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

**WRIT PETITION NO. 221 OF 2006**

MANUBHAI CHHOTUBHAI DESAI ..PETITIONER.

Vs.

1.DEEPAKBHAI BHIKHUBHAI DESAI
AND ORS. ..RESPONDENTS.

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Mr M.M. Vashi, Senior Counsel a/w Aparna Deokar and S.M. Sharma i/bM.P. Vashi & Associates for petitioner.
Mr. Subhash Desai i/b M/s Maneksha And Sethna for respondent No.1.
Smt. P.H. Kantharia for respondent No.5.
Mr. Deepak Thakare APP for State.

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**CORAM: A.S. GADKARI, J.**

**DATED: 21st April 2016.**

**P.C.:**

**1** The present petition under Article 227 of the Constitution of India is filed by the the original complainant in Criminal Case No.170 of 2003 before the Court of Chief Judicial Magistrate, Dadra and Nagar Haveli, Silvassa challenging the Order dated 7.4.2004 passed below Exhibit-1, dismissing the said complaint under Section 203 of the Cr. P.C. and the Judgment and Order dated 6.1.2006 passed by the learned Sessions Judge, Dadra and Nagar Haveli, Silvassa in Criminal Revision No.1 of 2004, thereby dismissing the Revision and confirming the Order dated 7.4.2004 passed by the Chief Judicial Magistrate, Dadra and Nagar Haveli, Silvassa below Exhibit-1 in Criminal Case No.170 of 2003.

**2** Heard Mr. M.M. Vashi, the learned Senior Counsel for the petitioner, Mr. Subodh Desai, the learned counsel for the respondent No.1 and Smt. P.H. Kanthari the learned APP for respondent No.5 and also perused the entire record pertaining to the present petition.

**3** In the present petition, Rule was granted by an Order dated 11.9.2007. That the respondent No.2-Shri Batukbhai Sanjanwala is duly served with the notice of the Rule. The record reveals that, at the request of Petitioner, by an Order dated 25.8.2009 the respondent Nos.3 and 4 were permitted to be deleted from the array of the respondents and accordingly, necessary amendment was carried out by the petitioner. Thus, in the present petition, the respondent Nos.1,2 and 5 are the contesting respondents.

**4** The petitioner in his complaint i.e. Criminal Case No.170 of 2003 dated 27.5.2003 filed in the Court of Judicial Magistrate, Silvassa has contended that, the respondent no.1 is his cousin brother. That the father of the complainant was residing at Dadra. That the petitioner along with other family members were the owners of the land bearing survey no.215 admeasuring about

12 acres and 12 gunthas which is lying and situated at village Dadra in the Union Territory of Dadra and Nagar Haveli. That the respondent no.1 took active part in selling the said land. The petitioner was serving and residing at Mumbai. The petitioner and his father had full faith in the respondent no.1. The respondent no.1 took active part in selling the said property to M/s Parasurampuria Industries Ltd. The said agreement was entered into in the year 1991 and in the year 1994 a sale deed has been executed. That the petitioner initially received a sum of Rs.81,000/- and subsequently did not receive any amount.

**5** The petitioner further contended that the respondent no.1 in conspiracy and in connivance with the respondent no.2 who was then working as a Branch Manager of the Gujarat Industrial Co-Operative Bank, Silvassa, opened a fictitious account bearing No.1429 in the name of “Manharlal Chhaganlal Desai”/ “M.C. Desai”. That the balance payment arising out of the aforestated sale transaction of the said land was subsequently received by the respondent no.1. That the said amount was deposited in the said fictitious account no.1429 and the amounts were thereafter withdrawn by the respondent no.1. That the petitioner learnt about the said fraud played by the respondent no.1 somewhere in August 2000. The petitioner initially made an enquiry on 14.8.2000 with the Gujarat Industrial Co-Operative Bank when it was revealed that there was no account in the name of “M.C. Desai”. The petitioner further made enquiry with the respondent no.1 to which the respondent no.1 confessed about receiving the amount of Rs.7 lacs from M/s Parasurampuria Industries Ltd. depositing of the said cheaques in the name of “M.C.Desai” in the said account and withdrawal of the said amount. The petitioner with a view to protect the reputation of the family and that the respondent no.1 being a very close relative, initially thought to codone the alleged criminal acts of the respondent no.1. The respondent no.1 thereafter handed over two post-dated cheques each amounting to Rs.3,50,000/- on 14.2.2001 to the petitioner. The said cheques were dishonoured when presented for realisation. The petitioner however realised that the respondent no.1 had also filed an appeal with the Income-Tax authority in the name of the petitioner denoting him as the “Karta” of the joint Hindu family and also signed the same in the name of the petitioner. The petitioner therefore again made an enquiry with the respondent no.1 to which the respondent no.1 confessed that he received a total amount of Rs.22 lacs for and on behalf of the petitioner and the said cheques were deposited in the account which was standing in the name of “M.C. Desai”.

