

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 524 OF 2014

Mr. Pramod Makharia)
60 years, residing at 5/27, Sagarkunj, 78,)
Neapeansea Road, Mumbai 400 006.)..Petitioner.

vs.

1. Mr. Dhruvkumar Makharia)
residing at 1st floor, Firdous Building,)
“D” Road, Marine Drive,)
Mumbai 400 020.)
2. Mrs. Vandana Makharia)
3. Mr. Laxmikant Makharia)
4. Mrs. Laxmidevi Makharia)
Respondent No. 2 to 4 residing at)
A-2/22, Elite Garden, D.P. Road,)
Anudh Road, Pune.)
5. The State of Maharashtra).. Respondents.

Mr. Sandeep Velkar a/w Ms. Reshma Kurle, Advocate for the
Mr. H.H.Nagi a/w Chaula Solanki i/b. H.H.Nagi & Associates for
respondent No.1.
Ms. V.S.Mhaispurkar, APP, for the State.

CORAM: SMT.SADHANA S.JAHAV,J.
DATE : 22nd September, 2015.

JUDGMENT:

The petitioner herein happens to be the original complainant in

C.C. No.554/SW/2012, which was filed in the Court of Metropolitan Magistrate, 66th Court, Andheri, Mumbai. The petitioner herein was seeking a direction under Section 156(3) of Cr.P.C. against the accused. The allegation levelled by the complainant was that he happens to be the real brother of the original accused Nos. 1 to 3, who are respondent Nos. 1 to 3 in the present petition. Respondent No.4 happens to be the mother of the petitioner and also the mother of respondent Nos. 1 to 3.

2. It is alleged that in the year 1973, the father of the petitioner had started a family business of car rentals in the name and style of “M/s. Makson Auto Hirers”. Respondent No.3 and his sister-in-law Manju were partners. On 25.2.1982, a new partnership firm under the name and style of “M/s. Metro Towers & Travels” was formed and the petitioner's father and the wife of the petitioner were partners. Hence, the family business consisted of 3 firms and all family members were the partners in one or the other firm. In the firm named “Energy Bakery & Foods”, the petitioner was the partner of respondent Nos. 1, 2 and 4. That in the year 1987, the father of the petitioner had decided to invest funds in real estate and hence purchased a plot at Oshiwara for a sum of Rs.7 lakhs in the name of respondent Nos. 1, 2 and 4. According to the complainant, i.e. the

petitioner, the plot was purchased from the funds of M/s. Makson Auto Hirers and Metro Tours and Travels. In 1991, Energy Bakery & Foods was converted into a private limited firm. The petitioner and respondent Nos. 1, 2 and 4 and one Mr. Jhunjhunwala had shares in the said private firm. According to the complainant, that without holding a meeting of the partners / directors, the respondent Nos. 1 to 4 had made correspondence with various authorities on the letter-head of the company in the year 2006.

3. It is alleged that the petitioner was not consulted. There was no resolution passed for the closure of the firm Energy Bakery & Foods (India) Pvt.Ltd. The petitioner was kept in dark. It is alleged that respondent Nos. 1 to 4 had obtained no objection certificate for closing down the factory and for redevelopment of the said plot without consent of the petitioner and by making false representations to the various statutory authorities.

4. It is further alleged that the respondent Nos. 1 to 4 had sold the development rights of the said plot to M/s. Dilip Estate and Town Planners Pvt.Ltd. Vide agreement dated 30.11.2006, they had received payment of Rs.97,26,000/- and Rs.23,03,868/- According to the petitioner, although the respondents were fully aware that the sources for purchasing the said plot

and for forming the company had floated from the family business, it was incumbent upon them to obtain the consent of petitioner as he had reserved his share. He had therefore, filed a complaint against the respondents in 66th Court of Metropolitan Magistrate at Andheri seeking investigation under Section 156(3) of Cr.P.C.

5. The learned Magistrate, upon perusing the contents of the complaint, had posted the matter for verification. On 22.2.2013, the verification statement was recorded and the learned Magistrate had issued process against the respondent Nos. 1 to 4 under Sections 417, 420, 463, 465 read with Section 34 of IPC.

