

IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.

CRIMINAL APPLICATION [APL] No. 1068/2019.

Kishor Mukundilal Agrawal,
Aged about 60 years, Occupation
Business, resident of Devi Khadan,
Akola, Taluq and District
Akola.

... **APPLICANT.**

VERSUS

1.Santosh s/o Mukundilal Agrawal,
Aged about 58 years, Occupation -
Business, resident of Alsi Plot,
Akola, Taluq and District
Akola.

2. State of Maharashtra,
through Police Station Officer,
Khadan Police Station, Akola,
Taluq and District Akola.

... **NON-APPLICANTS.**

Mr. A.A. Naik, Advocate for the Applicant.
Mr.R.L.Khapre, Senior Advocate with D.R. Goenka, Advocate for
Non-applicant No.1.
Mr.S.M. Ukey, Addl. P.P. for Non-applicant No.2.

CORAM : VINAY JOSHI, J.

CLOSED FOR JUDGMENT ON : 21.06.2022
JUDGMENT PRONOUNCED ON: 27.06.2022

JUDGMENT :

This application raises a challenge to the order dated 07.08.2019 of the Additional Sessions Judge, Akola by which the order dated 25.10.2018, passed by the Judicial Magistrate First Class, Akola directing registration of Crime in terms of Section 156[3] of the Code of Criminal Procedure, has been quashed and set aside. The applicant /original complainant, is aggrieved by the order of the Additional Sessions Judge reversing the order of registration of crime.

2. It is a sibling rivalry between two brothers. The applicant – Kishore alleges that the non-applicant – Santosh, who is his real brother, has forged and fabricated a document of Will dated 03.03.2016 purportedly executed by their late father Mukundilal. By alleging forgery and fraud, the applicant had applied to the Court of Judicial Magistrate First Class in terms of Section 156[3] of the Code

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seeking registration of crime. The applicant has brought to the notice of the learned Magistrate that prior to applying before him, he has filed a report with the concerned police on 18.01.2018, and to the Superintendent of Police on 02.06.2018, but, no action was taken in the form of registration of crime. In such a background he had applied to the Magistrate for issuance of appropriate directions to the police for registration of first information report. The learned Magistrate at pre-cognizance stage examined the application and vide order dated 25.10.2018 directed police to register crime for the offence punishable under Sections 467 and 468 of the Indian Penal Code.

3. Being aggrieved by said order, the non-applicant Santosh has applied to the Court of Sessions in its revisional jurisdiction for setting aside the order of registration of crime. In turn the learned Additional Sessions Judge after hearing both sides was pleased to uphold the contention of the non-applicant, and accordingly quashed and set aside the order of registration of crime dated 15.10.2018. In turn the applicant has raised a grievance under inherent jurisdiction of this Court and prayed for registration of Crime.

4. Heard extensively Shri A.A. Naik, learned Counsel for the Applicant, Shri R.L.Khapre, Senior Counsel alongwith Shri D.R. Goenka, Advocate for the Non-applicant No.1 and Shri S.M. Ukey, learned Addl.P.P. for Non-applicant No.2 State, as well as gone through the material on record and citations relied by the learned Counsel for the parties.

Admit and taken up for final disposal by consent.

5. The applicant – Kishore and non-applicant no.1-Santosh are real brothers having three sisters. The applicant has filed Regular Civil Suit No.136/2017 in the Court of Civil Judge, Senior Division, Akola against the non-applicant Santosh claiming the relief of declaration and injunction. The said suit was contested by Santosh and by amending written statement, has pleaded and claimed property rights on the basis of a disputed Will purportedly executed by their late father on 03.03.2016. According to the applicant, the said Will was never executed by their late father, but, it was forged and fabricated by his brother Santosh. After knowing about the purported Will dated 03.03.2016, the applicant forwarded

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the Will to the handwriting expert. On examination the handwriting expert has affirmed that it was not signed by the alleged testator. On receipt of the experts report, the applicant Kishore initially applied to the police and then to the Magistrate for registration of crime for the offence of forgery.

6. Shri A.A. Naik, learned Counsel appearing for the applicant by supporting the order of the learned Magistrate has seriously criticized the order of reversal Court. He argued that the purported Will was totally false and forged document. It does not bear the signature of applicants' father. It is his contention that applicant's father i.e. Mukundilal had already executed two registered Wills dated 29.04.2010 and 14.08.2015. There was no propriety and occasion for the applicant's father to execute third purported Will. On comparison of signatures on the disputed Will with the copies of registered Will, it is evident that they are forged one. Moreover, the handwriting expert has also opined about the case of forgery. Apart from doubting the signature of the testator, it is contended that in the wake of disposition of the family property by compromise, disposition of the same property by Will is seriously

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doubtful. It is stated that the testator Mukundilal was not keeping good health at the time of execution of the alleged Will. Moreover, the applicant was disinherited, though the deceased had equal love and affection to all his children. Precisely the contentions raised by the applicant are in the nature of defence in civil suit to impeach the genuineness of the Will.

