

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.830 OF 2014

Dhirajlal P. Desai

.. Petitioner

Versus

The State of Maharashtra & ors

.. Respondents

Mr.Yashpal Thakur i/b PKA Advocates for the petitioner.

Mr.Subodh Desai with Mr.Hrishikesh Chavan for respondent nos.2 to 6.

Mrs.M.R.Tidke, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

ORDER RESERVED : 3rd JULY, 2015ORDER PRONOUNCED : 3rd SEPTEMBER, 2015

ORAL JUDGMENT :-

1 The petitioner is the original complainant. He has filed a complaint alleging commission of an offence punishable under section 13 of the Maharashtra Ownership Flats Act, 1963 (hereinafter referred to as 'MOFA' for the sake of convenience) read with section 406 IPC and 420 of the IPC against the respondent nos.2 to 6 herein. The respondent no.2 is a partnership firm doing business as builders, developers and promoters, and the respondent nos.3, 4, 5 and 6 are the partners of the respondent no.2. The learned Addl. Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai, after examining the

petitioner on oath, formed an opinion that there were sufficient grounds for proceeding against the respondents in respect of an offence punishable under section 13 of the MOFA read with section 14 thereof. Accordingly, by an order dated 9th March 2012, he issued process against the respondent nos.2 to 6, requiring them to appear and answer to the accusation of an offence punishable under section 13 of the MOFA read with section 14 thereof. Being aggrieved thereby, the respondent nos.2 to 6 moved the Court of Sessions for Greater Mumbai by filing an application for revision, praying that the order issuing process as passed by the learned Addl. Chief Metropolitan Magistrate, 47th Court, Esplanade, be quashed and set aside. The learned Addl. Sessions Judge for Greater Mumbai, by an order dated 3rd February 2014, allowed the revision application and set aside the order issuing process as passed by the Magistrate. The Addl. Sessions Judge came to the conclusion that the learned Magistrate had no territorial jurisdiction to entertain the complaint and try the alleged offences. Consistently with this view, the learned Addl. Sessions Judge directed the Magistrate to pass an order for return of the complaint for presentation before the proper Court. Being aggrieved thereby, the petitioner has approached this Court by filing the present petition invoking the inherent powers of this Court saved by section 482 of the Code of Criminal Procedure, and the jurisdiction conferred upon it by Article 227 of the Constitution of India.

2 By consent of the learned counsel for the parties, it was decided to decide the petition finally at the admission stage itself.

3 Accordingly, Rule was issued, by consent of the respondent, was made returnable forthwith, and on the respondents waiving the service thereof, the petition was heard finally.

4 For the sake of convenience and clarity, the petitioner shall, hereinafter, be referred to as 'the complainant' and the respondent nos.2 to 6 as 'the accused'.

5 I have heard Mr.Yashpal Thakur, learned counsel for the complainant. I have heard Mr.A.P. Mundargi, Senior Advocate with Mr.Subodh Desai, learned counsel for the accused. I have carefully gone through the complaint, the record of the examination of the complainant under the provisions of section 200 of the Code of Criminal Procedure, the order issuing process as passed by the Magistrate, and the order passed by the Addl. Sessions Judge in revision.

6 Though a number of points were raised before the Court of Sessions in the revision proceedings, the real challenge was to the territorial jurisdiction of the Addl. Chief Metropolitan Magistrate, 47th Court to entertain the complaint and to deal with the alleged offences. In fact, the Revision Application has also been decided only on that basis i.e. *that the learned Magistrate had no territorial jurisdiction to entertain the complaint and try the alleged offences.* During the course of hearing of the petition, Mr.Mundargi, the learned Senior Advocate submitted that the accused persons would not mind if the order issuing process, as passed by the learned Magistrate is maintained, and the complaint

is returned to the complainant for filing it before a proper Court having territorial jurisdiction. He submitted that the accused persons will appear before the Court of the Magistrate to whom the complaint would be presented on a date which may be fixed by this Court or which may be directed to be fixed by the Addl. Chief Metropolitan Magistrate, 47th Court, while returning the complaint. He, however, submitted that the complaint, however, needs to be returned to the complainant for filing before a proper Court inasmuch as the Addl. Chief Metropolitan Magistrate, 47th Court clearly lacked territorial jurisdiction to try the alleged offences.

