

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

THURSDAY, THE 06TH DAY OF JUNE 2019 / 16TH JYAISHTA, 1941

Cr1.MC.No. 2255 of 2013

CRIME NO. 467/2013 OF Ponkunnam Police Station, Kottayam

PETITIONERS:

- 1 DAMODARA PANICKER
AGED 84 YEARS
KULATHOOR VEEDU, ELANGULAM KOORALI.P.O.,
PIN-686522.
- 2 SUMANGALADEVI
AGED 54 YEARS
W/O. JAYAKRISHNAN, KRISHNPRIYA, NARIYANANI.P.O., PIN-
686506. KOPRAKALAM, KOTTAYAM DISTRICT.

BY ADVS.
SRI.K.GOPALAKRISHNA KURUP (SR.)
SRI.K.SURESH
SRI.S.MANU

RESPONDENTS:

- 1 THE STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM-31.
- 2 ANILKUMAR.P.A.,
S/O. AYYAPPAN NAIR, PUNNAPPADIYIL VEEDU,
CHENGALAM.P.O., ELANGULAM-686583.

BY ADVS.
SRI.ALEX.M.SCARIA FOR R2
SRI.SAJEEVAN KURUKKUTTIYULLATHIL
PUBLIC PROSECUTOR E.C.BINEESH

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 23.05.2019,
THE COURT ON 06.06.2019 PASSED THE FOLLOWING:

"CR"

R.NARAYANA PISHARADI, J

Crl.M.C.No.2255 of 2013

Dated this the 6th day of June, 2019

ORDER

Can immovable property be the subject matter of commission of an offence of criminal breach of trust which is defined under Section 405 of the Indian Penal Code (for short 'IPC')? This question incidentally arises for consideration in this petition filed under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code').

2. The first petitioner is the father of the second petitioner. They are the first and the second accused in the case registered as Crime No.467/2013 of the Ponkunnam police station under Sections 406, 466, 467, 471 and 120B I.P.C. The aforesaid case was registered on the basis of the complaint filed by the second respondent in the Magistrate's Court concerned which was forwarded to the police under Section 156(3) of the Code for investigation. This petition under Section 482 of the Code is filed for quashing the first information report

(Annexure-A1) in the case.

3. The material averments in the complaint (Annexure-A2) filed by the second respondent (hereinafter referred to as 'the complainant') are as follows: The complainant is a member of Kalathur tharavad. The first petitioner is also a member of that family. Partition of the properties of the aforesaid tharavad took place in the year 1101 (M.E) as per the document registered as 1416 of the Sub Registrar's Office, Kanjirappally. The property having an extent of 6.11 acres, which is shown as item No.1 in the partition deed, was set apart as a common property in the nature of a trust for conducting certain divine and charitable acts as prescribed in that document. There is stipulation in the partition deed as to how the income from this property shall be used. It is the eldest member of the family who is empowered to manage the aforesaid property as a trustee. The property stood in the name of Kerula Panicker who was the eldest member of the family. The first petitioner had been managing the property from the year 1970 onwards as a trustee for the other members of the family. In order to grab this property, the petitioners entered into a conspiracy with the then Village

Officer of Elamgulam Village and they erased the name 'Kerula' in the thandaper register and substituted the name of the first petitioner as the owner of the property. Thereafter, the first petitioner executed and registered a settlement deed as document No.3269/2006 in favour of the second petitioner, his daughter, gifting her the aforesaid property. Execution of the settlement deed by the first petitioner in favour of the second petitioner was in violation of the stipulations contained in the partition deed. The petitioners have committed the offences punishable under Sections 406, 466, 467, 471 and 120B I.P.C.

4. Heard Sri.K.Gopalakrishna Kurup, learned Senior Advocate who appeared for the petitioners and Sri.Alex M.Scaria, learned counsel for the second respondent/complainant and also the learned Public Prosecutor.

5. Learned Senior Counsel Sri.K.Gopalakrishna Kurup has submitted that it is doubtful whether immovable property can be the subject matter of the offence of criminal breach of trust. He has also contended that the averments in the complaint do not make out the offences alleged against the petitioners.

