IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.901 OF 2014

Jagdish Dolabhai Patel & Anr. … Applicants
Vs.
The State of Maharashtra & Anr. … Respondents

Mr. Subodh Desai, Adv. a/w. Mr. Prakash Shinde, Adv. a/w. Chinmayee Ghag, Adv. i/b. MDP & Partners for the applicants.
Mr. J.H. Ramugade, APP for the State.
Mr. Sanjeev Sawant, Adv. a/w. Mr. B.K. Barve, Adv. a/w. Ms. Archana Lad, Adv. a/w. Ms. Shial Tanpure, Adv. a/w. Sandip Barve, Adv. a/w. Ajit Salunke, Adv. i/b. B.K. Barve & Co. for the respondent No.2.

CORAM : SMT ANUJA PRABHUDESSAI, J.

DATE : 15th February, 2016.

P.C. :

1. This is an application under section 482 of the Cr.P.C., directed against order dated 18th July, 2014 whereby the learned Sessions Judge dismissed the Cri. Revision Application No.633 of 2013 preferred by the Applicants (accused Nos.5 and7), challenging the order dated 29th April, 2013 passed in C.C. No.3829/SW/2013 for issuance of process under sections 406 and 420 r/w. 34 of the IPC.

The brief facts necessary to decide this application are as under :

2. The respondent No.2 is a company incorporated under the

Companies Act, 1956. The Applicants are the Directors of M/s. GSL (India) Ltd (hereinafter referred to as accused No.1-company). The said company is promoted by Mr. R.C. Badrodia (orignal accused No.4) and Gujarat State Industrial Development Corporation, as a spinning unit with a capacity of 17472 spindles, for the manufacture of synthetic blended yarn.

3. The accused No.1-company vide letter dated 19th July, 1994 had applied to the Respondent No.2-GIC Housing Finance Limited for a Line of Credit to the extent of Rs.200 lakhs by way of Housing Loan for its employees under its “Housing Loan Scheme”. The said loan was to be repaid within 15 years. The respondent No.2 company sanctioned a facility by way of a line of credit to the extent of Rs.200 lakhs to the accused No.1-Company. The accused No.1- M/s. GSL (India) Limited executed loan agreement dated 15th September, 1994 and agreed to repay the loan in 120 equal installments over a period of 10 years. It is alleged that the accused No.1 company also agreed to clear the loan by executing equitable mortgage in favour of the complainant by depositing of original title deeds in respect of each dwelling unit, which were to be acquired by their employees at material time.

4. The Respondent No.2-complainant claims that it had

disbursed Rs.200 lakhs on 15th September, 1994 to accused No.1-M/s. GSL (India) Ltd. The company executed a loan agreement dated 15.9.2014 and agreed that the said loan would be secured by way of an equitable mortgage in favour of the Respondent No.2, by deposit of the original title deeds in respect of each of swelling unit which were to be acquired by their employees at the material time. The accused No.1-M/s. GSL (India) Ltd. again applied for an additional facility under Line of Credit to the extent of Rs.150 lakhs and the said amount was disbursed by Respondent No.2 on 31.1.1995. The Company executed a loan agreement dated 27th January, 1995 and further agreed that the said loan facility would be secured by creation of equitable mortgage by the deposit of the original title deeds of each dwelling units acquired by its employees.

5. The complainant has alleged that the accused No.1 company had not utilized the loan amount for the purpose for which it was sanctioned. Hence by letter dated 19th July, 1995, Accused No.1 company was called upon to repay loan amount along with the interest by 31st August, 1995. It is alleged that after protracted negotiation and series of correspondence, the accused No.1 company and its directors were permitted to repay the loan in installments. Since the accused No.1 company did not repay the loan, a recall notice dated 26th

February, 1997 was issued to the accused No.1 company and to the guarantors for repayment of outstanding dues.

6. Subsequently on 21.3.2001 pursuant to the application filed by the company, before the Board for Industrial & Financial Reconstruction (for short "BIFR") the said company was declared a sick company. A Memorandum of Understanding (MOU) dated 16th June, 2003 was entered between the complainant-M/s. GIC Housing Finance Ltd., accused No.1-M/s. GSL (India) Ltd. and one M/s. Melodian Exports Ltd. (for short M/s. Melodian) where under M/s. Melodian agreed to repay to the complainant an amount of Rs.20 lakhs on behalf of accused No.1-M/s. GSL(India) Ltd. in discharge of liability under the dishonoured cheque.

7. The reference before BIFR was declared to be abated on 2nd March, 2010. By demand notice dated 21st February, 2012, the complainant company called upon accused No.1 company to repay the agreed sum of Rs.12,10,88,567/- being outstanding dues under the said loan as on 31st January, 2011. By reply dated 22nd February, 2011 Accused No.1 company informed the complainant company that the entire liability of the accused company has to be paid by the auction purchaser who has purchased the properties of accused No.1 company

in an auction conducted under SARFAESI Act, 2002. Having received the said letter, the complainant lodged a complaint dated 7.11.2012 against the company and its Directors. The complainant- M/s. GIS Housing Finance Ltd. claims that the accused No.1 and its directors had availed loan by misrepresentation and inducement. The complainant claimed that all the accused persons were involved in acts of cheating and criminal breach of trust. Hence the complainant company lodged the complaint against accused No.1 company and its Directors for offences punishable under Sections 406 and 420 r/w 34 of the IPC.

8. By impugned order 29th April, 2013, the learned Magistrate issued process against the accused No.1 and its Directors who are arrayed as accused Nos.2 to 8 for offences punishable under Sections 406 and 420 r/w. 34 of the IPC. The applicants herein being accused Nos.5 & 7 respectively challenged the said order in Criminal Revision No.633 of 2013. The said revision was dismissed by Addl. Sessions Judge, Gr. Mumbai by order dated 18th July, 2014. Aggrieved by said orders the applicants herein have invoked the jurisdiction of this Court under Section 482 of Cr.P.C.

