IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.4338 OF 2004
WITH
CRIMINAL WRIT PETITION NO.1910 OF 2004

1. Mahendra Premji Gangar
Aged : 45 years
Occ: Business

2. Shri Kalyanji Premji Gangar
Aged about 55 years
Occ: Business.
Both residing at -10, Gangar
Mansion, Mamlatdar Wadi
Cross Road No.1, Malad
(West), Mumbai. ...Applicants/Petitioners

Versus
1.The State of Maharashtra
2.Shri Jaisukhlal P. Vajani,
Aged about 55 years,
Occ: Business, r/o. 1st Floor,
Bhat Chawal, Jamli Galli,
Borivali (West), Mumbai. ...Respondents

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Ms Racheeta Dhuru for the Applicant
Mr. Mehul Shah for Respondent No.2.
Mr. Rajesh More, APP for Respondent No.1-State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATE : 10th DECEMBER, 2015.

ORAL JUDGMENT:

This application/petition arise from orders passed by the Additional Sessions Judge in Revision Application No.40 of 2003. The

Criminal application challenges the dismissal of the said revision application by the Additional Sessions Judge by order dated 28.9.2004 as well as dismissal of discharge application by the Magistrate and consequent framing of charge under sections 406, 420 and 120B r/w. 34 of the IPC. Whereas the Petition challenges the interlocutory orders dated 6.9.2004 and 10.9.2004 in the revision application viz issuance of search warrant, sealing of the subject premises, registration of FIR against the Applicant etc.

2. The brief facts necessary to decide the aforesaid application and petition are as under:-

The Applicants are the accused Nos.3 and 4 in the complaint filed by the Respondent No.2-complainant under sections 406 and 420 r/w. 34 and 120 B of the IPC. The Respondent No.2-complainant had alleged that on 5.5.1988 he had entered into an agreement with one Urmila Savla and Surendra Savla(accused Nos.1 and 2 respectively), the partners of M/s. Shah, Ratanji, Velji and Sons, to purchase / transfer tenancy rights along with the assignment of business and goodwill in respect of shop under the name and style of M/s.Shah, Ratanji, Velji and Sons for a sum of Rs.6 lakhs. The tenancy rights, business and the goodwill was to be assigned in favour of the

Respondent No.2-complainant within a period of three months from the date of the execution of the said agreement. The complainant had alleged that at the time of the execution of the said agreement he had paid to the accused Nos.1 and 2 an amount of Rs. 6 lakhs. The grievance of the complainant is that despite receipt of the said amount, the accused Nos.1 and 2 failed to transfer and assign the tenancy rights and business in his favour. Ultimately on 5.8.1990 another partner Kantilal executed a declaration confirming the contents of the agreement dated 5.5.1988.

3. The Respondent No.2-complainant alleged that on 15.1.1991 the accused No.2 Surendra Savla took him to the shop of the Applicant No.2 herein to resolve the dispute regarding the said agreement dated 5.5.1988. The Respondent No.2-complainant claimed that the Applicants herein had told him that they were interested in expanding their business. The Applicant No.2 further told him that since the agreement dated 5.5.1988 was not registered and was not acted upon for over a period of three years, they were planning to purchase and take over the business of M/s.Shah, Ratanji, Velji and Sons and that he should agree for the same.

4. The Respondent No.2-complainant claimed that he had not

agreed for the said proposal despite which the accused Nos.1 and 2 did not transfer and assign the tenancy rights and the goodwill but on the contrary threatened him. He therefore, lodged a complaint against the accused Nos.1 and 2 for an offence punishable under section 506 of the IPC. He also gave a public notice notifying the public in general that he had agreed to purchase the tenancy rights and the business of M/s. Shah, Ratanji, Velji & Sons. The Respondent No.2-complainant has stated that by letter dated 13.12.1991 the accused No.1 had informed him that the partner Laxmi Savla, during her life time, had transferred the tenancy rights and handed over the possession of family business of M/s. Shah, Ratanji, Velji and Sons in favour of the Applicants herein.