7 The limited issue that arises is, therefore, whether the Addl. Chief Metropolitan Magistrate, 47th Court, Esplanade had territorial jurisdiction to entertain the complaint and try the alleged offences.

8 I have carefully gone through the complaint. In the complaint, it is mentioned that the complainant negotiated and bargained with the accused for purchase of shops in some buildings which were to be constructed on a plot of land situate at village Mira in Taluka Thane, District Thane within the limits of Mira-Bhayendar Municipal Council in the Registrar, Sub-Division of District Thane. After bargaining, the complainant booked 14 shops and 52 flats in two buildings which were to be constructed, as aforesaid. Fourteen different agreements, as required under section 4 of the MOFA, were entered into between the complainant and the accused regarding the allotment of the said shops, out of which five were registered on 28-08-2007. The complaint

specifically mentions that it is confined only to the four shops in respect of which the agreements are registered all in the name of the complainant; and that the complainant shall be filing a separate complaint regarding the other shops and flats. (two other complaints have also been filed by the complainant against the respondents which are the subject matter of APL 504/14 and APL 505/14 pending before me). The basic grievance of the complainant is that the accused were purposely delaying the completion of the buildings and though the shops are ready, and though the entire/substantial payment towards the price of the said shops has been made; the accused are still not handing over the possession thereof to the complainant.

9 It is not in dispute that the shops in respect of which the complainant has entered into agreements with the accused persons are not situate within the territorial jurisdiction of the Addl. Chief Metropolitan Magistrate, 47th Court, Esplanade. It is not in dispute that some other Magistrate in Thane District would have territorial jurisdiction over the place where the flats are situate.

10 There is a jurisdiction clause – so to say – in the complaint. It reads as under :-

“The complainant carrying on business at 11, Bhangwadi Shopping Centre, 1st floor, Bhangwadi, Kalbadevi Road, Mumbai – 400002 and accused having their registered office 811, Embassy Centre, Nariman Point, Mumbai 400 021 hence this Hon'ble Court have jurisdiction to

try and entertain the above complaint. (Para 22
(Emphasis supplied)

Thus, it is clear that as per the complaint, the existence of jurisdiction in the Addl. Chief Metropolitan Magistrate is claimed on the basis that 'the complainant carries on his business at Kalbadevi Road, Mumbai' and 'the registered office of the accused is at Nariman Point, Mumbai'. Thus, it is on the basis of the place where complainant carries on business and the place where the accused have their registered office, that the claim that the Addl. Chief Metropolitan Magistrate has territorial jurisdiction to entertain the complaint and try the offences, has been made.

11 Mr.Mundargi, the learned counsel for the accused submitted that the place where the complainant or the accused have their respective offices, or the place where either of them carries on business, would not be matters conferring territorial jurisdiction. He submitted that the territorial jurisdiction of a criminal court would be decided by the provisions of Code of Criminal Procedure. He submitted that the property is situate in Thane district, the agreements in that regard have been registered at the office of the Sub-Registrar at Thane, which obviously is not within the territorial jurisdiction of the Addl. Chief Metropolitan Magistrate 47th Court. Mr.Mundargi submitted that the failure to give possession would also take place where the possession was to be given i.e. where the property is situate. He therefore, submitted that there was absolutely no case for holding that a Magistrate in Mumbai could have had jurisdiction to entertain the complaint.

12 During the course of arguments, Mr.Yashpal Thakur conceded that neither the place where the complainant was carrying on the business, nor the place where the accused have their registered office would be relevant, in itself, for deciding the question of territorial jurisdiction. What he, however, submitted is that some of the acts constituting the offences, had taken place within the jurisdiction of the Addl. Chief Metropolitan Magistrate, 47th Court. He submitted that apart from the offices of both the parties being situate within the jurisdiction of the Addl. Chief Metropolitan Magistrate, 47th Court, the publication with respect to the proposal of constructing the buildings was given by the accused from their registered office situate at Nariman Point, Mumbai. According to him, pursuant to the said publications, several meetings and negotiations had taken place between the parties at the registered office of the accused. It is submitted that four agreements in respect of the shops in question, were executed by and between the parties at the registered office of the accused no.1. It is also contended that the payments were made to the accused no.1 by cheques which were got delivered by the complainant at the registered office of the accused no.1, and that against the payments, the accused no.1 has issued various receipts from the registered office in favour of the complainant. He, therefore, submitted that the Addl. Chief Metropolitan Magistrate, 47th Court had also territorial jurisdiction to entertain the complaint and try the alleged offences.

