

GAHC010013182013



2024:GAU-AS:12709

**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : Crl.Pet./879/2013

PARAMANANDA CHAUDHURI @ 2 ORS
S/OLT. DURLAVANANDA CHAUDHURY PERMANENT RESIDENT OF HOUSE
NO. 5, PIYOLI PHUKAN ROAD, REHABARI, OPPOSITE M/S BHASKAR GAS
AGENCY GUWAHATI- 781008, P.O. REHABARI, P.O. PALTAN BAZAR, IN THE
DIST. OF KAMRUP METRO, ASSAM.

2: ASHIM KUMAR CHAUDHURY
S/O SHRI PARAMANANDA CHAUDHURI PERMANENT RESIDENT OF
HOUSE NO. 5
PIYOLI PHUKAN ROAD
REHABARI
OPPOSITE M/S BHASKAR GAS AGENCY
GUWAHATI- 781008
P.O. REHABARI
P.O. PALTAN BAZAR IN THE DIST. OF KAMRUP METRO
ASSAM.

3: GAURAV KUMAR CHAUDHURY
S/O SHRI PARAMANANDA CHAUDHURI PERMANENT RESIDENT OF
HOUSE NO. 5
PIYOLI PHUKAN ROAD
REHABARI
OPPOSITE M/S BHASKAR GAS AGENCY
GUWAHATI- 781008
P.O. REHABARI
P.O. PALTAN BAZAR
IN THE DIST. OF KAMRUP METRO
ASSAM

VERSUS

ARPAN KUMAR CHAUDHURY @ ANR
S/O LT. ACHYUTANANDA CHAUDHURY, R/O PLOT NO. 116, NAGAR VIKAS
SOCIETY, NARENDRA NAGAR NAGPUR, MAHARASHTRA

2:JAYANTA KUMAR DAS
S/O SHRI SURYA KANTA DAS R/OHOUSE NO. 16
P.B. ROAD
REHABARI
GUWAHATI- 781008
P.O. REHABARI
P.S. PALTAN BAZAR
IN THE DIST. OF KAMRUP METRO
ASSAM

Advocate for the Petitioner : MR.D K BHATTACHARYYA, MR.A K DAS,MR.R S BARUAH,MR. A K BHATTACHARYYA,MR.R DE,MR.B K SINGH,MR.A DAS,MR.K AGARWAL,MR.K K BHATTACHARYYA

Advocate for the Respondent : MS.M PAUL, ,MR.R SARMA,,,MR.R SARMA,MR.K K GOSWAMI,,

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : Mr. K. Agarwal, Sr. Advocate.
Mr. R. De. Advocate.

For the Respondents : Mr. R. Sarma, Advocate.

Date of Hearing : 14.11.2024

Date of Judgement : 16.12.2024.

JUDGMENT & ORDER (CAV)

1. Heard Mr. K. Agarwal, learned Senior Counsel assisted by Mr. R. De, learned counsel for the petitioner. Also heard Mr. R. Sarma, learned Senior Counsel for the respondents.

2. The present application under Section 482 of Code of Criminal Procedure, 1973 is filed for quashing the proceeding of C.R. Case No. 2189^c/2013 under Section 406/34 IPC pending before the learned Court of

Additional Chief Judicial Magistrate, Kamrup at Guwahati. The further challenge is an order dated 11.09.2013, passed by the learned Court of Additional Chief Judicial Magistrate, Kamrup at Guwahati in the aforesaid C.R. case, whereby cognizance of offence under Section 406/34 IPC was taken against the accused petitioners.

