

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 586 OF 2014

Mr. Ashok Kondiram Mane & ors. ... Petitioners.
Versus
Dadji Krishna Patil & anr. ... Respondents.

Mr. Surel S. Shah, advocate for petitioners.

Mr. Umesh Mankapure, advocate for respondent No. 1.

Ms. A.T. Jhaveri, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J
DATE : AUGUST 1, 2016

P.C.:

1 Heard the learned Counsel for the Petitioners and the learned Counsel for the respondent. Perused the papers.

2 Rule. Rule made returnable forthwith with the consent of the parties.

3 The Petitioners herein question correctness and legality of the
order dated 8/1/2014 passed by the Additional Sessions Judge,
Jaisingpur in Criminal Revision Application No. 11 of 2012.

4 The facts of the case are as follows :

The original complainant has filed a complaint before the JMFC, Jaisingpur against the Petitioner, which was registered as R.C.C. No. 25 of 2013. The complainant in the said complaint had alleged that he was a member of Chatrapati Shahu Cooperative Industrial Estate at Shirol, District Kolhapur. That he was allotted Gat No. 436 Plot No. 29 admeasuring 272.50 sq. mtrs. The letter of allotment was pursuant to the resolution dated 31st August, 1997 and he was put into possession of the said block on 11/9/1997. At this stage, it is pertinent to note that the complainant had not carried out any constructions on the said plot for almost 10 years.

5 In March, 2008, the Society has sent demand notice for Rs. 14,541/- towards lease of the plot, N.A. Taxes and interest. The

complainant had issued a demand draft dated 28th March, 2008 and the same was encashed by the said society. According to the complainant, the Society has terminated his membership on 31/1/2008 and had allotted the said plot to petitioner No. 16. According to the complainant, there was breach of trust and the complainant was cheated. In view of this, the complainant had prayed for issuance of process under Section 406, 409, 420 read with Section 34 of the Indian Penal Code.

6 The verification statement was recorded on 18/11/2010. The learned Magistrate by an order dated 13th March, 2012 was pleased to dismiss the complaint by assigning specific reason for the same. The learned Magistrate had followed the due procedure of law. A report under Section 202 of the Code of Criminal Procedure, 1973 was called for. The learned Magistrate has perused the documents filed alongwith report at Exh. 4, affidavit of complainant and other relevant documents. The learned Magistrate has further considered the fact that despite several notices issued by the Society, the complainant had

not started his business nor had undertaken any constructions on the allotted block. The complainant had not paid the necessary charges and therefore, the Society in accordance with its by laws, has proceeded to pass a resolution and cancelled the allotment. The learned Magistrate had also taken into consideration the fact that the complainant had deposited an amount of Rs. 14,541/-.

7 The learned Magistrate had taken into consideration by-laws of the society, wherein the society was permitted to cancel the allotment in the eventuality that the business is not commenced within 6 months from the date of the allotment. The resolution passed by the society was challenged before the Cooperative Court. The allotment of the plot to the opponent No. 16 was also under challenge and therefore, the learned Magistrate had rightly construed that the complainant has taken recourse to the appropriate proceedings permitted under the law, which would clearly indicate that the dispute between the member and the society was of civil nature, which would be decided by the Cooperative Court. The learned

Magistrate had rightly considered that despite issuance of notice for almost 10 years, the complainant had not complied with the demand notice and therefore, his expulsion was in accordance with law and hence, the complaint was dismissed under Section 203 of the Code of Criminal Procedure, 1973.

8 The complainant being aggrieved by the said order had filed Revision Application No. 11 of 2012 before the Sessions Court. The learned Sessions Court had passed the following order :

“ORDER

- (1) The revision petition is hereby allowed.
- (2) The order passed by the learned Judicial Magistrate First Class, Jaysingpur in Misc. Cri. Application No. 161/2012 is hereby set aside.
- (3) The process is hereby issued u/s. 406, 409, 420 r/w. 34 of Indian Penal Code against the proposed opponent Nos. 2 to 17.
- (4) Inform the Lower Court accordingly.”