13 Mr.Mundargi, the learned Senior Advocate in reply, contended that the facts constituting jurisdiction would necessarily be required to be spelt out from the averments in the complaint,

and when the complaint claims the existence of territorial jurisdiction on the basis of a certain fact, it would not be open for the complainant to now try to show that the Addl. Chief Metropolitan Magistrate, 47th Court had the necessary territorial jurisdiction on the basis of different facts and totally different grounds.

14 Though Mr.Thakur conceded that these facts have not been mentioned in the complaint, he submitted that there were a number of annexures to the complaint which were sufficient to spell out the facts giving jurisdiction to the Addl. Chief Metropolitan Magistrate, 47th Court.

15 I have carefully considered the matter.

16 There are no special rules of pleading with respect to the complaints. A complaint can even be oral. Therefore, a very technical view of the matter need not be taken. What is, however, necessary is that the complaint must show the facts which would indicate that the particular Magistrate before whom the complaint is lodged, has territorial jurisdiction to entertain the same. If this is spelt out from the complaint and the annexures thereto or any other material which was shown to the Magistrate at the time of filing of the complaint and/or issuance of process, it would be open for the Magistrate to entertain the complaint and try the alleged offences, notwithstanding that the complainant's assertion as to *how* and *why* the Magistrate has territorial jurisdiction, is wrong. I am of the opinion that though the 'jurisdiction clause' in the complaint is not sufficient to show that the Addl. Chief

Metropolitan Magistrate, 47th Court had territorial jurisdiction to entertain the complaint, still, whether he had, or had not, such jurisdiction would need to be examined on the basis of the averments in the complaint and the annexures thereto.

17 Chapter XIII of the Code deals with jurisdiction of Criminal Courts in inquiries in trials. Section 177 lays down the basic and general rule that every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed. Section 178, *inter alia*, provides that where an offence is committed partly in local area and partly in another, or consists of several acts done in different local areas, it may be inquired into, or tried by a Court having jurisdiction over any of such local areas. Section 179 lays down that when an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

18 The question that arises is whether the offence in this case i.e. the offence punishable under section 13 of the MOFA read with section 14 thereof, or any of the acts constituting the same, has or have taken place in the local jurisdiction of the Addl. Chief Metropolitan Magistrate, 47th Court. For deciding this, what the offence punishable u/s.13 of the MOFA constitutes of, needs consideration.

19 Section 13 of the MOFA deals with offences by promoters. It provides for punishment to a promoter who without reasonable excuse fails to comply with or contravenes the provisions of section 3, 4, 5, 10 or 11 thereof. A perusal of the complaint shows that the basic grievance of the complainant is that the accused have accepted substantial sums towards the purchase price of the flats/shops, but have still not given the possession thereof. The grievance is that the accused are purposely delaying the completion of the building, and though the shops are ready, the possession thereof is not being handed over to the complainant for which the accused persons are giving false excuses. The complaint, *inter alia*, alleges violation also of section 4 of the MOFA, and claims that though the agreements in respect of the shops which are the subject matter of the complaint, have been entered into, they are not in the prescribed form. It is also alleged that for the remaining flats and shops in respect of which the complainant, though has entered into agreements with the accused, these agreements are not got registered. There is also an allegation of contravention of the provisions of section 8 of the MOFA which says that if the promoter fails to give possession in accordance with the terms of the agreement by the date specified, then the promoter shall be liable, on demand, to refund the amounts already received by him with Simple Interest. The claim is that inspite of the demands of the complainant, the accused have neither given the possession of the flats nor have offered to refund the amounts.

