

**HIGH COURT OF JAMMU & KASHMIR**  
**AT JAMMU**

**Cr. Appeal No.26-A/2004**  
**MP No.116/2004**

Date of Order: 30.12.2015

Nand Kishore Sharma and ors. vs Maria Burnadette Collingasm.

**Coram:**

**Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge**

**Appearing counsel:**

For the petitioner(s) : Mr. Gagan Basotra, Advocate  
For the Respondent(s): : Mr. Ankesh Chandel, Advocate.

(i)	Whether to be reported in Press/Media :	---
(ii)	Whether to be reported in Law Journal/Digest :	Yes

1. By virtue of the order impugned, learned Court of Principal Sessions Judge Jammu has opined that it is expedient in the interest of justice to launch prosecution against the appellants (non applicants therein) for using the fabricated 'will' and for making false statement on oath in the Court when the proceedings in probate were in progress knowing the will to be fabricated.
2. Ashwin Nand Kishore Saddi, s/o appellant no.1 died but before his death, he is alleged to have executed a will deed dated 28.01.1994. Appellant No.1 after the death of said Ashwin Nand Kishore Saddi (Testator)

filed an application for grant of probate before the Court of District Judge Jammu on 23.07.1996. Same has been dismissed for lack of jurisdiction vide detailed order dated 05.05.1997. Observing therein that the property in question in respect of which probate is asked for is located outside the jurisdiction of the Court and also deceased having no fixed place of abode at Jammu so as to give jurisdiction to the Court at Jammu.

3. In the year 1998 i.e. on 09.01.1998, respondent herein (widow of the deceased) filed application under Section 476 Cr.PC through her attorney for initiating criminal proceedings against the appellants for using the fabricated 'will' and for making false statement in probate proceedings as were instituted by the appellants on the basis of the said 'will'. Appellant Nos.2 and 3 are said to be its marginal witnesses.
4. Learned District Judge after considering the submissions and the material on the record has granted the application vide order impugned dated 27.02.2004 holding therein that it shall be expedient in the interest of justice to launch prosecution against the appellants for using the fabricated 'will'.

5. Learned counsel for the appellants had questioned the maintainability of the application seeking launching of prosecution but not accepted by the learned District Judge, wrongly so, because in the proceedings initiated for grant of probate, legality of the 'will' has not been adjudicated upon or even the point of 'will' being fabricated has not been determined. It being so, no question for launching prosecution under Section 476 Cr.PC. In this behalf, learned Counsel for the appellants has rightly placed reliance on the judgment rendered by Hon'ble Apex court in the case of '*Har Govind and others v. The State of Haryana*' AIR 1979 Supreme Court 1760. In the reported judgment, it has been noticed that the appellants (therein) were alleged to have been attesting witnesses and had taken part in the execution of the will. The trial Court of Sub Judge as well as appellate court (Additional District Judge) had opined that the will was not genuine so was a forged one. But on perusal of the findings of the judgment in the suit, it appeared that the trial court as well as appellate court had found that will was executed under suspicious circumstances and not that it was a downright forgery. The Court has held as

under:

“It was incumbent on the Court filing the complaint to record a clear finding regarding the exact offence which was committed by the appellants. No such finding has been recorded by the District Judge in absence of such a finding, the order for filing the complaint cannot be supported in law”.

6. Learned counsel has also placed reliance on one more judgment of this Court titled ‘Dev Raj Kohli vs Nirmal Kumari’ 1993 KLJ 525. In the reported judgment, what had happened is that the false affidavit had been filed in the suit proceedings but suit was dismissed in default and not restored. Subsequently, after the gap of two years, an application was filed under Section 476 Cr.PC so that prosecution could be launched against the person who had filed the false affidavit. Since the suit was dismissed and never restored, there was no determination vis-à-vis position of the affidavit being false. Noticing the same, it was held as under:

“In the case on hand, the civil matter had been finally closed some two and half years back when

such an application was moved before the trial Court by the defendant and the trial court was thus justified in disposing of that application by holding that no action under Section 476/195 Cr.PC was invoked in the matter and as a result of the same, he dropped the proceedings. The learned Sessions Judge on an appeal has set this finding at naught against the provisions of the law as discussed above. He has been misled to hold that an enquiry was required to be conducted by the Magistrate knowing that civil matter had finally been closed and in no way, any perjury was committed to the plaintiff.

7. Coming to the case on hand, it is specifically pleaded and is also clear from the records that there was no determination vis-à-vis position of the will being fabricated. In addition thereto, the respondent through her attorney is stated to have filed proceedings in regard to the grant of succession certificate before the Court of Administrative Civil Judge Delhi in respect of same property in dispute to which the appellant No.1 had sought probate. In the objections, the same will deed dated 28.01.1994 has

been relied upon, therefore, the court of Administrative Civil Judge Delhi was seized of the matter wherein the legality of the will was to be judicially adjudicated by the said Court. The factum of the execution of the will was a subject matter before the Court of Administrative Civil Judge Delhi as such the learned District Judge Jammu could not simultaneously have held proceedings under Section 476 Cr.PC.

8. In case the Court of Delhi held the will to be genuine, there can be no chance for launching prosecution and even otherwise if the court at Delhi holds that the will is not genuine, still at present the application seeking proceedings under Section 476 CrPC could not be entertained.
9. The subject matter (property) made mention of in the will deed is located outside the state of J&K. It being so, an application for grant of probate as was filed before the Court of District Judge Jammu as noticed above has been dismissed on 05.05.1997 for want of jurisdiction, which would suggest that there is no determination vis-à-vis validity or otherwise of the will deed.

10. The findings as recorded by the learned Sessions Judge while considering the petition under Section 476 CrPC vis-à-vis genuineness or otherwise of the will if maintained will have bearing on the proceedings as were pending before the Court at Delhi. When in the proceedings seeking grant of probate, genuineness or otherwise of the will was not determined as having been dismissed for want of jurisdiction. Subsequently, there could be no occasion for learned District Judge to entertain the application so as to determine as to whether prosecution for using fabricated will could be ordered.

11. In the backdrop of the aforesaid facts and the law as referred to, the order passed by the District Judge dated 27.02.2004 is found to be unsustainable, as such is set aside. Petition so filed under Section 476 CrPC shall be deemed to be dismissed. However it is made clear that the observations and opinion as made hereinabove shall not in any manner divest the respondent from seeking appropriate proceedings at an appropriate stage i.e. after determination of the position of the validity of the will by the Court at Delhi where the proceedings are stated to be pending. The

order impugned dated 27.02.2004 passed by learned Sessions Judge Jammu is set aside. Appeal as such allowed.

- 12.** Record of the sub-ordinate court be sent back along with copy of this order.

**(Mohammad Yaqoob Mir)**  
**Judge**

**Jammu**  
30.12.2015  
**Raj Kumar**