IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 3370 OF 2005
WITH APPLN/1445/2006 IN APPLN/3370/2005

Shaikh Noor s/o Shaikh Chand
Age 65 years, Occ. Labour
R/o. Shankar Nagar, Hamalwada,
Parbhani ...Petitioner

versus

1. The State of Maharashtra
(Copy to be served on
Public Prosecutor, High Court
of Judicature at Bombay,
Bench at Aurangabad)

2. Shaikh Amir s/o Shaikh Chand
Age 60 years, Occ. Shankar Nagar
Hamalwada, Parbhani
(deleted as per court's order
dated 26.9.2016) ...Respondents

...
Advocate for Applicants : Mr. Anand P. Bhandari
APP for Respondents: Ms. R.P. Gour
.....

CORAM : V. K. JADHAV, J.
DATED : 26th SEPTEMBER, 2016

JUDGMENT:-

1. At the outset, learned counsel for the applicant submits that during pendency of this criminal application respondent No.2 original complainant died and as per the provisions of Section 249 of Cr.P.C. if the offence is lawfully compoundable or is not a cognizable offence, the Magistrate in his discretion, notwithstanding anything contained

in Chapter XIX, at any time before charge has been framed, discharged the accused. Learned counsel submits that in warrant trial the complaint or criminal prosecution does not abate on the death of the complainant and Magistrate can substitute another willing complainant to continue with the prosecution. So mere death of the complainant after filing of the complaint does not affect the trial since nobody is approached this Court in the pending criminal application to continue with the prosecution, the applicant is hereby permitted to delete the name of respondent No.2. Deletion to that effect be carried out forthwith.

2. Being aggrieved by the judgment and order dated 5.12.2005 passed by the Sessions Judge, Parbhani in Criminal Revision No. 33 of 2002 original accused in R.C.C. No. 377 of 2000, preferred this criminal application.

3. Brief facts giving rise to the present criminal application are as follows:-

a) Deceased respondent No.2 had filed a private complaint bearing R.C.C. No. 377 of 2000 against the present applicant and one Shri Guddewar (T.I.L.R.) with the allegations that in furtherance of their common intention, they had committed offence of cheating

punishable under Section 420 of I.P.C. and also committed offences punishable under Section 199, 200, 166, 167 r.w. 34 of I.P.C. by preparing false documents and record. It has alleged in the complaint that deceased father of the complainant and applicant original accused, viz. Shaikh Chand owned the house property bearing house No. 239 situated at Ward No.16 (old 179 and ward No. 14) allotted to him by the Chief Officer, Municipal Council, Parbhani in the year 1972 for residential purpose. The said Shaikh Chand died on 6.8.1995. It has further alleged in the complaint that, 4 years prior to his death, he had executed Hibanama on 13.6.1991 gifting the said house property to respondent No.2 complainant and on the basis of the said document, after his death, the said property ought to have been mutated in the name of complainant. However, applicant accused made an application for mutation in the office of Land Record and submitted false affidavit contending therein that he is the only legal heir of deceased Shaikh Chand. Accordingly, on the basis of his representation, mutation entry No. 299 dated 27.10.1999 came to be sanctioned in his name.

b) After verification of complaint, the learned Magistrate was pleased to issue process for the offences punishable under sections 420, 166, 167 r.w. 34 of I.P.C. against both the accused persons named in the complaint. However, cognizance of the offence

punishable under Sections 199 and 200 of I.P.C. was not taken. The said order of issuance of process was challenged in Criminal Revision No. 37 of 2001 by original accused No.2 and the said revision came to be allowed by the learned Sessions Judge, Parbhani. The order of issuance of process against accused No.2 was set aside.

c) Thereafter, present applicant moved an application Exh.13 before the Magistrate in R.C.C. No. 377 of 2000 for discharge. The learned Magistrate by his order dated 4.3.2002, has allowed the said application and discharged the present applicant original accused and also dismissed the complaint bearing R.C.C. No. 377 of 2000. Aggrieved by the same, respondent No.2 original complainant has challenged the order before the Sessions Court by filing Criminal Revision No. 33 of 2002 and the Sessions Judge, Parbhani by its impugned order dated 5.12.2005 allowed the revision and thereby quashed and set aside the order passed by the Magistrate. Hence, this criminal application.

4. Learned counsel for the applicant submits that even the allegations made in the complaint are accepted as it is, the offence under Section 420 of I.P.C. is not attracted. Learned counsel submits that present applicant has also lodged the complaint against

respondent No.2 original complainant Shaikh Amir and 4 others for having committed an offence punishable under Section 420 of I.P.C. It has alleged in the said complaint that respondent No.2/original complainant herein in furtherance of their common intention, with other accused persons named in the complaint, falsely prepared document of Hibanama and adoption deed in respect of same house property. Present respondent No.2 alongwith other accused persons in the said complaint, challenged the order of issuance of process by filing criminal revision No. 37 of 2001 before the Sessions court, Parbhani and the learned Sessions Judge, Parbhani by order dated 3.7.2001 set aside the order of issuance of process and dismissed the complaint with observations that the civil dispute is going on between the parties and the Magistrate ought to have taken more care before issuing process against them.