**6** It is the further case of petitioner that the respondent no.1 thereafter executed an indemnity bond dated 22.11.2002 and an affidavit admitting the guilt on the same date i.e. 22.11.2002. The petitioner has contended that he subsequently addressed a notice dated 22.4.2003 to the Gujarat Industrial Co-Operative Bank calling upon it to disclose the name of the officer who accepted the identification of the accused no.1 for “M.C. Desai” and attested his identification, upon which the said bank disclosed the name of the respondent no.2 as the concerned person.

Thus, the petitioner precisely contended that the land belonging to the joint family bearing survey no.215 lying and situate at village Dadra was sold by the respondent no.1 and the proceeds of the said sale transaction were deposited in a fictitious account bearing no.1429 with the Gujarat Industrial Co-Operative Bank and the said amounts were subsequently appropriated by the respondent no.1 in conspiracy with the respondent no.2 for his own benefit. The petitioner therefore prayed in the said complaint that the accused be tried for the offences punishable under Section 406, 409, 465, 120-B read with 34, 114 of the Indian Penal Code.

**7** The record reveals that after receipt of the said complainant, the verification statements of the complainant as contemplated under Section 200 of the Cr. P.C. was recorded by the Trial Court on 31.5.2003 and an Order under Section 202 of Cr. P.C. was passed on 6.6.2003. That the Silvassa Police Station submitted a report dated 5.2.2004 under Section 202 of Cr. P.C. It is to be noted here that, in the said report it is mentioned that there was a delay on behalf of the petitioner of about nine years in approaching the Court, that there is no substance in the complainant, that the petitioner had received a notice from the Income-Tax department and subsequently after lodgment of the first complaint, the petitioner settled the matter with the respondent no.1 on 14.2.2001 and accepted two cheques amounting to Rs.7 lacs, therefore the complaint of the petitioner has no substance in it.

**8** The learned Trial Court after hearing the petitioner and after perusing the report submitted by the police dated 5.2.2004 under Section 202 of Cr. P.C., was pleased to dismiss the said complaint under Section 203 of Cr. P.C. by its Order passed below Exhibit-1 dated 7.4.2004. The learned Trial Court while dismissing the complaint has held that, there was inordinate delay of about nine years in filing the said complaint and that the complainant though was aware of the fact that the respondent nos.1 and 2 have committed the offence had made an effort to get the matter compromised and in furtherance of the said compromise accepted two cheques each of Rs.3,50,000/- from the respondent no.1 and condoned the offence committed by the respondent no.1. The learned Trial Court has categorically held that the petitioner had filed the said complaint after a lapse of about nine years and therefore the complaint itself was time-barred.

**9** The petitioner feeling aggrieved by the said Order dated 7.4.2004 passed by the Trial Court thereby dismissing his complaint under Section 203 of Cr. P.C., preferred a Criminal Revision Application No.1 of 2004 in the Sessions Court, Dadra and Nagar Haveli, Silvassa. The learned Sessions Judge, Dadra and Nagar Haveli by its Order dated 6.1.2006 was pleased to dismiss the said revision, predominantly on the ground of unexplained delay of around nine years. It appears from the Judgment and Order dated 6.1.2006 passed by the Revisional Court that the said Court has taken into consideration the date of sale deed i.e. 26.8.1994 as the date to calculate the period of limitation and has reached the conclusion that there was an inordinate delay of about nine years and therefore the complaint suffers from delay and latches.

The petitioner has therefore impugned the Order dated 7.4. 2004 passed below Exhibit-1 by the learned Trial Court and Judgment and Order dated 6.1.2006 passed by the Revisional Court in the present petition as stated hereinabove.