9 The learned Counsel for the Petitioner rightly submits that the learned Revisional Court in Revisional jurisdiction could not have

issued process under section 406, 409, 420 r/w. 34 of the Indian Penal Code and in fact, an order of issuance of process is to be necessarily passed by the Court of the first instance i.e. the Judicial Magistrate First Class before whom the complaint was filed. In fact, the learned Magistrate has assigned justifiable reasons for dismissing the complaint. This Court by an order 14/2/2014 had granted interim relief by staying clause 3 of the operative order dated 8/1/2014.

10 The learned Counsel for the Petitioners submits that after filing of the complaint, the issue in respect of expulsion of the complainant as a member of the society was taken into consideration by the Cooperative Court. The complainant has simultaneously filed a dispute under Section 91 of the Maharashtra Cooperative Societies Act, 1960. The Cooperative Court had specifically observed that-

“it is necessary to see whether the disputant has shown compliance of his obligation in respect of membership of the society and the suit property. From the admitted position, it is crystal clear that, till the year 2008 the disputant has not

started any business in the suit property. It is pertinent to note that society has filed various notices on record sent to the disputant, which are particularly alongwith the list of documents dt. 5-01-2011 of opponent No. 1 dt. 05-01-2011 at Sr. No. 9, 11, 12, 13, 15.”

It is also observed that -

“Admittedly the disputant has not shown compliance of the construction of the building on the plot/suit property. So prima facie I do not find bonafides of the disputant in respect of discharge his obligation as per the bye-laws.... Interim application filed by the disputant was rejected.”

11 Revisional Court has appreciated this aspect by observing that -

“Being a Revisional Court having a limited powers and only to see whether the learned lower Court committed any error or not. After gone through the record it indicates that the block No. 29 was allowed to the petitioner as per the resolution No. 5 dtd. 31.8.1997 and he received the actual possession. It is needless to say that the petitioner required the lease deed to start the business over the said block. The record indicates that the petitioner demanded to the Co-operative Society and his

office bearers to execute the lease deed when he is unable to start the business without the said lease deed. The record further indicates that the Co-operative Society and its office bearers not executed any lease deed and hence the petitioner not succeeded to start his business in the allotted block No. 29.”

12 It appears that this issue was not raised in the dispute before the Cooperative Court and for the first time it was raised in the criminal proceedings that too in revision application.

13 The learned Counsel appearing for the respondent submits that the complainant was demanding lease deed from the society for almost 10 years. However, the same was not given and therefore, he could not start the construction. It is pertinent to note that in the complaint there is omnibus averment, which says that the lease deed was not given and therefore, he could not start construction. This Court cannot be oblivious of the fact that element of cheating has to be present at the inception of the transaction. There was nothing on record to show that the demand notice was made for lease deed,

which was for the first time considered by the revisional court. That the record indicates that there was demand by the petitioner for the lease deed. In a criminal proceedings, it is incumbent upon the complainant to make out a specific case of cheating. As on today, there is a finding recorded by the Cooperative Court that the Society had followed the rules of Bye-Laws and therefore, it appeared to be a civil dispute. It is further pertinent to note that the membership was cancelled in the year 2008 and the complaint was filed in the year 2010. Revisional Court ought not to have considered the merits of the matter. The revisional court has observed that-

“irrespective of the civil rights of the parties, it was duty of the learned lower Court to see only whether prima facie case is made out or not or there is sufficient ground to issue process as per the case of the petitioner or not. The report of the police authority is not binding on the learned Judicial Magistrate First Class.”

14 In fact, the learned Magistrate had rightly called for a report and had made an attempt to enquire into the allegations. It was incumbent upon the learned Magistrate to record a subjective

satisfaction that a case is made out for issuance of process. From the order passed by the learned Magistrate, it cannot be said that there was no application of mind. The report given by the police was not relied upon but was considered and only after recording verification, the learned Magistrate had dismissed the complaint. In any case, the Revisional Court could not have issued process. Taking all these aspects into consideration, the petition deserves to be allowed. Interim relief granted vide order dated 14/2/2014 stands confirmed.

15 Rule is made absolute in the above terms.

16 The observations made hereinabove shall not be taken into consideration while deciding any other civil dispute pending between parties. All contentions are kept open.

(SMT. SADHANA S. JADHAV,J)