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived (i) to deliver any property to any person, or (ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security).

20. When a sale deed is executed conveying a property claiming ownership thereto, it may be possible for the purchaser under such sale deed, to allege that the vendor has cheated him by making a false representation of ownership and fraudulently induced him to part with the sale consideration. But in this case the complaint is not by the purchaser. On the other hand, the purchaser is made a co-accused.

21. It is not the case of the complainant that any of the accused tried to deceive him either by making a false or misleading representation or by any other action or omission, nor is it his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce him to do or omit to do anything which he would not do or omit if he were not so deceived. Nor did the complainant allege that the first appellant pretended to be the complainant while executing the sale deeds. Therefore, it cannot be said that the first accused by the act of executing sale deeds in favour of the second accused or the second accused by reason of being the purchaser, or the third, fourth and fifth accused, by reason of being the witness, scribe and stamp vendor in regard to the sale deeds, deceived the complainant in any manner.

22. As the ingredients of cheating as stated in section 415 are not found, it cannot be said that there was an offence punishable under sections 417, 418, 419 or 420 of the Code.

A clarification

23. When we say that execution of a sale deed by a person, purporting to convey a property which is not his, as his property, is not making a false document and therefore not forgery, we should not be understood as holding that such an act can never be a criminal offence. If a person sells a property knowing that it does not belong to him, and thereby defrauds the person who purchased the property, the person defrauded, that is the purchaser, may complain that the vendor committed the fraudulent act of cheating. But a third party who is not the purchaser under the deed may not be able to make such complaint.

24. 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.

25. In *Dr. Vimla vs. Delhi Administration* - AIR 1963 SC 1572, this Court explained the meaning of the expression 'defraud' thus "14.....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."

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

26. The Penal Code however defines 'fraudulently', an adjective form of the word 'fraud', in section 25, as follows :

"25. 'Fraudulently'- A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise".

27. The term "fraudulently" is mostly used with the term "dishonestly" which is defined in section 24 as follows :

"24. 'Dishonestly'- 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".

28. 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) Fraudulent removal or concealment of property (sec.206, 421, 424)
- (ii) Fraudulent claim to property to prevent seizure (sec. 207).
- (iii) Fraudulent suffering or obtaining a decree (sec. 208 and 210)
- (iv) Fraudulent possession/delivery of counterfeit coin (sec.239, 240, 242 and 243).
- (v) Fraudulent alteration/diminishing weight of coin (sec. 246 to 253)
- (vi) Fraudulent acts relating to stamps (sec. 261-261)
- (vii) Fraudulent use of false instruments/weight/measure (sec.264 to 266)
- (viii) Cheating (sec. 415 to 420)
- (ix) Fraudulent prevention of debt being available to creditors (sec. 422).
- (x) Fraudulent execution of deed of transfer containing false statement of consideration (sec. 423).
- (xi) Forgery making or executing a false document (sec. 463 to 471 and 474)
- (xii) Fraudulent cancellation/destruction of valuable security etc.(sec. 477)
- (xiii) Fraudulently going through marriage ceremony (sec.496).

It follows therefore that by merely alleging or showing that a person acted fraudulently, it cannot be assumed that he committed an offence punishable under the Code or any other law, unless that fraudulent act is specified to be an offence under the Code or other law."

Relevant paragraph Nos. 5, 11, 14, 20 & 24 of the judgment of Devendra (supra) are quoted hereinbelow:

"5. On or about 22.08.1997, a sale deed was executed by the appellant Nos. 1 and 2 in favour of the appellant Nos. 3 and 4.....

11. The fact that the appellants are co-sharers is not in dispute. The dispute between them is confined to the extent of their respective shares. It must be determined only in a civil suit. If the appellant Nos. 1 and 2 had executed a deed of sale in favour of a third party stating that they have one-third share over the entire properties, the same would not be binding on the complainant - respondent. If any cause of action arose by reason of a threat of dispossession at the hands of the co-sharer or at the hands of the third-party, as was contended, recourse to legal action could always be taken. Even for that purpose, a proceeding under Sections 144 and 145 of the Code of Criminal Procedure would be maintainable. The decision of a criminal court in a case of this nature would not

be binding on the civil court.

14. It was, however, submitted that by reason of execution of a deed of sale claiming title over the property to which the appellants were not entitled to, the complainant - respondent had been cheated. It is difficult to accept the said contention. Appellants had not made any representation to the respondent No. 2. No contract and/ or transaction had been entered into by and between the complainant and the appellants.

20. Appellants are the owners of the property. They have executed a sale deed. Execution of the deed of sale is not denied. If somebody is aggrieved by the false assertions made in the said sale deed, he would be the vendees and not the co-sharers. Appellants have not been alleged to be guilty of creating any false document.

24. There is no dispute with regard to the aforementioned propositions of law. However, it is now well-settled that the High Court ordinarily would exercise its jurisdiction under Section 482 of the Code of Criminal Procedure if the allegations made in the First Information Report, even if given face value and taken to be correct in their entirety, do not make out any offence. When the allegations made in the First Information Report or the evidences collected during investigation do not satisfy the ingredients of an offence, the superior courts would not encourage harassment of a person in a criminal court for nothing."

By perusal of the judgments, this fact is very much clear that when the title is disputed and subjudice, one of co-sharer has sold out his land to third person, no case of fraud is made out against the other co-sharer in the present complaint case. Here, it is not disputed that title is subjudice, therefore, selling the property in dispute to third person does not cause fraud upon the applicants. No case is made out against the applicants and further the sale deed executed by the applicants is also under challenge, the same is still subjudice before this Court. Therefore, Apex Court has also held in the case of Devendra (supra) that even if given face value and taken to be correct is their entirety, do not make out any offence, Superior Courts would make endeavour not harass a person for criminal proceedings.

Learned counsel for the opposite party no.2 has relied upon the judgment in the case of Jairam, S/O Nathu Salunke (supra). The fact of this case is entirely different as it pertains to obtain compensation on the basis of false and fraudulent document without having any title over the land.

In the present case, this fact is undisputed that the title of land is still disputed and subjudice before the Court.

Therefore, under such facts and circumstances, this fact is undisputed that earlier the complaint under Section 156(3) Cr.P.C. dated 3.10.2006 was dismissed by the learned A.C.J.M. vide order 4.12.2006 and almost on the basis of same facts, second FIR has been lodged in which charge sheet and summoning order dated 27.2.2008 has been passed.

In light of law laid by High Court as well as Apex Court from time to time, such second criminal proceeding on the same fact is not maintainable.

So far as allegation of fraud against the applicants are concerned, this fact is also undisputed that till date the title of the land in dispute is subjudiced before the Court and cancellation for sale deed is also pending before the Court, therefore, in light of law laid down by the Apex Court, no case of fraud is played upon the complainant by the applicants. Therefore, charge sheet as well as summoning order is not sustainable in the eyes of law and is hereby quashed.

Accordingly, the Application is allowed.

Order Date :- 29.11.2018 Junaid