**10** Mr. Vashi, the learned senior counsel appearing for the petitioner submitted that the police in its report dated 5.2.2004 filed under Section 202 of Cr. P.C. have not taken into consideration the statements of the witness namely, Pravinsinh Solanki, Shri V.N. Joshi, the next Branch Manager and the statement of the respondent no.2 in its proper perspective. That the learned Trial Court also did not give proper consideration to the said statements which clearly makes out a case for issuance of process against the respondent nos.1 and 2. That the said witnesses have categorically stated that an account bearing no.1429 was opened in the name of “M.C. Desai” to which the respondent no.1 is an identifying witness. He further submitted that with a view to protect the reputation of the family and also with a view to condone the misdeeds of the respondent no.1, the petitioner did arrive at a settlement with the respondent no.1 after his lodging of the first complaint with the police in the month of January 2001. He further submitted that both the Courts below have erroneously held the date of sale deed i.e. 26.8.1994 as the date from which the limitation to file the complaint begins. That the petitioner came to know about the criminal acts of the respondent nos.1 and 2 initially in the month of August 2000 and therefore he lodged the first complaint in the month of January 2001 with the police. That after receipt of a notice from the Income-Tax department on 18.10.2002, the doubt of the petitioner about the commission of offence by the respondent nos.1 and 2 was reinforced and therefore the petitioner filed the present complaint on 27.5.2003. He further submitted that in the agreement for sale dated 1.7.1991 an amount of Rs.81,000/- was shown to have been received by the petitioner, however in the sale deed dated 26.8.1994 there is no reference of agreement dated 1.7.1991 and the receipt of amount of Rs.81,000/- by the petitioner. That the respondent no.1 with malafide intention did not disclose the true and correct fact to the Parasrampuria Industries and has defalcated the entire amount received by him from the said transaction by opening fictitious account in the name of "M.C. Desai". He further submitted that the affidavit dated 26.12.2006 filed by the Chief of Police, Dadra and Nagar Haveli in Criminal Writ Petitiion No.2358 of 2005 further supports the contention of the petitioner and clearly makes out a case for issuance of process. He therefore prayed that the Orders passed by the Courts below may be set aside and the present writ petition may be allowed.

**11** Mr. Desai, the learned counsel appearing for the respondent no.1, submitted that the respondent no.1 has filed a detailed affidavit dated 28.4.2006 opposing the petition. He further submitted that the alleged Indemnity Bond and affidavit admitting the guilt by the respondent no.1, both dated 22.11.2002 were obtained under duress and coercion by the petitioner from the respondent no.1 and therefore the respondent No.1 immediately affirmed a subsequent affidavit on the same day i.e. on 22.11.2002 thereby retracting from the contents of the earlier affidavit and Indemnity Bond and/or resiling from the said two documents. He submitted that after taking into consideration the entire material available on record, there are no chances of conviction and it will not be justifiable to issue process against the respondent nos.1 and 2. He submitted that as a matter of fact the father of the petitioner had opened the alleged account bearing no.1429 with the Gujarat Industrial Co-Operate Bank and for the same the respondent no.1 cannot be held guilty. He therefore prayed that the present petition being dehors of any merits be dismissed.

**12** Smt. P.H. Kantharia, the learned Special Public Prosecutor for respondent No.5, The Administrator, Union Territory of Dadra and Nagar Haveli, Silvassa pointed out the affidavit filed by the Chief of Police, Dadra and Nagar Haveli, in Criminal Writ Petition No.2358 of 2015 and submitted that the police have properly conducted the enquiry and submitted that appropriate orders in the interest of justice may be passed.

**13** At the outset it is to be noted here that, both the Courts below have held that there is an inordinate delay of approximately nine years in filing the complaint. It appears from the record that the Courts below have taken into consideration the date of sale deed i.e. 26.8.1994 as the date to count the start of limitation. The complaint is filed on 27.5.2003.The Revisional Court has further held that, the petitioner came to know about the alleged commission of offence in the month of August 2000 and there is delay of about two years and nine months in filing the complaint on 27.5.2003. It is to be noted here that both the Courts below have incorrectly reckoned the date of sale deed i.e. 26.8.1994 as the date of occurrence of the offence and not the actual date or month on which the petitioner came to know about the alleged occurrence of offence. In my considered view, the period of limitation if at all, is to be calculated, same has to be calculated from August 2000 and not prior to it. Once it is held that the date to be reckoned for the purpose of limitation as August 2000, as per the record it is clear that the complaint is filed within a period of three years from the said date. Even otherwise, the provisions of Section 468 of Cr. P.C. are not applicable in the present case, as the offence alleged against the respondent nos.1 and 2 is a cognizable and non-bailable offence and for which sentence for more than three years is prescribed under the law. Thus, according to me the finding recorded by the Courts below with respect to delay and latches is not correct and proper.

