

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 167 OF 2007

Ahmedkhan S/o Alamkhan Pathan,
Age. 33 years, Occu. Agri. and
Private Service, R/o. Wadhwana (Bk),
Tq. Udgir, Dist. Latur, at present
R/o. Aurad (B), Tq. Aurad (B),
Dist. Bidar, (Karnataka)

....Petitioner

Versus

1. The State of Maharashtra.
2. Alamkhan s/o Sarwarkhan Pathan.
Age. 60 years, Occu. Agril.,
3. Younuskhan S/o Alamkhan Pathan,
Age. 22 years, Occu. Agril.,

Respondent No. 2 & 3 both R/o.
Wadhwana (Bk), Tq. Udgir, Dist. Latur.

....Respondents

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Advocate for Petitioner : Mr. P G Rodge
APP for Respondent No.1: Mr. A.R. Kale
Advocate for Respondents 2 and 3 : Mr. Satej S. Jadhav

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CORAM : V. K. JADHAV, J.
DATED : 24th NOVEMBER, 2016

ORAL JUDGMENT:-

1. Being aggrieved by the judgment and order passed by the Additional Sessions Judge, Udgir, dated 29.3.2006 in criminal revision petition No. 5 of 2006, the original complainant has preferred this writ petition.

2. Brief facts, giving rise to the present writ petition, are as follows:-

a) The petitioner original complainant has lodged a complaint at police station Udgir on 26.10.1999 against his own father and step brother, alleging therein that they have committed offence of forgery and cheating by personation, by executing sale deed of land bearing survey No. 52/2 i.e Gat No. 27, admeasuring 0.82 R, situated at village Dangewadi, (Wadhwana), owned and possessed by him. It has further alleged in the complaint that on 17.2.1999, the father of the complainant, respondent No.2 herein, had executed sale deed of his land by personation, in favour of his step brother i.e. respondent No.3 herein. On the basis of said complaint, crime No. 95 of 1999 came to be registered with Udgir (Rural) police station, for the offences punishable under Sections 420, 467, 468 r.w. 34 of I.P.C. and after due investigation, charge sheet was submitted before J.M.F.C. Udgir.

b) The learned Magistrate, Udgir has framed charge against both the accused for having committed offences punishable under sections 420, 467, 468 r.w. 34 of I.P.C. to which both of them pleaded not guilty and claimed to be tried. Thereafter, the trial was commenced and learned A.P.P. had examined the petitioner

complainant before the Magistrate, as P.W.1 at Exh.30 on 13.4.2005. He was also subjected to cross examination by the accused. His evidence was closed on that day itself. On 24.8.2005, the petitioner complainant had filed an application Exh.36 through A.P.P. before the Magistrate under section 311 of Cr.P.C. for recalling himself for re-examination and cross examination, if any. Learned Magistrate, by his order dated 2.2.2006, below Exh.36 allowed the said application. Being aggrieved by the same, respondent Nos. 2 and 3 original accused preferred criminal revision petition No. 5 of 2006 before the Sessions Court, Ahmednagar and the learned Additional Sessions Judge, Udgir by his impugned judgment and order dated 29.3.2006, allowed the revision petition, thereby quashed and set aside the order passed by the Magistrate, dated 2.2.2006, below Exh.36 in R.C.C. No. 431 of 1999. Hence, this criminal writ petition.

3. Learned counsel for the petitioner submits that the petitioner complainant has acquired the land survey No. 52/2 block No. 27 situated at village Dangewadi to the extent of 0.82 R from his own earnings. However, the father of complainant (accused No.1) and his step brother (accused No.2) have committed offence of forgery and cheating by personation, by executing sale deed in respect of the said land. Furthermore, the petitioner complainant had instituted R.C.S. No. 242 of 1999 against respondent Nos. 2 and 3 herein in

respect of the said land for declaration about the said sale deed and also for decree of perpetual injunction. Learned counsel submits that upon due intervention of panchas in the village, the petitioner, original complainant, considering the relations, compromised the dispute. Accordingly, the compromise was effected in the said suit, wherein respondent Nos. 2 and 3 agreed to re-convey the sale deed in favour of the petitioner complainant and also agreed not to cause obstruction to his peaceful possession over the suit land.