Learned counsel further submits that present applicant had instituted civil suit in respect of said house property against respondent No.2. Learned Civil Judge has partly decreed the suit and held that the present applicant as well as respondent No.2 herein are entitled for half share each in the said house property. However, during pendency of said suit, respondent No.2 died and his L.Rs. are substituted in his name in the said suit. Being aggrieved by the same, the L.Rs of respondent No.2 preferred appeal before the

District Court and the said appeal came to be disposed of in terms of compromise arrived at between the present applicant and the legal heirs of respondent No.2. Learned counsel submits that the applicant was asserting his exclusive right to the house property and for that purpose he had also instituted a civil suit. Furthermore, the applicant also filed private complaint before the court alleging therein that respondent No.2 alongwith two other persons created false documents of Hibanama and also adoption deed.

Learned counsel for the applicant submits that on this background, assuming that if the applicant had submitted an affidavit before the authorities stating therein that he has exclusive right in the suit property, ingredients of Section 420 of I.P.C. does not attract. The Magistrate on the given set of facts and circumstances of the case, has taken a view that no case is made out against the applicant accused. Even accepting the allegations made in the complaint, the revisional court cannot be justified in setting aside the order merely because other view is possible. Revisional Court is not mean to act as an appellate court. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised

arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction. Learned counsel thus submits that the judgment and order passed by the learned Sessions Judge is liable to quashed and set aside.

Learned counsel for the petitioner, in order to substantiate his submissions, places reliance on the judgment of Hon'ble Supreme Court in the case of ***Sanjaysingh Ramrao Chavan vs. Datatray Gulabrao Phalke and others,*** reported in ***2015 Cri.L. J. 1259.***

5. I have also heard learned A.P.P. for the respondent State.

6. It is a matter of record that the applicant was asserting his exclusive right in respect of the house property and the respondent No.2 was also claiming his right in respect of the same property on the basis of certain documents. It appears that the learned Magistrate while discharging present applicant has considered the same and accordingly discharged the present applicant. The applicant was asserting his exclusive right in respect of house property by filing civil suit and also by filing private complaint before the court and in that way if he submitted any affidavit before the authority stating therein that he has exclusive right in the house property, I do not think that ingredients of Section 415 of I.P.C. stand

attracted. Furthermore, even assuming that the applicant has submitted an affidavit before the authority with some false statement in the affidavit, still then ingredients of Section 415 of I.P.C. are not attracted. Section 415 of I.P.C. is divided into two parts. First part of Section 415 is made punishable under Section 420 of I.P.C.. In the instant case, I do not find that by making some false statement in the affidavit, the applicant fraudulently and dishonestly induced respondent No.2 original complainant to deliver the property to any person or to consent that any person shall retain the property.

7. In the case of ***Sanjaysingh Ramrao Chavan vs. Datatray Gulabrao Phalke and others (supra),*** the Supreme court, in para 15 has made the following observations:-

> *"15. Cognizance is a process where the court takes judicial notice of an offence so as to initiate proceedings in respect of the alleged violation of law. The offence is investigated by the police. No doubt, the court is not bound by the report submitted by the police under Section 173(2) of Cr.P.C. If the report is that no case is made out, the Magistrate is still free, nay, bound, if a case according to him is made out, to reject the report and take cognizance. It is also open to him to order further investigation under Section 173(8) of Cr.PC. In the case before us, the learned Magistrate went through the entire records of the case, not limiting to the report filed by the police and has passed a reasoned order holding that it is not a fit case to take cognizance for the purpose of issuing process to the appellant. Unless the order passed by the Magistrate is perverse or the view*

taken by the court is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records, the revisional court is not justified in setting aside the order, merely because another view is possible. The revisional court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. Revisional power of the court under Sections 397 to 401 of Cr.P.C is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction."

8. In the instant case, I do not find that the order passed by the Magistrate is perverse or untenable in law or is grossly erroneous.

9. In view of the above discussion, the impugned order passed by the learned Sessions Judge does not stand. Hence, I proceed to pass the following order:-

O R D E R

I. Criminal application is hereby allowed in terms of prayer clause "B".

II. Criminal application is accordingly disposed of. Rule made absolute in the above terms.

III. In view of disposal of criminal application, criminal application No. 1445 of 2006 is also disposed of.

(V. K. JADHAV, J.)

rlj/