20 Since a contravention of the provisions of section 4, 5, and 8 of the MOFA has been alleged in the complaint, and since that constitutes the offence punishable under section 13 of MOFA, it would be necessary to see *where* those contraventions have taken place. Section 4 of the MOFA enjoins upon a promoter to enter into a written agreement for sale, and stipulates that such agreement shall be in the prescribed form. Now, if the agreement is not in the prescribed form, the provisions of section 4 would stand contravened, but *where* would such contravention can be said to have taken place ? Section 5 enjoins upon the promoter to maintain separate account of sums taken as advance or deposit. The questions is 'if such separate account is not maintained, *where* can the said contravention be said to have taken place ?' Section 8 of MOFA enjoins upon a promoter to refund the amount paid with interest for failure to give possession within the specified time. Now, if the promoter fails to pay the amount, and contravenes the provisions of section 8, *where* can such contravention be said to have taken place ?

21 Mr.Yashpal Thakur has relied upon a number of judgments delivered by this court in support of his contention that the Additional Chief Metropolitan Magistrate, 47th Court did have territorial jurisdiction to enquire into and try the offences as alleged in the complaint. He has also placed reliance on a decision of the Supreme Court of India. I have gone through all these decisions and I find that none of them is relevant in the context of the controversy that arises in the present case. Certain judgments dealing with the question of

territorial jurisdiction on which reliance has been placed by Mr.Thakur relate to the offences punishable under Sections 420 and/or 406 of the Indian Penal Code. The reasoning adopted in those decisions would not be applicable while considering the territorial jurisdiction of a Court in respect of an offence punishable under Section 13 of the MOFA. Some of the decisions relied upon by Mr.Thakur relate to the provisions of MOFA, but they do not relate to the question of territorial jurisdiction, which is the only point needing determination in this case.

22 Mr.Mundargi, the learned counsel for the accused has also placed reliance on a decision rendered by this Court and some decisions rendered by the Supreme Court of India. The decisions rendered by the Supreme Court of India on which reliance has been placed relate to the territorial jurisdiction in respect of an offence punishable under Section 138 of the Negotiable Instruments Act and the observations made therein do not provide sufficient guidelines in the matter of resolving the issue that needs determination in this Petition. The decision of this court on which reliance has been placed also is not relevant for determining the local jurisdiction in respect of an offence punishable under Section 13 of the MOFA. Not much assistance, therefore, can be derived from the authoritative pronouncements cited by the learned counsel for the parties.

23 Deciding the place *where* the offence punishable under section 13 of the MOFA has taken place, would not be always easy. It would depend on the type of contravention which

forms the basis of the said offence. In this case, the contravention alleged is of the provisions of sections 3, 4, and 5. {Contravention of section 8 is not specifically covered by the penal provisions of section 13 of the MOFA}. Section 3 lays down the general liabilities of a promoter. So far as the violation of section 4 is concerned, the registration of the agreement would necessarily be required to be done in the local jurisdiction of a Magistrate at Thane, and a Magistrate in Mumbai would have no jurisdiction over that place. The agreement is required to be in the prescribed form, and if the same is not in the prescribed form, that also contravenes the provisions of section 4. Such contravention would naturally be taken as having occurred at a place *where* such agreement has been entered into. In the instant case, there is a specific allegation to the effect that the agreement in question has not been in the prescribed form. If that is so, this contravention has taken place *where* the agreement between the parties has been entered into.

24 It is not in dispute that the agreement between the complainant and the accused no.1 has been entered into at Mumbai. The agreement specifically states so and also refers to the address of the office of the accused no.1. Though I am not impressed by the other contentions advanced by Mr.Thakur viz. of meetings having taken place in the registered office of accused no.1, receipts of payments having been delivered into registered office etc, the fact that the agreements between the parties were entered into and executed at Mumbai, is a significant aspect of the matter for determination as to the place whether the alleged offence, or any part thereof has taken place.

25 MOFA is a social legislation. It has been enacted, *inter alia*, to curb the malpractices in the construction and sale of flats taken on ownership basis, and is aimed at regulating of the promotion of the construction, sale, management and transfer of flats taken on ownership basis. It casts several liabilities on a promoter which arise upon execution of a written agreement of the purchase of a flat between the promoter and the purchaser. The execution of an agreement between the promoter and the purchaser is the very basis of the liabilities and responsibilities that are cast upon a promoter by MOFA. In such a situation, when a particular violation/s or contravention/s of the provisions of MOFA which cannot be satisfactorily determined as having taken place 'in a particular legal area' takes place, such contraventions must be treated as having taken place in the area where the agreement between the promoter and the purchaser has been entered into and executed.