**14** The record further discloses that as the police in its report dated 5.2.2004 did not take into consideration the statements of Pravinsinh Solanki and Shri Vasantbhai Joshi and other related aspects pertaining to the investigation/ enquiry of the present crime, the petitioner had filed a criminal Writ Petition no.2358 of 2005 in this Court for further investigation. In the said Writ Petition, Shri Rajesh Deo, Chief of Police, Dadra and Nagar Haveli had filed a detailed affidavit dated 26.4.2006. In paragraphs- (v), (vii) and (xiv) of the said affidavit it is stated as under:---

(v) Account No.1429 with Guj.Ind.Co. Bank was thoroughly enquired into. This bank account was opened on 26.08.1991 in the name of 'Manharlal Chhaganlal Desai and Shri Deepak B. Desai had introuced this 'Manharlal Chhaganlal Desai' to the bank. The signature of Deepakbhai Desai is present on the reverse side of the specimen signature card.

Deepak Desai states that the father of the petitioner told him to introduce this 'Manharlal Chhaganlal Desai' to the bank. The petitioner's father is no more, hence this could not be confirmed. The bank officials have stated that the petitioner's father Shri Jayantbhai Chhotubhai Desai was present in the bank at the time of opening this account. On cross checking Shri Batukbhai Sanjanwala, Junior Officer of the bank has however admitted that prior to 26.08.1991 he had never seen the petitioner's father, but insisted that he was present in the bank at the time of opening the account.

(vii) In the bank records of account no.1429 for the period 1991-94 are not available, only the ledger is available. The list of cheques issued by the Parasurampuria Industries and the ledger of account No.1429 has been tallied and eight cheques of similar values as issued by Parasurampuria Industries have been deposited in this account. The dates of issuing of these cheques and their being deposited in the bank also correspond so much so that one cheques of valaue Rs.1,81,375/- was issued on 25.08.1994 and a cheques of exactly the same amount has been credited in this account on 30.08.1994. It can be concluded on circumstances that one part of the payments made by Parasurampuria Industries was deposited in this account and subsequently the cash was withdrawn.

(xiv) …... Hence in a way no wrongful loss was caused to anybody, despite the fact that moire than 13 lacs rupees was diverted in the fradulent account and withdrawn in cash.

The enquiry has suffered from certain shortcoming as the bank records for the period of enquiry is not available and most importantly the father of the petitioner who was his power attorney holder and also the most important protagonist in this transaction has died."

**15** Thus, the conclusions of the equiry conducted by the said Chief of Police as reproduced hereinabove would further reinforce the contention of the petitioner that the respondent nos.1 and 2 have committed the offence as alleged against them. It is to be noted here that, after filing of the aforesaid affidavit by the Chief of Police, Dadra and Nagar Haveli the petitioner withdrew the said petition. From the aforestated conclusion drawn by the Chief of Police, a clear case for issuance of process for the offence mentioned in the complaint is made out. The respondent no.1 alleged to have opened fictitious account with the said Gujarat Industrial Co-Operate Bank in the in the name of “Manharlal Chhaganlal Desai”/ “M.C. Desai” and the respondent no.2 has facilitated the respondent no.1 in initially opening the said account and subsequently siphoning off the amount deposited in the said account. Thus a clear prima facie case of issuance of process against the respondent nos.1 and 2 has been made out by the petitioner.

**16** As far the contention of the learned counsel for the respondent no.1 that, in view of the material available on record, there are no chances of conviction of the respondent nos.1 and 2 and there is no material at all to justify the issuance of process is concerned, in view of the reproduction of relevant paragraphs from the affidavit of the Chief of Police, Dadra and Nagar Haveli I am of the considered opinion that the said submission is without any substance. Even otherwise it is the settled position of law that, for the issuance of process only a prima facie case as made out from the complaint and supporting documents has to be seen and the Court is not suppose to conduct a mini trial or evaluate the evidence on record at that stage. This Court is therefor of the considered view that both Courts below have committed error in dismissing the complaint filed by the petitioner under Section 203 of Cr. P.C.

**17** In view of the above, the present petition deserves to be allowed. Hence the following.

**(i)** The Order dated 7.4.2004 passed below Exhibit-1 in Criminal Case No.170 of 2003 by the learned Chief Judicial Magistrate, Dadra and Nagar Haveli, Silvassa and the Judgment and Order dated 6.1.2006 in Criminal Revision No.1 of 2004 passed by the Sessions Judge, Dadra and Nagar Haveli, Silvassa are hereby quashed and set aside.

**(ii)** The Trial Court is directed to issue process under Sections 406, 409, 465, 120-B read with Section 34 and 114 of the Indian Penal Code against the respondents/ accused nos.1 and 2 mentioned in the complaint and to decide the said complaint as expeditiously as possible and preferably within a period of one year from the date of receipt of the present order.

**(iii)** The Writ Petition is allowed in the aforesaid terms.

**(A.S. GADKARI,J.)**