

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 3127 OF 2016

1. Rashami w/o Satish Khandvikar,
Age : 33 years, Occu. Household
2. Satish s/o Bhangwantrao Khandvikar,
Age : 42 years, Occu. Business

Both r/o Daulatabad, Tq. Khultabad,
District Aurangabad

APPLICANTS

VERSUS

1. The State of Maharashtra,
through Police Station Officer,
Sailu Police Station,
Tq. Sailu, District Parbhani
2. Ashok Narayan Dhage,
R/o Sarang Galli, Sailu,
Tq. Sailu, District Parbhani

RESPONDENTS

Mr. M.D. Narwadkar, Advocate for the applicants
Mr. A.R. Borulkar, A.P.P. for respondent No. 1
Mr. Anup R. Nikam, Advocate for respondent No. 2

CORAM : S.S. SHINDE AND
SANGITRAO S. PATIL, JJ.

JUDGMENT RESERVED ON : 3rd OCTOBER, 2016
JUDGMENT PRONOUNCED ON : 17th OCTOBER, 2016

JUDGMENT (PER : SANGITRAO S. PATIL, J.) :

Rule. Rule made returnable forthwith. With
the consent of the learned counsel for the parties,
heard finally.

2. The applicants have prayed for quashing of FIR No. 96 of 2016, dated 10th April, 2016, registered in Police Station, Sailu, District Parbhani against them for the offence punishable under section 420 read with section 34 of the Indian Penal Code (for short, "I.P.C.").

3. In short, it is the case of respondent No.2 (the informant) that he had agreed to purchase a plot bearing No. 7/1, having size 15 meters x 7.5 meters from the applicants for a consideration of Rs. 15,00,000/- (Rupees fifteen lakhs) under an agreement of sale dated 30th July, 2015. He had paid an amount of Rs. 9,00,000/- (Rupees nine lakhs) towards earnest and the balance amount or Rs. 6,00,000/- (Rupees six lakhs) was to be paid to the applicants on or before 30th October, 2015, whereon the sale deed was to be executed by the applicants in favour of respondent No.2. However, despite sending three notices to the applicants from 10th July, 2015 till the date of lodging the FIR i.e. 10th April, 2016, the applicants did not execute sale deed in respect of the above referred plot in favour of

respondent No.2. On the contrary, they sold it out to one Pralhad Kisanrao Kanhekar, resident of Jintur Colony, Sailu for a consideration of Rs.16,00,000/- (Rupees sixteen lakhs) and as such, they cheated him.

4. The learned counsel for the applicants submits that the contents from the FIR disclose purely a civil dispute, which cannot be allowed to be fought before the criminal court. He submits that mere breach of promise does not amount to cheating. He submits that the FIR does not at all contain the ingredients of the offence punishable under section 420 of the I.P.C. There is no mention that the applicants, since inception, had intention to cheat respondent No. 2 and therefore, induced him to enter into the alleged proposed sale transaction in respect of the above mentioned plot. He submits that no prima facie case is disclosed against the applicants for the offence of cheating. Therefore, relying on the judgments in the cases of ***Hari Prasad Chamaria Vs. Bishun Kumar Surekha AIR 1974 SC 301, S.W. Palanitkar Vs. State of Bihar AIR 2011 SC 2960*** and ***Dalip Kaur and others Vs. Jagnar Singh and another AIR 2009 SC 3191***, he submits that in the above circumstances,

continuation of the criminal proceedings against the applicants would be abuse of process of the Court. He, therefore, prays that the above numbered FIR may be quashed and set aside.

5. As against this, the learned counsel for respondent No. 2 submits that even after receiving the earnest amount of Rs. 9,00,000/- from respondent No. 2, the applicants did not execute the sale deed of the above numbered plot in his favour though he was ready to pay the balance amount of Rs. 6,00,000/- to them. He submits that the applicants further sold out the said plot to a third person for a consideration of Rs.16,00,000/- with a view to cheat respondent No. 2. He submits that even after entering into the agreement of sale in respect of the above numbered plot with respondent No.2 and receiving the substantial amount from him, they sold out the said plot to a third person by receiving the amount of Rs.1,00,000/- more than that was offered by respondent No.2, which would make the intention of the applicants clear to deceive respondent No.2 since inception. Relying on the judgment in the case of **Rajesh Bajaj Vs. State (N.C.T.) of Delhi AIR**