3. The learned Senior counsel for the petitioner submits that the accused petitioner no. 1 has in the meantime expired. Therefore, the proceeding has abated against him. In this regard, the learned Senior counsel for the petitioner has also produced a Death Certificate issued by Registrar (Birth & Death), Guwahati Municipal Corporation, certifying that the accused No. 1 expired on 16.03.2021. Such statement and the certificate has not been disputed by the learned counsel for the respondent/ complainant. Accordingly, the C.R. case no. 2189^c/2013 stands abated against the accused No. 1 namely Paramananda Chaudhury.
4. The criminal complaint was filed by the respondent No. 1 through his power of attorney i.e. the respondent No. 2 under Section 190 of the Code of Criminal Procedure, 1973 praying for punishing the accused petitioners under Section 403/404/406/417/418/420/448/34 IPC.
5. The brief facts which are stated in the complaint and necessary for the determination of the present petition are recorded herein below:-
 - I. Accused petitioner No. 1 is the paternal uncle of the complainant and the accused petitioner Nos. 2 and 3 are sons of accused No. 1.
 - II. Being not a resident of Assam, the complainant executed a power of attorney authorizing the respondent No. 2, herein to take all

necessary steps for and on behalf of the complainant to protect his interest by executing a general power of attorney dated 28.05.2013.

- III. The complainant is one of the legal heirs of Late Durlabhananda Chaudhury (grandfather) and the accused persons and some others are also legal heirs of said Durlabhananda Chaudhury.
- IV. Both the parents of the complainant died when the complainant was a minor and he was brought up by his grandfather. However, his grandfather expired when the complainant was only 14 years of age and after the death of his grandfather, the accused No. 1 thrown the complainant out of the house of his deceased grandfather ignoring the fact that the complainant is also entitled for share of the house of Late Durlabhananda Chaudhury by virtue of inheritance and having no alternative, the complainant left his parental home at the age of 16 years and finally settled at Nagpur and doing his own business.
- V. According to him, in the meantime, the complainant approached his family members with a request to take up the matter with the accused No. 1, in order to settle the problem amicably within the family. Accordingly, family members tried to talk with the accused No. 1 to allow the complainant to stay in his own house, however, accused No. 1 never allowed the complainant to stay in his property situated at Rihabari, Guwahati.
- VI. It is also alleged that after death of grandfather, the accused No. 1, took possession of five Nos. of Trunks/Suitcases where all the papers and other valuables of late Durlabhananda Chaudhury were kept.

VII. It was also alleged that the accused No. 1 threatened that he would go to extreme violence, if anybody tried to ask him about the will of the deceased Durlabhananda Chaudhury. According to the complainant, the accused No. 1, concealed about existence of a will and claimed the entire Rehabari property to be his own. According to the complainant, the copy of the will which the accused No. 1 had shared in the year 2007 was not the last testament of late Durlabhanada Chaudury, and he made another will in the year 1999. The other family members did not have any copy of both the wills inasmuch as the accused No. 1 forcefully took away the copies which are available with the three witnesses, of which two witnesses were already died and one was still alive.

VIII. According to the complainant, the complainant is having a share in the ancestral property, which is well demarcated though not legally partitioned among the legal heirs. However, to the utter surprise of the complainant, the accused No. 1, let out the complainant's share in property to a stranger without obtaining any prior consent from the complainant.

IX. On 03.04.2013, the complainant was informed by his another paternal uncle through an email that his grandfather had left a will declaring inter alia as to how and as to whom the properties mentioned therein is to be bequeathed or distributed amongst the legal heirs and accused No. 1 was the sole executor of the said will. According to the complaint, a copy of the letter dated 29.07.2010 whereby such information was given was accompanied by the will.

The details of the properties as declared in the will are also stated in the paragraph 10 of the complaint.