7. The learned Counsel for the applicant has strongly criticized the order of the revisional Court. He would submit that the two prior Wills dated 29.04.2010 and 14.08.2015, were registered one, therefore, prima facie its genuineness cannot be disputed. It is his submission that experts' opinion is in the aid of other material. At the preliminary stage it is expected from the Magistrate to apply his mind to find out whether bare reading of the complaint discloses a cognizable offence. To substantiate said contention, he has relied upon the decision of the Supreme Court in case of **Srinivas Gundluri and others .vrs. Sepco Electric Power Construction Corporation and others – (2010) 8 SCC 206.**

8. The learned Counsel for the applicant further submitted

that the applicant – Kishore in his complaint has specifically stated about a case of forgery and fraud. The allegations leveled in the complaint makes out a prima facie case to constitute an offence. The order of the Magistrate is well reasoned and discloses due application of mind to the extent of perceiving commission of a cognizable offence. He would submit that at this stage it is not expected from the Magistrate to delve upon the merits of the allegations and therefore, the order of Magistrate is well justified.

9. He would submit that preliminary enquiry conducted by the police was one sided which has no bearing at all. The learned Counsel for the applicant would submit that though the disputed will was produced in pending civil proceedings, however, civil and criminal action would go hand in hand. Relying on the decision of the Supreme Court in case of **M. Krishnan .vrs. Vijay Singh and another – (2001) 8 SCC 645**, it is submitted that merely on the basis of pendency of a civil suit, criminal action cannot be quashed. Reliance is also placed on the decision of the Supreme Court in case of **Priti Saraf and another .vrs. State of NCT of Delhi and another – 2021 SCC Online SC 206**, to contend that the criminal prosecution

cannot be quashed on the ground that simultaneous civil remedy is available to the party. On the same line further reliance is placed on the decision in case of **Kamal Shivaji Pokarnekar .vrs. State of Maharashtra and others – (2019) 14 SCC 350** to impress that though litigation bears civil flavour, still criminal action would lie.

10. Per contra, Shri Khapre, the learned Senior Counsel appearing for non-applicant no.1 has supported the order of the Additional Sessions Judge by contending that the issue regarding genuineness of the Will is pending before the civil Court, hence, simultaneous criminal action is not maintainable. On facts he would submit that though there was a compromise in between the siblings, however, it was not acted upon. The applicant Kishore has issued cheques in terms of the compromise, however, they were dishonoured, therefore, the property disposed of in terms of compromise has become part of bequeath. He would submit that the testator has executed a Will in presence of two attesting witnesses. Since the testator had kept the Will with his wife, the non-applicant Santosh was unaware about the execution of the Will. As and when he got knowledge of the Will, he has produced the same in the civil

suit filed by the applicant Kishore.

11. The learned Senior Counsel would submit that in pursuance of directions of the Supreme Court in case of **Lalita Kumari .vrs. Government of Uttar Pradesh and others – (2014) 2 SCC 1**, the dispute being amongst the family members, police have conducted preliminary enquiry on the initial report. He has attracted my attention to the preliminary enquiry report, wherein, after recording statements, including attesting witness, the police concluded that no offence is made out. It is his submission that the applicant Kishore has suppressed the said material while applying to the Magistrate for registration of crime.

12. The learned Senior Counsel would submit that the opinion expressed by the handwriting expert itself is defective. The handwriting expert has compared signatures on the basis of photocopies. By placing reliance on the decision of Punjab and Haryana High Court in case of **Mohinder Singh vrs. State of Haryana and others – (Crm.A.No. 623-MA of 2016 decided on 02.03.2017)**, he would submit that comparison of signatures on the

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basis of photocopies would loose the credibility of experts evidence. Besides that it is submitted that the expert has compared the signature of disputed Will with the signatures on two earlier Wills, which itself are in dispute. In other words, there is no comparison of disputed signature with admitted one.

13. According to the non-applicant, the learned Magistrate seriously erred in directing police to register the crime, and the order does not reflect due application of mind. According to him, there is no iota of evidence to make out a case for issuance of directions to the police for registration of a first information report. The learned Senior Counsel has relied on several decisions to uphold his contention that since the issue of genuineness of the Will is pending for consideration in civil suit, the criminal action would not lie.