6. On the other hand, learned counsel Sri.Alex M.

Scaria has contended that the court has to accept each of the allegations made in the complaint as correct on its face value for the purpose of determining whether the ingredients of the offences alleged are made out or not. He has submitted that this Court would not be justified in invoking the power under Section 482 of the Code to quash the first information report so as to strangle the investigation at the inception. Relying upon various decisions of the Apex Court, he has contended that it is not within the power of the High Court, in a petition filed under Section 482 of the Code, to delve deep into disputed facts and to embark upon appreciation of evidence.

7. One of the offences alleged against the petitioners is criminal breach of trust which is defined under Section 405 I.P.C. The punishment for that offence is provided under Section 406 I.P.C. In the present case, immovable property is the subject matter of the aforesaid offence alleged. The question arises whether immovable property can be the subject matter of an offence of criminal breach of trust which is defined under Section 405 I.P.C.

8. Section 405 of the Indian Penal Code reads as follows:

"Criminal breach of trust. - Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

9. Section 405 I.P.C speaks of entrustment of property or dominion over property. The operation of this provision is not restricted to 'movable property'. If the legislature had intended to restrict the operation of Section 405 I.P.C to movable property, there is no reason why the general word 'property' is used in that provision without the qualifying word 'movable'. In this context, it is pertinent to note that the operation of many other provisions in the Indian Penal Code (for example, Sections 378 and 403) is expressly restricted to 'movable property'. Therefore, there is no reason to find that the expression "property" used in Section 405 I.P.C refers to movable property only.

10. In **R.K.Dalmia v. Delhi Administration : AIR 1962**

SC 1821, the Apex Court has held as follows:

"We are of opinion that there is no good reason to restrict the meaning of the word 'property' to movable property only when it is used without any qualification in Section 405 or in other sections of the Indian Penal Code. Whether the offence defined in a particular section of the Indian Penal Code can be committed in respect of any particular kind of property will depend not on the interpretation of the word 'property' but on the fact whether that particular kind of property can be subject to the acts covered by that section. It is in this sense that it may be said that the word 'property' in a particular section covers only that type of property with respect to which the offence contemplated in that section can be committed".

11. As noticed above, the operation of Section 405 I.P.C is not restricted to movable property. Entrustment of immovable property or dominion over such property can be made upon a person. Conversion, use or disposal of such property, in violation of the terms of such entrustment, can be committed by the person to whom the entrustment is made. In other words, immovable property can be the subject matter of the

acts covered by Section 405 I.P.C. Therefore, the offence of criminal breach of trust, which is defined under Section 405 I.P.C, is capable of being committed in respect of immovable property.

12. Before considering the question whether the facts stated in the complaint would attract the offences alleged against the petitioners, it is necessary to refer to some of the stipulations contained in the partition deed (Annexure-A3) with regard to the property involved. As per the partition deed, the property was set apart as a common property for the benefit of the members of the tharavad. There is a stipulation in the partition deed that the income from the property shall be used for the divine and charitable acts prescribed in that document. The partition deed contains a stipulation that till the death of Kerula Panicker, the aforesaid property shall stand in his name and after his death, the property shall be managed by the eldest member (karanavar) of the family. There is also a stipulation that if any such person responsible for the management of the property shows neglect in the performance of his duties, the next eldest member shall have the right to give notice to disengage such person from the management of

the property and to take over the management of the property. The partition deed further contains a stipulation that no member of the family alone has got right to make any document in respect of the property and if any document is to be executed, it shall be done by all the members of the family who have attained majority and if any document is executed in violation of this stipulation, such document shall be void and any member of the family has got the right to seek appropriate relief.