4. Learned counsel for the petitioner submits that thereafter, respondent Nos. 2 and 3 original accused persuaded the petitioner complainant to depose in the Court in criminal matter in their favour. Though the parties have filed an application before the Court Exh.28 to compound the matter, learned Magistrate has rejected the said application, as the offence was non compoundable. Learned counsel submits that accordingly the petitioner complainant has deposed in favour of respondent Nos. 2 and 3 accused, as the matter was compromised between them. However, respondent Nos. 2 and 3 original accused refused to obey the compromise decree in terms of its conditions. Even the learned A.P.P. before the court below has not cross examined the petitioner complainant on account of compromise effected between the parties.

5. Learned counsel submits that the petitioner original complainant should not suffer any loss on account of subsequent acts done by respondent Nos. 2 and 3 original accused. Learned counsel submits that powers under Section 311 of Cr.P.C. required to be invoked if exigency of justice is required. In the instant case, the petitioner complainant was cheated by respondent No.3 original accused and even though compromise was effected in the civil litigation failed to obey the terms and conditions of compromise. Learned counsel submits that if the petitioner complainant is not recalled for his re-examination, the truth will not come before the Court and the respondent accused will get the benefit of their own wrong. Learned counsel submits that the learned Magistrate has rightly allowed the application. However, learned Additional Sessions Judge, without application of mind erroneously passed the impugned order by setting aside the well reasoned order passed by the Magistrate.

Learned counsel for the petitioner in order to substantiate his contentions, placed reliance on the judgment of Supreme Court in the case of ***Mohanlal Shamji Soni vs. Union of India and another, reported in AIR 1991 SC 1346***, wherein in para 9 of the judgment, the Supreme Court has made following observations:-

“9. The very usage of the words such as, any Court 'at any

stage', or 'of any enquiry, trial or other proceedings'. 'any' person' and any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the Section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case."

6. Learned counsel for respondent Nos. 2 and 3 submits that there is no error committed by the learned Sessions Judge in passing the impugned order and therefore, the criminal writ petition be dismissed.

7. I have also heard learned A.P.P. for respondent No.1 State.

8. In the instant case, the petitioner original complainant insisting the court to invoke the power under section 311 of Cr.P.C. on the ground that in non compoundable case, he has deposed in favour of the respondents original accused under the belief that they would follow the terms and conditions of the compromise effected in the

civil litigation, scrupulously. The petitioner original complainant has made serious allegations against respondents original accused and accordingly learned Magistrate has framed charge against respondents original accused for having committed offences of forgery and cheating by personation. The police machinery was set in motion on the basis of such serious allegations made in the complaint lodged in the police station. Even during the course of investigation, disputed documents were sent to the handwriting expert and after obtaining report, the charge sheet was submitted before the Court. It was thus the duty of the petitioner complainant to substantiate the charges levelled against respondents original accused to his utmost capacity with all legal remedies available to him. The petitioner original complainant, by filing application Exh.36 to some extent has accepted before the Court below that he has made false statement before the court while recording his evidence in order to support the respondents accused in terms of the compromise effected between them in the civil litigation. However, the said illegal course, is not available to any of the party, facing criminal trial before the Court.

9. In view of the above, learned Additional Sessions Judge has rightly taken a view that application Exh.36 cannot be allowed on the ground, as is raised in the application. Needless to say that entire

case of the petitioner/complainant rests upon the documentary evidence and evidence of handwriting expert and thus the petitioner still, can substantiate the charges levelled against the respondents-accused.

10. In the light of above, no prejudice is likely to be caused to the petitioner complainant. However, if application Exh.36 is allowed, then the same would cause prejudice to the defence of the accused. Thus, I do not find any error in the impugned order passed by the learned Additional Sessions Judge. Hence, I proceed to pass the following order:-

O R D E R

Criminal writ petition is hereby dismissed. Rule discharged.

(V. K. JADHAV, J.)

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