

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRI. WRIT PETITION NO. 2754 OF 2015

M/s. Neeraj Constructions & Others. ... Petitioners.
(Org.Accused)

V/s.

Mr. Anil Kishan Hirani & Others. ... Respondents.

Mr. Subhodh Desai i/by Mr. Jayesh Ashok Vithlani for the
Petitioners.

Mr. Abhishek Pungliya, Advocate for Respondent Nos.1 & 2.
Mr. Deepak Thakre, APP for the State.

CORAM : A.V. NIRGUDE, J.

DATE : 04th DECEMBER, 2015.

P.C. :

1 Heard.

2 Earlier order, dated 27th November, 2015, passed in
presence of learned Advocate Mr. Shetty, who had appeared
for the Petitioners, is set aside at the request of new Advocate
Mr. Subhodh Desai, who appears for the Petitioners today.

3 The facts leading to this petition in short can be
stated as under :

Petitioner No.2 is the proprietor of Petitioner No.1-
Firm and Director of Respondent No.3, a private limited

company. The Petitioners were admittedly developing buildings in Khar, Mumbai and Respondents-Complainant Nos. 1 and 2 agreed to buy plot no. 102 for such buildings. On 15th February, 2008, a letter of allotment is issued in their favour. They paid a sum of Rs. 60,00,000/- out of agreed sum of Rs. 1,34,50,000/-. Thereafter, on 5th June, 2008 they paid further amount of Rs.5,00,000. On 27th June, 2008 a crime under section 4 of the MOFA Act was registered. On 28th June, 2008, the bank granted loan of remaining amount to the complainants. The bank disbursed the sum of Rs. 40,00,000/- on 30th June, 2008 to the Petitioners and on 30th August, 2008 another sum of Rs.4,50,000/- was handed over to the petitioners. The respondents-complainants, however, did not pay remaining amount till 17th October, 2008. The bank also did not disburse the remaining amount of consideration and therefore, on 17th October, 2008 the petitioners terminated the agreement. The complainants, thereafter, filed a suit for specific performance, on one hand, and on the other, they also filed this complaint, alleging offence of cheating punishable under section 13 of the MOFA Act. The order of issuance of process was challenged before the Sessions Court by both the parties. Ultimately, the learned Sessions Judge came to the conclusion that the offence under sections 420 r/w. Section 34 of the Indian Penal Code is clearly made out for issuing process against all the petitioners. It is because of this order, the petitioners are before this court.

4 The question is - whether the complaint makes out an offence punishable under section 420 of the IPC and under section 13 of the MOFA Act.? The answer is in affirmative. The facts quoted above, really indicate that since February, 2008, the petitioners had, since beginning, no intention to sell the flat in question to the complainants. Had they really intended to do so, they would not have terminated the agreement barely within 8 months from the date of the allotment letter. They had admittedly received about 85% of the consideration in eight months time. In such situation, an honest developer would abide by his commitment. Assuming remaining consideration was defaulted, the petitioners-developer could have approached the bank, who had advanced loan to the complainant. It was the bank who could have fulfilled the remaining commitments. But the petitioners did not approach the bank for reasons best known to them. All these facts clearly indicate that the petitioners intended to defraud the complainants since beginning.

5 The termination of the agreement is not possible because there is no provision under the MOFA Act, permitting termination of such agreement. An agreement under section 4 of the MOFA Act, is almost equivalent to a deed of conveyance. Statutory rights are created in favour of the purchaser. If developer avoids his responsibility to abide by the terms of the

agreement, he would commit breach of the statutory obligations arising from the agreement. So offence under section 13 of the MOFA Act is also made out for issuance of process.

6 In the result, the petition stands dismissed.

7 The observations, made above, shall not influence the learned trial Magistrate, who would eventually try the case.

(A.V. NIRGUDE, J.)

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