5. The Respondent No.2-complainant has alleged that the accused Nos.1 and 2 had induced him to part with a sum of Rs.6 lakhs under a false representation of sale and transfer of the business. The Respondent No.2-complainant had stated that the Applicants herein were aware of the transaction dated 5.5.1988, despite which they entered into a transaction with the accused Nos.1 and 2 in respect of said business. The Respondent no.2- complainant therefore, filed a private complaint against the Applicants and the accused Nos.1 and 2 for the offences as stated above.

6. The learned Magistrate issued process against the Applicants and since the case was warrant triable, the learned Metropolitan Magistrate held enquiry before charge. By the impugned order dated 13.12.2002 the learned Metropolitan Magistrate dismissed the discharge application filed by the Applicants and ordered to frame charge for offences under section 406 and 420 of the IPC.

7. The Applicants challenged the said order in criminal revision application No.40 of 2003. It is pertinent to note that by an interlocutary order dated 6.9.2004 in the revision application filed by these Applicants and the other co-accused the learned Additional Sessions Judge held that the co-accused had no right, title or interest in running the business and/or to transfer the tenancy right and goodwill in respect of the said shop in respect of the Applicants herein. The learned Sessions Judge further held that the Applicant Nos.3 and 4 had no right to enter in the premises which was already conveyed to the complainant by operation of law. The learned Sessions Judge has further held that it is just and necessary to seal the premises and seize all the subsequent fraudulent documents for impounding. The learned Sessions Judge therefore, held that for deciding the said revision

application it is necessary to pass certain interlocutary orders and accordingly issued search warrant and directed the senior police inspector, D.B. Marg Police Station to search the residential premises of the Applicants and the other co-accused as well as to search the premises in dispute and to seize all the documents of transfer and title of shop No.403. The learned Sessions Judge also directed the Inspector to conduct an inventory of articles lying in the said shop and to physically remove any person found in the premises and seal the premises.

8. The Applicants filed a criminal Misc. Application No.633 of 2004 stating that they were in possession of the said premises and running the business transferred in their favour by virtue of an assignment deed dated 19.7.2002. The Applicants stated that in view of the order dated 6.9.2004 the police had physically dispossessed them from the suit premises. By order dated 10.9.2004 the learned Judge held that the Applicants cannot be considered to be bonafide purchasers. The learned Sessions Judge however, directed the inspector of police of D.B. Marg Police Station to return to the Applicants the stock in trade, articles, etc. and re-seal the premises. The learned Sessions Judge held that the averements made in the

application No.633 of 2004 disclosed that the Applicants have committed the second offence and directed the police to treat the Misc. Application No.633 of 2004 as FIR and register offence punishable under section 420 against the present Applicants and to investigate the same.

9. The Applicants herein had challenged the said orders dated 6.9.2004 and 10.9.2004 in Criminal Writ Petition No.1910 of 2004. By order dated 21.9.2004 this Court granted rule and stayed the operation of the impugned orders dated 6.9.2004 and 10.9.2004.

10. Subsequently, by order dated 28.9.2004, the learned Sessions Judge dismissed the revision application. The learned Sessions Judge held that by agreement dated 5.5.1988 the co-owners have already transferred all the rights in respect of the premises in favour of the complainant and as such they had no right to transfer the rights in respect of the said premises in favour of the Applicants. The learned Sessions Judge further held that the present Applicants have taken possession of the said premises despite knowing that it was already conveyed to the complainant by operation of law. The learned Magistrate therefore, held that theses Applicants have committed criminal tresspass and unlawfully entered the premises with intent to

cheat, intimidate, insult and annoy the Respondent No.2-complainant. The learned Sessions Judge further held that the equitable relief granted or refused by other courts do not affect the original rights of the Respondent No.2-complainant. The learned sessions Judge directed the Additional Chief Metropolitan Magistrate to frame additional charges against the Applicants for offences under sections 448 and 120B of the IPC. Being aggrieved by the said orders the Applicants have invoked the jurisdiction of this Court under section 482 of the Cr.P.C.

11. The learned counsel for the Applicants has submitted that the dispute between the Respondent No.2-complainant and accused Nos.1 and 2 is of civil nature and that no criminal offence is made out. She has further submitted that the Applicants herein are not in any manner involved in committing any crime. The learned counsel for the Applicants has submitted that the learned Sessions Judge has exceeded his jurisdiction in passing the order dated 6.9.2004 and 10.9.2004. She has further submitted that the averments made in the complaint do not disclose the essential ingredients of offence qua these Applicants. She therefore, claims that the continuation of proceedings against these Applicants would be abuse of process of law and hence,

the proceedings are required to be quashed qua these Applicants.