- X. It is alleged that though the said will was made on 14.06.1987 in presence of three attesting witnesses, and is required to be executed immediately after the death of the testator, the accused No. 1 instead of producing it before the Court, has been concealing the will from the rest of the family members in total disregard of the last intention of the testator and therefore, he has committed an offence.
- XI. It is further alleged that the movable properties mentioned in the will which are believed to be with the accused person, might have been misappropriated by the accused person without consent and knowledge of the complainant and other legal heirs of late Durlabhananda Chaudhury and the complainant is unaware of present status of the immovable property.
- XII. The allegation against accused No. 3 is to the effect that he has used the aforesaid will for availing a House Loan for construing a house in the land by mis-representation that the property belongs to his father in terms of the said will and he did not obtain any NOC form the other co-owners including the complainant. The allegation against accused No. 2 is that he has been passively participating in the illegal activities of the accused No. 1 and 3, despite of having full knowledge that such activities are illegal and may render them liable to be prosecuted in the Court of law.

6. Mr. Agarwal, learned Senior counsel appearing for the petitioner submits

that the dispute is essentially civil in nature and a criminal colour has been given to such dispute. According to Mr. Agarwal, learned Senior counsel on the face of the complaint, even if accepted to be correct no case under Section 406/34 IPC is made out. It is further contended by Mr. Agarwal, learned counsel that mere mention of the Sections and the incorporation of language of Section is not sufficient and the informant is required to bring out the particulars of the offence committed by the accused person and the role played by the alleged accused in committing the offence.

7. Per contra, Mr. Sarma, learned counsel for the respondent submits that this Court in exercise of power under Section 482 of Cr.P.C. should not enter into the merit of the claim as raised in the complaint and is to consider whether a reading of the complaint makes out a *prima facie* case when such assertion made in the complaint is taken in its face value.
8. Mr. Sarma, learned counsel for the respondent further argues that a clear case of criminal breach of trust is made out from reading of the complaint. Therefore, this Court should not exercise its power under Section 482 of Cr.P.C. to quash the criminal proceeding.
9. Mr. Sarma, learned counsel for the respondent further submits that as the facts disclosed makes out a case under Section 406/34 of IPC, the complainant should not be deprived of the rights to continue with the prosecution inasmuch as complainant is not encyclopaedia of all the facts.
10. Mr. Sarma, learned counsel for the respondent relying on the decision of the Hon'ble Apex Court in the case of **Vijayander Kumar and Others – Vs- State of Rajasthan and Another** reported in **(2014) 3 SCC 389**

argues that in the given set of facts though it may look like a civil wrong however, same shall not automatically make the complaint liable for interference in exercise of power under Section 482 of Cr.P.C., more particularly, in the given facts of the present case, when the complaint *prima facie* discloses an offence under Section 406 of IPC. Therefore, Mr. Sarma, learned counsel for the respondent submits that the present criminal petition should be dismissed and the complaint should be allowed to be proceeded.

11. This Court has given anxious consideration to the submissions advanced by the learned counsel for the parties. Also perused the materials available on record including the testimonies of the witnesses in the backdrop of argument that the decision is a perverse decision.
12. Section 405 IPC defines the criminal breach of trust. A reading of the aforesaid provision of law, the essential ingredients of criminal breach of trust can be summarized as below:
 - A. There must be an entrustment of property or dominion over it upon the accused.
 - B. The accused upon whom such property is entrusted has dishonestly used or disposed of the property in violation of any provision of law which prescribed the mode in which such trust is to be discharged or of any contract made defining the discharge of such trust.
13. Now coming to the case in hand, the fundamental allegation is against the accused No. 1 of depriving the complainant from the share of his property left by Late Durlabhananda Chaudury. The further accusation is that the

accused No. 1 had not disclosed about the existence of the will executed in the year 1997. However, as the accused No. 1, has in the meantime expired, he cannot be prosecuted as on date, on the basis of the complaint, even if it is assumed that such allegation makes out any criminal offence.

