

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 769 OF 2013

Sudhir Sitaram Pise. ... Applicant.

Versus

The State of Maharashtra & anr. ... Respondents.

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Mr. Bhushan A. Walimbe i/b. Ms. Preeti B. Walimbe, advocate for  
Petitioner.

Mr. Kuldeep Patil, advocate for respondent Nos. 2 to 5.

Mr. A.S. Patil, APP for State.

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**CORAM : SMT. SADHANA S. JADHAV,J**

**DATE : SEPTEMBER 1, 2015**

**P.C.:**

1 Heard the learned Counsel for the Petitioner, learned Counsel  
for the respondent Nos. 2 to 5 and the learned APP for State.

2 Rule. Rule made returnable forthwith with the consent of the parties.

3 The petitioner herein impugns the order passed by the Additional Sessions Judge, Islampur dated 6/12/2012 thereby quashing the order passed by the Judicial Magistrate First Class, Islampur dated 4/3/2011 and has quashed the order of issuance of process passed by the learned Magistrate on 4/3/2011 in R.C.C. 336 of 2010. The Petitioner happens to be the original complainant. That the Petitioner had filed a complaint before the Judicial Magistrate First Class on 29/11/2010 alleging therein that the petitioner herein entered into an agreement with the present respondents to purchase the land at Survey No. 19/1+2+3 admeasuring 25 R. That the Respondents had agreed to sell the land. There was a written notarised agreement between parties which was executed on 17/7/2006. That towards consideration of the said agreement to sale, the Petitioner therein had paid Rs. 15,50,000/-. That subsequently, proposed accused persons had informed the Petitioner

that due to some reasons they do not wish to execute the sale deed or sell the land in favour of the Petitioner and had agreed to refund the amount of Rs. 15,50,000/- paid by the Petitioner to the accused persons. It was agreed to execute an agreement to that effect thereby cancelling the earlier deed of agreement of sale. Accordingly, on 29/5/2010, notarised agreement was executed between the parties for cancelling the agreement to sale dated 17/7/2006. At the time of cancellation of the agreement, the respondents had given two cheques in favour of the Petitioner drawn on Sangli District Cooperative Bank, Islampur for an amount of Rs. 8,00,000/- and Rs. 7,50,000/-. The Petitioner had presented the said cheques for encashment on 25/9/2010. Both the cheques were dishonoured.

4 It is alleged in the complaint that the Petitioner had issued statutory notice under Section 138 of the Negotiable Instruments Act to the respondent. The respondents had replied the said notice and had admitted the liability of Rs. 15,50,000/-. It is further alleged that the respondents had issued the cheques with intention to cheat the

Petitioner and that right from the inception the respondents had no intention to pay the said amount. It is alleged that the respondents had deliberately cheated the complainant. Upon perusal of the complaint, the learned Magistrate by an order dated 4/3/2011 was pleased to issue process against the respondents under Section 420 read with Section 34 of the Indian Penal Code.

5 Being aggrieved by the said order, the respondents herein had filed revision application before the Sessions Court. The learned Sessions Court by an order dated 6/12/2012 has been pleased to quash and set aside the order issuing process and consequently, the complaint is dismissed. Hence, this Writ Petition.

6 At the threshold, it is necessary to observe that when the matter was heard for the first time, this Court had asked the parties to explore the possibility of amicable settlement. However, it has not borne any fruit and hence, the Petitioner prays that the order of

issuance of process be restored by setting aside the order dated 6/12/2012.

7 The learned Counsel for the Petitioner submits that in the present case, signature was obtained by the respondents by misrepresentation of the facts. That the agreement dated 29/5/2010 has been refuted and denied.

8 The learned Counsel for the respondents submits that the reply has been filed on the basis of the legal advice. It is specifically contended that the said reply is a matter of consideration in the proceedings under Section 138 of the N.I. Act and only because the petitioner has denied the contents of the agreement dated 29/5/2010, it cannot be inferred that Section 420 of the Indian Penal Code is attracted. It is true that the dispute between the parties is subjudiced by way of civil suit as well as in the proceedings under Section 138 of the Negotiable Instruments Act.

9     It is pertinent to note that in the complaint filed under Section 138 of the Negotiable Instruments Act, the Petitioner could have charged the respondents with Section 420 of the Indian Penal Code and the same could have been tried by the same Court. Intention to cheat i.e. intention to issue the cheques with an intention that the same should not be honoured, can be considered in the proceedings under Section 138 of the N.I. Act.

10    The learned APP submits that as far as the dishonour of two cheques is concerned, the Petitioner has initiated proceedings under Section 138 of N.I. Act and the same are pending before the concerned Court. It is further submitted by the learned APP that in the reply to the statutory notice, the respondents had not only admitted the liability, but had specifically stated that while executing the agreement dated 29/5/2010 cancelling the agreement dated 17/7/2006, it was specifically agreed between the parties that the cheques should be presented for encashment after a period of one year and that the respondents would pay the amount within one

year. However, without giving notice to the respondents the cheques were presented for encashment. It is pertinent to note that the respondents had specifically replied that they have bonafide intention to refund the amount. That they have no intention to cheat the complainant and they would repay the entire amount within the stipulated period.

11 The learned Counsel for the Petitioner submits that there is an averment in the complaint that the cheques were issued with intention to defraud the complainant and never to abide by the undertaking to refund the amount accepted by the respondents on 17/7/2006. That the conduct of the respondents would clearly show that they had no intention to refund the amount. To substantiate the said contention, the learned Counsel for the Petitioner has placed reliance on the written statement filed by the Petitioner filed in Civil Suit seeking recovery of the amount paid by the Petitioner on 17/7/2006. According to the learned Counsel for the Petitioner, in the said written statement, the respondents herein have denied to

make the said payment and therefore, according to the Petitioner, there was an intention to cheat right from the inception.

12 As against this, the learned APP submits that the Written Statement filed in the civil suit will be considered in the proceedings for recovery of the said amount and the same cannot be considered in the present case. As far as the present complaint is concerned, it is apparent on the face of the record that on 29/5/2010, there was consent between the parties that the agreement dated 17/7/2006 stands cancelled and towards refund of the said amount, the respondents had issued cheques, which have been dishonoured and the trial under Section 138 of the Negotiable Instruments Act is pending before the learned Magistrate. The intention to cheat has to be inferred not only from the averments made in the complaint, but also after considering the reply given to the Petitioner dated 10/11/2010. The respondents had specifically admitted the liability and expressed their intention to refund the amount.

13 It is a matter of record that the application is filed on 29/11/2010 i.e. after receipt of the reply. Therefore, the intention to cheat cannot be inferred. The fact that a cheque issued has been dishonoured, by itself does not constitute an offence of cheating. The conduct of the accused post issuance of cheque and reply to the statutory notice has to be considered. Dishonour of post-dated cheque by itself does not amount to cheating. The honest intention of the accused to repay or fulfill the liability cannot be excluded. Direct proof of mens-rea is seldom available and it has often to be inferred from the surrounding circumstances.

14 In view of the aforesaid reasons, the Petition being sans merits stands rejected. The issue as to whether the complaint was maintainable under Section 420 of the Indian Penal Code or not, is not the issue in question. What is being considered today is whether offence under Section 420 of the Indian Penal Code has been disclosed. In the absence of any specific material, it does not warrant continuance of the proceedings. There is no reason to interfere with

the order passed by the Revisional Court. The Petition being sans merits stands rejected.

15 Rule is discharged. The Writ Petition is disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)

**CERTIFICATE**

**Certified to be true and correct copy of the original signed  
Judgment/order.**