

(1)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.224 OF 2016

1. Anita w/o Bhimashankar Dhule,
Age : 35 years, Occu. Business,
R/o Ranisawargaon, Taluka Gangakhed,
District Parbhani
 2. Bhimashankar s/o Ramlingappa Dhule,
Age : 45 years, Occ. Business,
R/o Ranisawargaon, Taluka Gangakhed,
District Parbhani
- ..PETITIONERS

VERSUS

1. The State of Maharashtra,
Through Police Station Incharge,
Police Station Pimpaldari
 2. Namdeo s/o Nagorao Ghalgir,
Age : 42 years, Occu. Business,
R/o Ranisawargaon, Taluka Gangakhed,
District Parbhani
- ..RESPONDENTS

Mr S.S. Gangakhedkar, Advocate for petitioners;
Mr A.R. Kale, Addl. Public Prosecutor for respondent no.1;
Mr N.,B. Khandare, Advocate for respondent no.2

CORAM : N.W. SAMBRE, J.

DATE : 13th April, 2016

ORAL ORDER :

The petitioners are accused in complaint cases, bearing Regular Criminal Case Nos.106 of 2010 and 107 of 2010, pending on the file of Judicial Magistrate First Class, Gangakhed, for offences punishable under

(2)

section 138 of the Negotiable Instruments Act and section 420 of the Indian Penal Code.

2. The learned Magistrate ordered issuance of process in the said matters, restricting for an offence punishable under section 138 of the Negotiable Instruments Act. Learned Magistrate, *prima facie*, has not issued any process for an offence punishable under section 420 of the Indian Penal Code.

3. It is thereafter, respondent no.2 – holder of cheque and original complainant filed another complaint case bearing Regular Criminal Case No.46 of 2013, alleging that the petitioners have committed offences punishable under sections 420, 311 read with section 34 of the Indian Penal Code, in which the learned Judicial Magistrate First Class, Gangakhed ordered dismissal of complaint on 1st January, 2014, which was subject-matter of Criminal Revision Application No.4 of 2014 at the behest of respondent no.2. The said revision came to be allowed by an order dated 25th February, 2015 and the learned Additional Sessions Judge, Gangakhed set aside the order dated 1st January, 2014, passed in Regular Criminal Case No.46 of 2013 and ordered issuance of process against the petitioners for offence punishable under section 420 of the Indian Penal Code. It is this order which is impugned in the present criminal writ petition.

(3)

4. Heard Mr Gangakhedkar, learned Counsel appearing on behalf of the petitioners and Mr Khandare, learned Counsel appearing on behalf of respondent no.2.

5. Mr Gangakhedkar would urge that once the respondent no.2 – complainant had come out with a case for an offence punishable under section 420 of the Indian Penal Code read with section 138 of the Negotiable Instruments Act in Regular Criminal Case Nos.106 and 107 of 2010 and the Magistrate had taken cognizance only for offence punishable under section 138 of the Negotiable Instruments Act by issuing process against the accused, the Court must draw a presumption that the petitioners are absolved of charge/offence under section 420 of the Indian Penal Code. According to him, it was the duty of respondent no.2 – complainant to invite findings, having prayed for issuance of process for an offence punishable under section 420 of the Indian Penal Code and in absence, respondent no.2 – complainant must suffer, as respondent was not diligent in exercising his powers. He would then invite attention of this Court to the judgment of the Apex Court, in the matter of **Sangeetaben Mahendrabhai Patel vs. State of Gujarat & anr.**, reported in **AIR 2012 SC 2844**, particularly paragraph 15 of the said judgment. According to him, this Court must draw an inference, in absence of Magistrate taking cognizance for offence punishable under section 420 of the Indian Penal Code, that the petitioners are discharged of offence punishable under section 420 of the Indian Penal Code.