12. The learned counsel for the Respondent No.2-complainant has submitted that the Applicants were well aware that the Respondent No.2-complainant had entered into an agreement with the partners of M/s.Shah, Ratanji, Velji and Sons and that despite which they have got the said business and tenancy rights transferred in their favour. The learned counsel for the Respondent No.2-complainant therefore, claims that the complaint prima facie shows the involvement of the Applicants in commission of the crime and hence, the application is not maintainable.

13. I have perused the records and considered the submissions advanced by the learned counsel for the Applicants and the learned counsel for the Respondent No.2-complainant.

14. A Perusal of the complaint reveals that the Respondent No.2-complainant had entered into an agreement dated 5.5.1988 with the partners of M/s. Shah, Ratanji, Velji and Sons whereby the partners of M/s. Shah, Ratanji, Velji and Sons had agreed to transfer and assign the tenancy rights, business and goodwill of the business in favour of the Respondent No.2-complainant. The records reveal that

subsequently the said business and the tenancy rights in respect of the goodwill of M/s. Shah, Ratanji Velji and Sons had been transferred in favour of the Applicants herein. The agreement reveals that the Respondent No.2-complainant had paid to the partners Shri Kantilal Savla, Urmilaben and Laxmi Savla the amount of Rs.6 lakhs. The said agreement reveals that transaction was to be completed within a period of three months from the date of the said agreement.

15. The records reveal that subsequently by letter dated 13.12.1991 the accused No.2 informed the Respondent No.2-complainant that during the life time of partner Laxmiben Savla right, title, interest including tenancy rights and possession of M/s. Shah, Ratanji, Velji & Sons was assigned to the Applicants herein.

16. The Respondent No.2-complainant stated that the said assignment/transfer was in breach of the terms of the agreement dated 5.5.1988. On the basis of the said allegations charge is ordered to be framed against the present Applicants for committing offence under sections 406 and 420 of the IPC.

17. In **S.N. Palanitkar and Others Vs. State of Bihar and Another AIR 2001 SC 2960**, the Apex court while dealing with the

ingredients of criminal breach of trust and cheating, has observed thus:
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> *"9. The ingredients in order to constitute a criminal breach of trust are: (i) entrusting a person with property or with any dominion over property (ii) that person entrusted (a) dishonestly misappropriating or converting that property to his own use; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged, (ii) of any legal contract made, touching the discharge of such trust.*
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> *10. The ingredients of an offence of cheating are: (i) there should be fraudulent or dishonest inducement of a person by deceiving him, (ii)(a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and*
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> *(iii) in cases covered by (ii)(b), the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property."*

18. In the instant case, the averments in the complaint indicate that vide agreement dated 5.5.1988 the partners of M/s. Shah, Ratanji, Velji & Sons had agreed to transfer the business, goodwill and tenancy rights in favour of the Respondent No.2- complainant. Pursuant to the said agreement the Respondent No.2-complainant had paid to them a

sum of Rs.6 lakhs. The Respondent No.2-complainant has alleged that in breach of the said agreement, the partners of the said firm transferred the premises, business and goodwill in favour of the Applicants. The only allegation against the Applicants is that he has entered into the said transaction despite being aware of the previous agreement. The complaint does not disclose that the Applicants were entrusted with any property or that he had any dominion over the property and further that he had dishonestly misappropriated or converted that property to their own use.

19. It is also pertinent to note that the Applicants were not parties to the agreement dated 5.8.1988. It is not the case of the complainant that the Applicants had in any manner induced him to part with money or any property. There was no privy of contract between the Applicants and the Respondent No.2-complainant. The averments in the complaint merely indicate that the Applicants are the subsequent transferee. These averments even if are taken on its face value and are accepted to be true, do not disclose the core postulate of dishonest intention, inducement and deception, which is a sine qua non for attracting and fastening criminal liability. The learned Magistrate and the learned Additional Sessions Judge have therefore,

erred in dismissing the application for discharge and the revision application respectively. Since the acts alleged against the Applicants do not constitute offence even prima facie continuing the criminal proceeding against the Applicants will be, in my considered view, an abuse of process of the court.