14. Since both the sides have relied on various decisions on the point of maintainability of the criminal action during the pendency of the civil suit, I have carefully examined the decisions cited by the parties. The first reliance of the applicant is on the

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decision in case of *Srinivas Gundluri* (supra). In said case, a criminal complaint was lodged alleging forgery of some documents. A civil suit was filed by the accused therein pertaining to the same documents. In that contest it has been observed that filing of civil suit after initiation of criminal action, would not stall the criminal proceeding. Pertinent to note that in said case the facts were such that the respondent therein against whom there was allegation of forgery had filed civil suit in respect of the same document, and on that basis he has challenged the maintainability of the criminal action. In such peculiar facts it was held that the criminal proceedings cannot be quashed only on the ground of pendency of civil suit. The said case is clearly distinguishable on facts.

15. In case at hand, a civil suit was filed by the applicant Kishore, wherein the issue about the genuineness of Will has cropped up. I may reiterate that in the suit filed by the applicant Kishore, the non-applicant [accused] has claimed his right on the basis of a disputed Will dated 03.03.2016. Obviously, in civil suit the onus would lie on the non-applicant who proposes that Court shall believe on the disputed Will. It is a matter for consideration whether the

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testator was in sound mind; whether there was reason for diverting natural course of succession and so on. Thus, principally the issue regarding genuineness of the Will is pending consideration in a suit filed by the applicant himself. On such a background before adjudication of civil suit, the applicant himself has filed a criminal complaint, rather at a premature stage alleging that the Will is forged and fabriucated.

16. In decision cited by the learned Senior Counsel in case of **Rajeshbhai Muljibhai Patel and others .vrs. State of Gujarat and another – AIR 2020 SC 818**, the Supreme Court in similar situation held that the issue as to the genuineness of receipts is pending in civil suit, therefore, the first information report ought not allowed to have been continued as it would cause prejudice to the interest of the parties and the stand taken by them in the civil Court.

17. Likewise in the decision of the Supreme Court relied by the non-applicant in case of **Sardar Ali Khan .vrs. State of Uttar Pradesh and another – AIR 2020 SC 626**, a civil suit for cancellation of sale deed was filed. During the pendency of said suit, a criminal

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action was initiated alleging forgery. In that context, it is observed that when the matter of validity of sale deed is subjudice before the competent civil Court, it is for the civil Court to decide whether the fraud is played or not, and therefore, a party cannot pursue criminal proceeding for forgery.

The next reliance by the non-applicant is on the decision in case of **Sardool Singh and another .vrs. Smt. Nasib Kaur – SCC 1987 Suppl. 146**, wherein the Supreme Court has expressed that when Civil Court is seized with the question as regards to validity of the Will, at this juncture, the respondent cannot be permitted to institute a criminal prosecution on the allegations that the Will is forged one. Inasmuch as, it is expressed that quashing of criminal action will not come in the way of instituting appropriate proceeding in future in case the civil Court comes to the conclusion that the Will is forged one. On the same line, the learned Senior Counsel has relied on the decisions in case of **Laxman Vithoba Jadhav and others .vrs. State of Maharashtra and others – 2016 [1] Bom.C.R. (Cri) 167** and **Wallace Joseph Hayden and others .vrs. State of Maharashtra and others – 2007 All MR (Cri) 3401**, wherein this

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Court also took a view that during the pendency of issue of genuineness of a document before the Civil Court, continuation of criminal prosecution amounts to abuse of the process of criminal Court and duplication of proceeding.

18. Herein undisputedly the question of genuineness of disputed Will dated 03.03.2016 is very much pending for adjudication before the Civil Court, which is the competent Court to decide the issue involved. In civil Court evidence would be led to establish the genuineness of Will, including rebuttal evidence of expert, if any. In the wake of such position, if criminal proceeding is simultaneously allowed to go on, then it would be prejudicial to the interest of other side. No doubt, after disposal of the civil suit, if so advised, the party can resort to criminal remedy as held by the Supreme Court in case of Sardool (supra).

19. On facts, various contentions are raised on the point whether the order of Magistrate exposes due application of mind. The rival submissions are made as to whether the contents of application are sufficient to make out a prima facie case regarding a

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cognizable offence. I do not deem it necessary to delve upon the said factual aspect, as from above discussion I hold that during pendency of civil suit, wherein the same issue is seized by the civil Court, it is not permissible to run a parallel action in the form of criminal prosecution. It is open for the applicant to initiate criminal proceeding after disposal of the civil suit, if so advised. In that view of the matter, the order under challenge calls for no interference. Criminal Application is therefore, dismissed.

JUDGE