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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION No. 271 of 2016.

Shabhan Gulamali Thanawala ..Applicant.

Vs

Behram Maneck Pardiwalla & Ors. ..Respondents.

Mr Vinod Kashid for the Applicant.

Mr R.M. Pardiwalla i/by K.S.Irani for the Respondents No. 1 and 2.

Smt. P.P. Bhosale, APP for the State.

CORAM : A.S.GADKARI, J.

DATE : 11th August, 2016

P.C.

(1) Heard the learned counsel for the applicant, the learned counsel for the respondents no. 1 and 2, and the learned APP and also perused the record annexed to the application.

(2) The present application under Section 482 of the Code of Criminal Procedure, 1973 is filed by the applicant impugning the Order dated 24/2/2016 passed below Exh.1 in C.C. No. 124/SW/2015 by the learned Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai

thereby rejecting the application of the applicant under section 457 of Cr.P.C., for return of the property involved in the present crime.

(3) After hearing the learned counsel for the applicant at length, when this Court was not inclined to interfere with the impugned Order dated 24/2/2016, on earlier occasion, the learned counsel for the applicant had sought time to take instructions from his client. Today the learned counsel for the applicant, on instructions, sought leave of this Court to withdraw the present application with liberty to file a fresh application under section 451 of Cr.P.C., as the earlier application was rejected by the Trial Court during the pendency of the investigation and now the charge-sheet has been filed.

The learned counsel appearing for the respondents no. 1 and 2 vehemently opposed the said prayer and submitted that, he has no objection for simplicitor withdrawal of the present application. However, the applicant may not be granted liberty to file fresh application under section 457 of Cr.P.C. before the

trial Court.

In the premise, I have heard the learned counsel for the respective parties and also perused the record annexed to the application.

5) The record reveals that the applicant is the original complainant. The applicant had filed a private complaint in the Court of Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Mumbai on 30.6.2015 alleging that the respondents no. 1 and 2 forged and/or fabricated the Will and the last testament i.e. valuable document of deceased Ramzan Gulamali Thanwala and got bequeathed his entire property in their own name. The complaint also proceeds on the footing that to the exclusion of the real brother of the deceased i.e. the applicant herein, the said property is shown to have been bequeathed to the respondents no. 1 and 2. In the premise the said complaint was filed. The Metropolitan Magistrate by its Order dated 30.7.2015 directed the police to investigate the same under section 156 (3) of Cr.P.C. The said complaint was initially registered with Azad Maidan Police Station as M.E.C.R

No.5/2015 under sections 420, 465, 467, 468, 471, 408, 451 to 457, 392, 393, 395, 506 (II) read with section 34 of the Indian Penal Code and subsequently transferred to E.O.W. (Unit-II) for further investigation having renumbered M.E.C.R.No.6/2015 against the respondents no. 1 and 2, the accused persons.

6) The record reveals that in pursuance of the complaint lodged by the applicant, the crime was registered with Azad Maidan Police Station and subsequently it was transferred to E.O.W. (Unit-II) for further investigation. That when the investigation was in progress, the applicant being the complainant and real brother of the deceased, Ramzan Thanawala preferred an application under section 457 of Cr.P.C. dated 1/10/2015 below Exh.1 in the Court of Additional Chief Metropolitan Magistrate, 47th Court, Explanade, Mumbai. The learned Metropolitan Magistrate rejected the said application filed below Exh.1 by the impugned Order dated 24/2/2016.

7) That the final report i.e. the charge-sheet in the present crime was filed by the police on 8/3/2016. The

present application challenging the impugned order dated 24/2/2016 is filed on 8/3/2016. The applicant moved this Court by way of circulation praecipe for the first time on 1/4/2016. That on 15.6.2016 notice was issued to the respondents no. 1 and 2. The respondents no. 1 and 2 through their counsel appeared on 27.7.2016. That on 27.7.2016 the present application was heard at length and when this Court was not inclined to interfere with the impugned Order dated 24.2.2016, the learned counsel for the applicant had sought time to take instructions from his client as stated earlier. The present application was thereafter listed on board on 5.8.2016 and the learned counsel appearing for the applicant, on instructions, sought leave to withdraw the application with liberty to file a fresh application before the Trial Court in view of the fact that the charge-sheet was filed by the police and a substantive remedy under section 451 of Cr.P.C. is now available to the applicant.

The learned counsel appearing for the respondents no. 1 and 2 opposed the said prayer and submitted that the

applicant has suppressed certain facts from this Court and, therefore, the present application was posted for hearing today.

8) As stated earlier, on a prayer / request made by the learned counsel for the applicant for withdrawal of the present application, the learned counsel for the respondents no. 1 and 2 i.e. the original accused persons, vehemently opposed the same on the ground that the applicant is withdrawing the present application after this Court prima facie opined that the order passed by the Trial Court needs no interference. He further submitted that once the applicant has exhausted the remedy under section 457 of Cr.P.C., he cannot be granted liberty to file a fresh application after filing of the charge-sheet under section 451 of Cr.P.C., even though the law permits for the same and the said liberty has to be curtailed as the intention of the applicant in filing the said application under section 451 of the Cr.P.C. is not bona fide. The said submission is recorded only for its rejection at its threshold, as it is against the settled canons of criminal jurisprudence and

also in utter ignorance of the statutory provision as contemplated under section 451 of the Cr.PC.

9) It is the settled position of law that a person is entitled to file an application under section 451 of Cr.PC. for return of the property after the investigating agency submits the final report as contemplated under section 173 (3) of Cr.PC. The said remedy available to a person, including the accused persons cannot be curtailed by a Court thereby defeating the basic intention of the legislature. If the applicant is having remedy to be exhausted and/or availed under the law, this Court by exercising its jurisdiction under section 482 of Cr.PC. cannot do the same. It prima facie appears to me that the accused persons in the present crime, after succeeding in their ill designed motive in allegedly fabricating the Will of the deceased Ramzan Thanawala and to grab the property of the said deceased are now opposing even for withdrawal of the present application of the complainant and permitting him to avail the remedy available under the law.

10) In the premise, the applicant is hereby

permitted to withdraw the present application with liberty to file a fresh application under section 451 of Cr.P.C., before the Trial Court, or as may be permissible under the law.

11) It is to be noted here that the applicant/complainant is about 84 years of age today. Taking into consideration the age of the applicant, the interest of justice demands that the trial be concluded expeditiously. The Trial Court is hereby directed to conclude the trial of C.C.No.124/SW/2015 in any event within a period of one year from today.

12) The application is disposed off as withdrawn in the aforesaid terms.

(A.S. GADKARI, J.)