13. Now, it shall be examined whether the facts stated in the complaint attract the offence of criminal breach of trust.

14. According to Section 405 I.P.C, the offence of criminal breach of trust involves the following ingredients: (a) a person should have been entrusted with property, or entrusted with dominion over property; (b) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so; and (c) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has

made, touching the discharge of such trust (See **Indian Oil Corporation Limited v. NEPC India Limited : AIR 2006 SC 2780**). Two distinct parts are involved in the commission of the offence of criminal breach of trust. The first part consists of the creation of an obligation in relation to the property over which dominion or control is acquired by the accused. The second part involves misappropriation or dealing with the property dishonestly and contrary to the terms of the obligation created (See **Onkar Nath Misra v. State : (2008) 2 SCC 561**)

15. In the instant case, the averment in the complaint is that the first petitioner had been managing the property in question from the year 1970 onwards as a trustee for all members of the family. But, there is no averment in the complaint as to how the first petitioner had acquired management or possession of the property. There is no averment in the complaint that there was any entrustment of the property or dominion over the property to the first petitioner in any manner.

16. The expression 'entrusted with property' or 'with any dominion over property' has been used in a wide sense in

Section 405 I.P.C. The expression 'entrusted' appearing in Section 405 I.P.C is not necessarily a term of law. It has wide and different implications in different contexts. The property in respect of which criminal breach of trust can be committed must necessarily be the property of some person other than the accused or the beneficial interest in or ownership of it must be in other person and the offender must hold such property in trust for such other person or for his benefit (See **Central Bureau of Investigation v. Duncans Agro Industries Limited: AIR 1996 SC 2452**).

17. True, entrustment of property as envisaged in Section 405 I.P.C need not be in any particular manner. The entrustment may arise in "any manner" whatsoever. The words 'in any manner' in the context are significant. The section does not provide that the entrustment of the property with the accused shall be made by some person. As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property to be applied in accordance with the terms of entrustment and for the benefit of the owner (See **Som Nath**

Puri v. State of Rajasthan : AIR 1972 SC 1490).

18. In the instant case, there is not even an averment in the complaint that the first petitioner had come into possession or management of the property as the eldest member of the family at that time or by virtue of any other stipulation contained in the partition deed. There is no averment in the complaint sufficient to make at least an inference that the first petitioner had come into possession or management of the property by virtue of any stipulation in the partition deed.

19. In order to establish "entrustment or dominion" over property to an accused person the mere existence of that person's dominion over property is not enough. It must be further shown that his dominion was the result of entrustment (See **Velji Raghavji Patel v. State of Maharashtra : AIR 1965 SC 1433**). The term "entrusted" in Section 405 I.P.C governs not only the word "with the property" immediately following it but also the words "or with any dominion over the property" occurring thereafter (See **State of Gujarat v. Jaswantlal Nathalal : AIR 1968 SC 700**).

20. The complaint does not contain even an averment that the first petitioner was entrusted with the property or dominion

over it at least by virtue of the stipulations contained in the partition deed. In the absence of any averment in the complaint regarding entrustment of property or dominion over the property in question with the first petitioner in any manner, one of the basic ingredients of the offence of criminal breach of trust is not made out against him. When the offence punishable under Section 406 I.P.C is not made out against the first petitioner, the second petitioner cannot be made liable for committing such offence with the aid of Section 120B I.P.C.

21. The other offences alleged against the petitioners are under Sections 466, 467 and 471 I.P.C. Section 466 I.P.C provides the punishment for committing forgery of court records, public registers etc. Section 467 I.P.C provides the punishment for committing forgery of valuable securities, will etc. Section 471 I.P.C provides that whoever fraudulently or dishonestly uses as genuine any document or electronic record which he knows or has reason to believe to be a forged document or electronic record, shall be punished in the same manner as if he had forged such document or electronic record.

22. One of the allegations in the complaint is that the first petitioner executed and registered a settlement deed in

favour of the second petitioner, gifting her the property in question and therefore, he has committed the offence of forgery punishable under Sections 467 and 471 I.P.C.