20. In **S.N. Palanitkar and Others Vs. State of Bihar and Another** (supra) the Apex court while cautioning against issuing of process as an instrument at the hands of the private complainant as vendetta to harass the person reiterated the principles in **Punjab National Bank & Ors. Vs. Surendra Prasad Sinha**, [1993] Supp. (1) SCC 499. The Apex court has cautioned that the judicial process should not be an instrument of oppression or needless harassment. The Apex court has held that it is the responsibility and duty of the magistrate to find whether the concerned accused is legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. It is observed that at that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in

the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance.

21. In the instant case, the learned Magistrate failed to appreciate that the complaint does not on the face of it disclose the essential ingredient of cheating or breach of trust as against these Applicants. The learned Magistrate therefore, erred in dismissing the application for discharge. It is pertinent to note that the Applicants challenged the said order by filing the revision under section 397 of the Cr.P.C. In the case of **Amit Kapoor Vs. Ramesh Chander (2012) 9 SCC 460** the Apex Court has held as under :

> *"12. The jurisdiction of the Court under Section 397 can be exercised so as to examine the correctness, legality or proprietary of an order passed by the trial court or the inferior court, as the case may be. Though the section does not specifically use the expression 'prevent abuse of process of any court or otherwise to secure the ends of justice', the jurisdiction under Section 397 is a very limited one. The legality, proprietary or correctness of an order passed by a*

court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily."

22. In the instant case, the Applicants had challenged the order of dismissal of discharge application and consequent framing of charge. Hence in exercise of revisional powers under section 397 of the Cr.P.C. the court had powers to call for the records and examine whether the evidence recorded under section 244 Cr.P.C. made out prima facie case to frame the charge against the Applicants. A plain reading of the impugned orders reveals that the learned Additional Sessions Judge has not only dismissed the revision application but by way of interlocutory orders passed in the said revision application has suo moto issued search warrant for seizure of all the documents and all other articles lying in the said premises and further ordered to physically remove the persons found in the said premises and thereafter to lock and seal the said premises. The learned Additional Sessions Judge has also ordered to treat the application filed by the

Applicants for recall of the said order as FIR and directed the police to register an offence against them.

23. It is pertinent to note that the Respondent No.2-complainant had already filed a civil suit before this Court being Civil Suit No.575 of 1995 in respect of the said shop. The notice of motion taken out in the said civil suit for appointment of receiver was dismissed by this Court. Another notice of motion No.2086 of 1995 with prayers for receiver and for injunction was also dismissed by this Court. It was observed by this Court that despite knowing that the premises in question were transferred in favour of these Applicants in the month of December-1991, the Respondent No.2 had kept silent for over a period of four years, which would dis-entitle him for claiming equitable relief. Despite the said orders, the learned Additional Sessions Judge has virtually converted the said revision application into civil proceedings. The learned Sessions Judge has granted the relief which was rejected by this Court by observing that the equitable relief granted or refused by other courts do not affect the original rights of the complainant. To say the least the order dated 6.9.2004 is not only erroneous and illegal but is capricious exercise of power in breach of statutory provision resulting in miscarriage of justice. Hence, this is a

fit case to exercise the powers under section 482 of the Criminal Procedure Code to quash and set aside the order of framing of charge qua the Applicants. Similarly, the order dated 10.9.2004 directing the police to treat the application filed by the Applicants as FIR and to register an offence under section 420 of the IPC against the present Applicants is wholly arbitrary, perverse and violative of every principle of criminal law.

24. Under the circumstances, the impugned orders are unsustainable. Hence the application and the petition are allowed. The impugned orders dated 28.9.2004 and 13.11.2002 as well as orders dated 6.9.2004 and 10.9.2004 are quashed and set aside. Consequently, the Applicant Nos.1 and 2 stand discharged. Considering that the offence is of the year 1991 the learned Trial Court to dispose of the case as expeditiously as possible, in any event within a period of six months from the date of receipt of this order.

25. Rule is made absolute.

(ANUJA PRABHUDESSAI, J.)