26 Having regard to the aims and objects of the Act and the fact that execution of an agreement between the promoter and the purchaser is the very basis of the liabilities of the promoter, the place where the agreement is entered into becomes extremely important. The execution of agreement being an intricate and inseparable part of the offence punishable under section 13, when violation of the agreement, which also contravenes the provisions of MOFA, takes place, it cannot be said that no part of the offence punishable under section 13 has taken place *where* the agreement is entered into. A promoter, who enters into and executes an agreement with a purchaser in

Mumbai, cannot drive the purchaser out of Mumbai for prosecuting the promoter on the allegation of contravention of the provisions of MOFA – which include violations of the terms of the agreement – on the ground that the property sought to be purchased by the purchaser is situated outside Mumbai.

27 It is undoubtedly true that the place where the property is situate would be relevant in determining the territorial jurisdiction. That the Magistrate in Thane has territorial jurisdiction to entertain the complaint can be more obviously seen, and the facts conferring territorial jurisdiction upon the Magistrate in Mumbai, may not be so obvious and need greater contemplation. However, that would not mean that the complainant should be forced to select a forum, which may not be convenient to him. Territorial Jurisdiction is actually a matter of convenience. The law does not treat the lack of territorial jurisdiction on par with lack of jurisdiction arising on account of other factors such as incompetency of the Court with respect to the subject matter of the dispute etc. Section 462 of the Code is indicative of this principle. Under section 407 of the Code, cases can be transferred even to the Courts which lack territorial jurisdiction provided such transferee Courts are in other respect competent to inquire into or try the offences in question. Thus, the territorial jurisdiction is a matter of convenience, and where expedient, convenient or necessary, a case can be transferred to a Court not having territorial jurisdiction. Certainly, this will not justify the proceeding with a complaint by a Magistrate who lacks territorial jurisdiction, but the relevant provisions have been mentioned to emphasize that lack of territorial jurisdiction is not

such a vital factor as the lack of jurisdiction arising out of some other factor such as inability or incompetency of the Court to deal with the subject matter of the dispute. In the instant case, the parties are from Mumbai. Their registered offices are at Mumbai. It is not that it would be more convenient for any of the parties to have the case tried before a Magistrate in Thane – atleast it has not been suggested.

28 When in this background, the fact that the agreement between the parties was entered into at Mumbai is taken into consideration, it is not possible to hold that the Magistrate at Mumbai would have no jurisdiction to entertain the complaint and try the alleged offences. At the cost of repetition, it may be observed that executing an agreement is the very basis of the promoter – purchaser relationship and is an intricate and inseparable part of the general liabilities of a promoter. When the violation of such general liabilities is alleged, which violations are alleged to be amounting to an offence punishable under section 13 of MOFA, it cannot be said that the act of executing the agreement is not an integral part of the alleged offence. Therefore, the Court within whose local jurisdiction the agreement was entered into, would have territorial jurisdiction to try an offence punishable under section 13 of MOFA, irrespective of the place where the property is situate.

29 The learned Addl. Sessions Judge was, therefore, not right in coming to the conclusion that the Addl. Chief Metropolitan Magistrate, 47th Court, did not have territorial jurisdiction. He ought not to have set aside the order issuing process on the basis

of this conclusion. The impugned order suffers from an error in comprehending the nature of the acts made punishable under section 13 of the MOFA, and the difficulty – if not inability – to determine the precise area/places where some of the alleged contraventions of the provisions of MOFA can be said to have taken place. The same, unnecessarily drives the complainant out of a Court of his choice, which Court also had territorial jurisdiction to entertain the complaint, and try the alleged offences. It, therefore, needs to be interfered with.

30 Petition is allowed.

31 The impugned order is set aside.

32 Interim stay stands vacated.

33 The learned Magistrate shall proceed further with the case in accordance with law.

34 Rule is made absolute in the aforesaid terms.

(ABHAY M.THIPSAY, J)