(4)

6. While opposing the claim, Mr Khandare, learned Counsel appearing on behalf of respondent no.2 would urge that even if in the first complaint bearing Regular Criminal Case Nos.106 of 2010 and 107 of 2010, the claim for issuance of process under section 420 of the Indian Penal Code was also made along with section 138 of the Negotiable Instruments Act and the Magistrate having ordered issuance of process only for an offence punishable under section 138 of the Negotiable Instruments Act, the Court cannot infer or conclude that the petitioners-accused are absolved of the alleged offence under section 420 of the Indian Penal Code. He would then submit that neither any adjudication nor any findings are recorded by the Magistrate while issuing process restricting to offence under section 138. In the above background, as there is no adjudication *qua* commission of the offence under section 420 of the Indian Penal Code against the petitioners and no findings are recorded to that effect, it is always open for the respondent no.2 – complainant to file second complaint for the same cause.

7. With the assistance, I have perused the entire findings recorded by the Courts below.

8. In my opinion, the parameters as are required to be taken into account for an offence punishable under section 138 of the Negotiable Instruments Act are altogether different than the one for an offence punishable under section 420 of the Indian Penal Code. The difference that could be taken note of is, under the Negotiable Instruments Act there

(5)

is a presumption in favour of the holder of the cheque and against the accused, whereas for an offence punishable under section 420 of the Indian Penal Code, it is for the complainant to establish *mens rea* on the part of the accused, in the matter of commission of crime.

9. In the above background, if the claim as is sought to be put-forth by learned Counsel appearing on behalf of the petitioners is evaluated, it could easily be inferred from the record that the Magistrate while issuing process only for offence under section 138 of the Negotiable Instruments Act has not dwelt upon right of the complainant for issuance of process, also for offence under section 420, as there is no consideration whatsoever reflected in the order of issuance of process against the petitioners *qua* an offence punishable under section 420 of the Indian Penal Code.

10. Once, from the record it is not demonstrated or established before this Court that in Regular Criminal Case Nos.106 of 2010 and 107 of 2010, though a claim for issuance of process under section 156 (3) of the Code of Criminal Procedure for an offence punishable under section 420 of the Indian Penal Code was canvassed, adjudicated and findings is recorded, this Court will not be in a position to presume or draw an inference, that the learned Magistrate, while ordering issuance of process for offence under section 138 of the Negotiable Instruments Act had an occasion to adjudicate also the claim for issuance of process under section 420 of the Indian Penal Code.

(6)

11. It is then required to be noted that the learned Magistrate, while issuing process having not recorded any finding upon adjudication of right of the complainant *qua* a particular offence alleged, it is always open for such party to file another complaint for the same offence inviting adjudication and findings. I am fortified in my view, in the light of law laid down by the Apex Court, in the matter of Sangeetaben (*supra*). Paragraph 15 of the said judgment is worth referring to, which reads thus :-

“This Court has time and again explained the principle of issue estoppel in a criminal trial observing that where an issue of fact has been tried by a competent court on an earlier occasion and a finding has been recorded in favour of the accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the acceptance/reception of evidence to disturb the finding of fact when the accused is tried subsequently for a different offence. This rule is distinct from the doctrine of double jeopardy as it does not prevent the trial of any offence but only precludes the evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding has been recorded at an earlier criminal trial. Thus, the rule relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent court in a previous trial on a factual issue. (Vide: [Pritam Singh & Anr. v. The State of Punjab](#), AIR 1956 SC 415; [Manipur Administration, Manipur v. Thokchom Bira Singh](#), AIR 1965 SC 87; [Workmen of the Gujarat Electricity Board, Baroda v. Gujarat Electricity Board, Baroda](#), AIR 1970 SC 87; and [Bhanu Kumar Jain v. Archana Kumar & Anr.](#), AIR 2005 SC 626)”.

(7)

12. In view of above observations, in my opinion, no case for interference is made out. Criminal Writ Petition as such fails and stands dismissed.

(N.W. SAMBRE, J.)

amj