23. Section 463 I.P.C defines forgery and Section 464 I.P.C deals with making a false document. Section 463 provides that whoever makes any false document or false electronic record or part of a document or electronic record with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery. In order to constitute forgery, the first essential condition is that the accused should have made a false document. The false document must be made with an intent to cause damage or injury to the public or to any class of public or to any community. The definition of the offence of forgery declares the offence to be completed when a false document or false part of a document is made with specified intention. In a case of forgery, the questions are: (i) is the document false (ii) is it made by the accused and (iii) is it made with an intent to defraud. Every forgery postulates a false

document either in whole or in part, however, small.

24. An analysis of Section 464 I.P.C shows that it divides false documents into three categories: (1) The first is where a person dishonestly or fraudulently makes or executes a document with the intention of causing it to be believed that such document was made or executed by some other person, or by the authority of some other person, by whom or by whose authority he knows it was not made or executed. (2) The second is where a person dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part, without lawful authority, after it has been made or executed by either himself or any other person and (3) The third is where a person dishonestly or fraudulently causes any person to sign, execute or alter a document knowing that such person could not by reason of (a) unsoundness of mind; or (b) intoxication; or (c) deception practised upon him, know the contents of the document or the nature of the alteration. In short, a person is said to have made a 'false document', if (i) he made or executed a document claiming to be someone else or authorised by someone else; or (ii) he altered or tampered a document; or (iii) he obtained a document by practicing

deception, or from a person not in control of his senses (See **Mohammed Ibrahim v. State of Bihar: (2009) 8 SCC 751**).

25. In **Mohammed Ibrahim** (supra), the Apex Court has held as follows:

"There is a fundamental difference between a person executing a sale deed claiming that the property conveyed is his property, and a person executing a sale deed by impersonating the owner or falsely claiming to be authorised or empowered by the owner, to execute the deed on owner's behalf. When a person executes a document conveying a property describing it as his, there are two possibilities. The first is that he bona fide believes that the property actually belongs to him. The second is that he may be dishonestly or fraudulently claiming it to be his even though he knows that it is not his property. But to fall under first category of 'false documents', it is not sufficient that a document has been made or executed dishonestly or fraudulently. There is a further requirement that it should have been made with the intention of causing it to be believed that such document was made or executed by, or by the authority of a person, by whom or by whose authority he knows that it was not made or executed. When a document is executed by a person claiming a property which is not his, he is not claiming that he is someone else nor is he claiming that he is authorised by

someone else. Therefore, execution of such document (purporting to convey some property of which he is not the owner) is not execution of a false document as defined under Section 464 of the Code. If what is executed is not a false document, there is no forgery. If there is no forgery, then neither Section 467 nor Section 471 of the Code are attracted."

26. Making of any false document is sine qua non to attract the offence of forgery. In **Sheila Sebastian v. Jawaharaj : AIR 2018 SC 2434**, the Apex Court has held that the definition of "false document" is a part of the definition of "forgery" and both must be read together. A person is said to make a false document or record if he satisfies one of the three conditions as noticed hereinbefore and provided for under Section 464 I.P.C.

27. In the instant case, there is no allegation that the first petitioner had executed the settlement deed claiming to be someone else or authorised by someone else. There is no allegation that he had dishonestly or fraudulently altered the settlement deed, without lawful authority. There is also no allegation that he obtained any document by practicing deception, or from a person not in control of his senses.

Therefore, execution of the settlement deed by the first petitioner in favour of his daughter does not attract the offence of forgery.

28. Execution of a document by a person, who has got no title over a property, selling or transferring that property in favour of another person, does not satisfy the ingredients of commission of the offence of forgery (See **Ramesh Dutt v. State of Punjab : (2009) 15 SCC 429**).

29. Learned counsel for the second respondent/complainant would point out that there is allegation in the complaint that the petitioners entered into a conspiracy with the Village Officer concerned and they corrected the entry regarding the ownership of the property in the revenue register (thandaper register) and the aforesaid allegation would attract the offence of forgery.