6. Being aggrieved by-the said order, the respondents had filed Revision Application No.549 of 2013 before the Sessions Court at Mumbai. The learned Addl. Sessions Judge by an order dated 4.12.2013, allowed the Revision Application and set aside the order of issuance of process against respondents Nos. 1 to 4. Hence, this Writ Petition.

7. Upon perusal of the order of the revisional Court, it is clear that the complaint filed by the complainant suffers from suppression of

material facts. Material facts were that the complainant had filed Suit No.2723 of 2007 against the respondents with Notice of Motion No.3944 of 2007 in the High Court of Judicature at Bombay. On 5.12.2007, this Court (Coram: Dr. D.Y.Chandrachud, J.) had passed an order by taking on record the consent terms signed between the parties and their Advocates. The same was marked as "X". Both the parties had informed the Court that the parties have arrived at an amicable settlement. A draft amendment was tendered before the Court. Both the parties had agreed to the contents of the draft amendment and hence the amendment was allowed. A decree was drawn in terms of the consent terms. At the request of the respective counsel, the Court had recorded that the payment has been made in pursuance of the consent terms by the 2nd defendant to the plaintiff. The suit was settled and accordingly the Notice of Motion was disposed of.

8. In the consent terms, it was specifically agreed that the suit property belongs exclusively to Dhruvakumar B. Makharia, Laxmikant B. Makharia and Vandana Makharia and they are alone entitled to exploit the benefits thereof. The plaintiff i.e. the present petitioner had withdrawn several allegations and claims made towards the ownership and/or possession of the suit land situated at Oshiwara and described in the consent

terms. The plaintiff had also consented and agreed to co-operate in getting the name of Energy & Bakery Foods (India) Pvt.Ltd. deleted from the official documents.

9. It is pertinent to note that there is no whisper in the complaint about the suit filed by the present petitioner in this Court and that the consent terms were recorded and a decree was drawn pursuant to the consent terms. The revisional Court had rightly observed that these facts were never brought to the notice of the learned Magistrate and, therefore, the learned Magistrate was of the opinion that the complainant was having interest in the property which was sold by the respondent without the permission and consent of the complainant and thereby he was cheated. After considering the facts of the case, the learned Addl. Sessions Judge, Greater Bombay vide order dated 4.12.2013, had rightly allowed the Revision Application and set aside the order of issuance of process dated 22.2.2013 passed by the Metropolitan Magistrate, 66th Court, Andheri.

10. In view of the above discussion, it is clear that the petitioner herein had initiated criminal prosecution against the respondents which suffered from suppression of fact. The issues were settled in a civil

proceeding before the Hon'ble High Court. No doubt, the complaint suffers from suppression of facts. It appears that the petitioner had a change of attitude after 5 years of decree being drawn pursuant to the consent terms and, therefore, had initiated criminal prosecution. The judgment in a civil proceeding would be a judgment in rem and a judgment in criminal proceeding would be a judgment in personam. Consent Decree was drawn. In the case of **Rattinavel Chettiar vs. V. Sivaraman reported in (1999) 4 SCC 89**, the Hon'ble Apex Court has held – “A decree has to have the following 3 essential elements (1) there must have been an adjudication in a suit, (2) the adjudication must have determined the rights of the parties in respect of, or any of the matters in controversy and (3) such determination must be a conclusive determination resulting in formal expression of the adjudication. Once the matter in controversy has received judicial determination, the suit results in a decree either in favour of the plaintiff or the defendant.”

11. In the present case, the petitioner has made an attempt to bypass the judicial determination of rights by initiating criminal prosecution which is an abuse of process of law. That the complainant has not made out a case that he has withdrawn the consent in a peculiar situation. The petitioner cannot turn his back on the consent terms. It was a family

business. The continuance of the present proceedings in the criminal complaint would be an abuse of process of law. The decree-holders in civil suit would have to go through an ordeal of criminal proceedings for no good reason.

12. Taking into consideration all these aspects, Writ Petition being sans merits deserves to be dismissed.

Petition stands dismissed.

(SMT.SADHANA S.JADHAV, J.)