1999 SC 1216, he submits that it is not necessary that the FIR/complaint should state in so many words that the intention of the accused was dishonest or fraudulent and it is not necessary for the complainant/informant to reproduce in verbatim in the body of the complaint or FIR all the ingredients of the offence he is alleging. He further relies on the judgment in the case of **Medchl Chemicals and Pharma Private Limited Vs. Biological E. Limited AIR 2000 SC 1869** wherein it is held that when the complaint/FIR discloses the commission of offence of cheating and the ingredients of the offences punishable under sections 415, 418 and 420 of the I.P.C. are not totally absent on the basis of the allegations made in the complaint, whether or not the allegations in the complaint/FIR are otherwise correct, has to be decided on the basis of the evidence to be led at the trial in the complaint case but simply because of the fact that there is a remedy provided for breach of contract, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy available to the complainant/informant. He submits that the contents of the FIR lodged by respondent No. 2 prima facie disclose the ingredients of the offence of

cheating. He, therefore, prays that the application may be dismissed.

6. As mentioned in paragraph 10 of the judgment in the case of **S.W. Palanitikar** (supra), the ingredients of the offence of cheating are as under :-

- (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
- (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.

7. There is reference of the judgment in the case of **Hridaya Ranjan Prasad Verma and others Vs. State of Bihar and another 2000 (3) SC 604** in paragraph 11 of the said judgment wherein it is observed as under :-

"In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may

be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise, cannot be presumed."

8. If the contents of the FIR filed by respondent no.2 are tested on the touchstone given in the above referred judgment, it would prima facie be clear that the ingredients of the offence of cheating do not exist therein. There is absolutely no mention in the FIR that the applicants, since inception, had no intention to sell the above numbered plot to respondent no.2 and with a dishonest intention to cheat him, induced him to enter into an agreement of sale and part with the amount of Rs.9,00,000/-. The reading of the FIR would make out a pure civil dispute between the parties. Only because the applicants committed breach of promise to sell the above numbered plot to respondent no.2, in the absence of above referred ingredients of the offence of the

cheating, the applicants are not liable to be prosecuted for the said offence. The other two rulings cited on behalf of the applicants also are on the same line.

9. In the case of **Rajesh Bajaj** (supra), cited on behalf of respondent no.2, it has been mentioned in paragraph no.11 as under:-

"The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that respondent after receiving the goods have sold them to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities."

10. In the present case, there is absolutely nothing in the FIR to show that the applicants induced respondent no.2 to purchase the above numbered plot and on that pretext, made him to pay an amount of Rs.9,00,000/- to them. The contents of the FIR disclose a plain proposed transaction of sale/purchase of the above numbered plot. Therefore, the above cited rulings

would be of no help to respondent no.2.

11. In the case of **Medchl Chemicals and Pharma Private Limited** (supra), cited on behalf of respondent no.2, there is specific mention in paragraph no.18 of the judgment that on careful reading of the complaint, it cannot be said that it does not disclose the commission of an offence. It is further mentioned that the ingredients of the offences under Sections 415, 418 and 420 cannot be said to be totally absent on the basis of the allegations in the complaint. In the circumstances, it was held that simply because there is remedy provided for breach of contract, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy available to the appellant therein.

12. As stated above, in the present case, the ingredients of the offence of cheating are totally absent. Therefore, the above mentioned case would be of no help to respondent no.2 to support his contentions that the FIR lodged against the applicants for the offence of cheating is maintainable.

13. There are no sufficient grounds to proceed against the applicants for the offence of cheating. At the most, there is breach of promise on the part of the applicants. In the circumstances, continuation of criminal proceedings on the basis of the FIR lodged by respondent no.2 would be an abuse of process of law. We make it clear that the observations made above as to factual aspects of the case are prima facie and shall not influence any Court while deciding the case finally on merits. In the result, we allow the application with the following order:-

O R D E R

- (i) The Criminal Application is allowed.
- (ii) The FIR No.96 of 2016, dated 10th April, 2016, registered in Police Station, Sailu, District Parbhani against the applicants, for the offence punishable under section 420 read with section 34 of the Indian Penal Code, is quashed and set aside.

(iii) The Rule is made absolute in the above terms.

Sd/-
[**SANGITRAO S. PATIL**]
JUDGE

Sd/-
[**S.S. SHINDE**]
JUDGE

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