30. There is an averment in the second paragraph of the complaint that the petitioners erased the name 'Kerula' from the name 'Kerula Panicker' in the thandaper register and incorporated the name of the first petitioner as the owner of the property for the purpose of grabbing the property. There is also averments in the third and the fourth paragraphs of the

complaint that the petitioners had entered into a conspiracy with the Village Officer and that they corrected the entry in the thandaper register kept in the village office.

31. In this context, it is to be noted that the Village Officer, against whom the allegation is raised by the complainant, is not made an accused in the case. The date or month or year in which correction was made in the revenue register which was kept in the village office is not mentioned in the complaint. It is also not stated in the complaint how the petitioners got possession of the register kept in the village office enabling them to make any correction in it. It is inherently improbable that the petitioners had corrected the entry in a register which was kept in the village office in the custody of the Village Officer. The vague and general allegation that the petitioners had entered into a conspiracy with the Village Officer is not sufficient. What is to be considered is the substance of the complaint. Mere allegation that the petitioners had entered into a conspiracy with the Village Officer, that too, without making that Village Officer as an accused, is not sufficient. As held by the Apex Court in **Sheila Sebastian** (supra), a charge of forgery cannot be imposed on a person

who is not the maker of the false document. Making of a document is different than causing it to be made. In order to attract the offence of forgery, it is imperative that a false document is made and the accused person is the maker of the same.

32. In the aforesaid circumstances, the allegations/ averments in the complaint do not spell out the ingredients of the offence of forgery punishable under Sections 466, 467 and 471 I.P.C against the petitioners.

33. In this context it is also pertinent to note that some of the other members of the family of the complainant have instituted a suit as O.S.No.148/2013 in the Munsiff's Court, Pala against the petitioners and two other persons seeking certain reliefs in respect of the property involved in the present case. In that suit, a decree of declaration is sought that the property is a trust property and a decree of recovery of possession of the property is also sought. There is also a relief sought in that suit for settlement of a scheme for administration of the property.

34. The dispute involved in the instant case is basically or essentially of a civil nature. True, a civil remedy does not

foreclose the right of the aggrieved party to approach the criminal court with a complaint setting out allegations disclosing commission of criminal offences. But, if the allegations contained in the complaint taken on their face value do not constitute any of the offences alleged, the High Court shall not hesitate to quash the criminal proceedings. When the dispute relates to immovable property is basically or essentially of a civil nature and when it is given the colour of criminal offences, the accused cannot be made to undergo the ordeal of a trial in a criminal court. Criminal proceedings are not a short cut of other remedies available in law.

35. In the present case, some other members of the family have instituted a suit for appropriate reliefs in respect of the property involved. The second respondent filed the complaint against the petitioners nearly six years after the execution of the settlement deed in respect of the property by the first petitioner in favour of the second petitioner. The averments in the complaint, read on its face, do not disclose the ingredients necessary to constitute the offences alleged against the petitioners. An attempt has been made by the second respondent to cloak the dispute, which is essentially of

a civil nature, with a criminal nature. In these circumstances, the first information report, which is based on the complaint, is liable to be quashed.

36. Consequently, the petition is allowed. Annexure-A1 first information report in Crime No.467/2013 of Ponkunnam police station and all further proceedings pursuant to it are hereby quashed.

(sd/-)

R.NARAYANA PISHARADI, JUDGE

jsr/27/05/2019

APPENDIX

PETITIONERS' EXHIBITS:

EXHIBIT P1 ANX.A1 TRUE COPY OF THE FIR IN CRIME
NO. 467/13 OF THE PONKUNNM POLICE
STATION.

EXHIBIT P2 ANX.A2 TRUE COPY OF THE COMPLAINT IN
C.M.P. NO. 1457/2013 FILED BY THE 2ND
RESPONDENT.

EXHIBIT P3 ANX.A3 TRUE COPY OF THE DOCUMENT NO.
1816 OF 1101 (ME) OF THE KANJIRAPPALLY
SUB REGISTRY.

EXHIBIT P4 ANX.A4 TRUE COPY OF THE DOCUMENT NO.
3269/2006.

RESPONDENTS' EXHIBITS:

NIL

TRUE COPY

PS TO JUDGE