14. Be that as it may, a reading of the complaint as a whole, what is discernible is that the dispute is relatable to the distribution of share of property left by Late Durlabhananda Chaudhury, renting out joint properties to tenants without consent of the co-sharers. However, it is also uncontested in the complaint as regards existence of a will executed in the year 1991, another will in the year 2007 and the will dated 14.06.1987, a copy of which was admittedly given to the accused No. 1. Thus, from the complaint itself, it is the allegation that there exist three wills executed by the Late Durlabhananda Chaudhury, i.e. one in the year 1987, another in the year 2007 and other in the year 1991. Therefore, which will is valid will and be probated, can be a subject matter of a civil dispute.
15. Though the learned counsel for the complainant has strenuously argued that an offence under Section 448 IPC was made out, however, such argument shall not be sustainable in absence of any challenge by the complainant to the order of cognizance dated 11.09.2013 inasmuch as the learned Magistrate had not taken cognizance under Section 448 IPC. On the other hand such offence even, if made out can be against the accused No. 1, who had expired in the meantime.
16. The uncontested fact also remains that the complainant issued a pleaders notice on 24.09.2014 calling the accused No. 1 to produce the will dated 14.06.1987 before the competent Court i.e. in the Court of District &

Sessions Judge, Kamrup, Guwahati for grant of probate within a period of 15 days from the receipt of this notice. The accused No. 1, replied to such notice dated 24.09.2014 through his lawyer. By his reply dated 20.05.2013, he intimated that the accused No. 1 requires three months time to furnish necessary documents/detailed information in respect of the subject matter of the notice and requested the complainant not to proceed in the matter and await reply to the notice dated 29.04.2013. Thereafter the CR case was filed on 09.07.2013.

17. Thus from the aforesaid notice, the grievance is as regards non execution of the will dated 14.06.1987. No whisper was made in the aforesaid notice as regards any alleged commission of offence under Section 406 IPC or any whisper or allegation was made against the accused No.2 and 3. The facts also remains that Indian Succession Act, itself provides procedure for the beneficiary of a will, when the executor fails to put it to execution.
18. The statement of one Jayanta Kumar Das, attorney of the complainant recorded under Section 200 Cr.P.C., also discloses nothing as regards any entrustment of property and misappropriation thereof. The respondent No. 2, Jayanta Kumar Das in his statement recorded by the Magistrate stated that the complainant could know about the will from his uncle. The facts also remain that the statement of the complainant was not even recorded but his power of attorney i.e. respondent No. 2 was examined on his behalf.
19. Another witness namely Rajashri Baruah stated that she is a relative of complainant and she could learn that the Late Durlabhananda Chaudury executed a will and the accused person had concealed it and used the

same for their benefit. Though the complainant asked the accused to produce the same before the Court, but they have not done the same. Therefore, from evidence of this witness also, no case under Section 406 IPC is made out even such statements are taken to be correct in its face value.

20. The argument of the learned counsel for the complainant that case under Section 448 IPC is made out, then also such accusation is against the accused No. 1, who had in the meantime expired and cannot be prosecute as on date.
21. From the reading of the complaint as well as deposition of the witnesses under Section 200 Cr.P.C., as discussed hereinabove, this Court is of the considered opinion that the complainant even if has been able to make out a case that there was entrustment of the property upon the accused No. 1. However, there is no statement of facts or material suggesting even remotely that the accused No. 1 had dishonestly disposed of the property rather as discussed hereinabove, it is a specific case of the complainant that the will dated 14.06.1987 was not put to probate by the accused No. 1, though he was the sole executor of such will inasmuch as the complainant himself takes a stand that there are two more wills, one is executed in the year 2007, and one is executed in the year 1991 and will executed in the year 1991 was the last will.
22. Accordingly, the present criminal petition stands allowed by setting aside and quashing the proceeding of C.R. Case No. 2189^c/2013 under Section 406/34 IPC pending before the learned Court of Additional Chief Judicial Magistrate, Kamrup at Guwahati and also the order dated 11.09.2013,

passed by the learned Court of Additional Chief Judicial Magistrate, Kamrup at Guwahati in the aforesaid C.R. case, whereby cognizance of offence under Section 406/34 IPC was taken against the accused petitioners.

JUDGE

Comparing Assistant