9. Mr. Subodh Desai, the learned counsel for the applicants has submitted that the applicant No.2 who is accused No.7 became the

director of Accused No.1 company on 16th November, 2005 whereas the applicant No.1 who is accused No.5 become the director of accused No.1 company on 5th April, 2006. Mr. Desai further submitted that the applicants were not involved in any manner with accused No.1-M/s GSL (India) Ltd. He has further submitted that the applicants herein were not incharge of the company and were not responsible for company as on the date the offence was committed. Consequently they are not vicariously liable for the offence committed by the Accused No.1 company. The learned counsel Mr. Desai further submitted that the accused No.1 company was declared as a sick unit on 21st March, 2001. The reference was made to BIFR on 3rd February, 2010 and subsequently Assets Reconstruction Company Ltd. (ARCIL) had issued a notice under Section 13 (2) of SARFESI Act had given a public notice dated 2nd July, 2011 and issued sale certificate in favour of the auction purchaser. He has submitted that the complaint does not prima facie disclose the essential ingredients of Section 405 or 415 as against the present applicants. Hence Mr. Desai claims that the learned Magistrate has erred in issuing process against the present applicants and the learned Sessions Judge has also erred in rejecting the revision application.

10. Mr. Sawant, the learned counsel for the respondent No.2 has

submitted that the accused No.1 company had availed loan by executing loan agreement dated 15th September, 1994 and had agreed to repay the said loan amount within the period stipulated in the said agreement. He has further submitted that accused No.1 company did not utilize the said loan amount for the purpose for which it was sanctioned. He has further submitted that the applicants being accused No.5 & 7 were aware of this fact and despite which they sold the assets in favour of the third party and thereby committed the offence of cheating and criminal breach of trust. Mr. Sawant has further submitted that the complaint prima facie disclosed the essential ingredients of the alleged offence. He has submitted that the defence, if any, will have to be established on merits and cannot be considered at this stage. In support of this contention he has relied upon the decisions of the Apex Court in the cases of ***P.S. Meherhomji Vs. K.T. Vijay Kumar & Ors., 2014 ALL MR (Cri) 4494 (S.C.), Shivjee Singh Vs. Nagendra Tiwary & Ors., AIR 2010 Supreme Court 2261, Mahavir Prashad Gupta & Anr. Vs. The State of National Capital Territory of Delhi & Ors., (2000) 8 Supreme Court Case 115 and The State of M.P Vs. Surendra Kori, MANU/SC/0832/2012***.

11. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties.

12. The aforesaid Applicants have challenged the order of issuance of process under sections 406 and 420 of the IPC. It may be mentioned that the offence of criminal breach of trust, as defined under section 405 of the IPC, necessarily involves entrustment of the property or dominion over the property and dishonest misappropriation or conversion of the property by the agent to his own use or dishonest use or disposal of the property in violation of mandate of the law or dishonest use or disposal of the property in land in terms of any illegal contract.

13. Similarly, in order to constitute an offence of cheating, there must be deception and fraudulent or dishonest intention to induce the person so deceived to part with his property. It is well settled that intention to deceive should be at the inception and a mere failure to keep the promise cannot be an act of cheating. The averments made in the complaint as well as documents produced in support thereof prima facie indicate that Accused No.1-M/s. GSL(India) Ltd. had availed loan from the complainant company for the purpose of construction of flats for their employees and had agreed to repay the loan in 15 years. The complaint prima facie indicates that the accused No.1 company had not repaid the said loan and hence vide letter dated 19th July, 1995, the

complainant company had called upon the accused No.1 company to repay the dues along with the interest accrued thereon. Despite the negotiations held between the complainant and accused No.1 and despite granting time to the accused no.1-Company to repay loan amount by installments, accused No.1 company did not repay the loan amount. Hence the complainant company issued recall notice dated 26th February, 1997 to accused No.1-company.

14. The applicants, who are the Directors of the accused No.1-company had neither made any representation on behalf of the accused No.1-company either for availing the loan or for repayment of the loan. These applicants were not on the board of Directors of the said accused No.1-company at the relevant time and there are no averments to indicate that they were in any manner involved in misrepresenting or inducing the complainant-company in granting the loan. The averments in the complaint also do not indicate that the applicants herein were entrusted with any property or dominion over the property and dishonestly misappropriated or converted the said property to their own use. Consequently, these applicants cannot be held vicariously liable for the acts of the accused No.1-company.

15. The averments in the complaint do not indicate that the

Applicants herein were entrusted with property or had dominion over the property and that they had dishonestly misappropriated the said property or converted the said property to their own use.

16. It is pertinent to note that the provisions of Section 406 are sought to be invoked mainly on the basis of letter dated 2nd February, 2012. It is pertinent to note that the accused No.1 company was declared a sick unit on 21st March, 2001. The reference had abated on 2nd March, 2010. Vide notice dated 21st February, 2012, the complainant company had called upon the accused No.1 company to repay the outstanding dues. By reply dated 27th February, 2012, the accused No.1 company had informed the complainant company that in the year 2001 accused No.1 company had filed reference before BIFR. Vide its case No.254 of 2000. BIFR declared accused No.1 company as sick company under the provisions of Sick Industrial Companies Act, (SICA). The reply further states that in or about 2004, the majority of the secured creditors of the company assigned their security interest in favour of ARCIL and on 19th April, 2011 ARCIL gave a public notice of sale of assets of company by auction. The reply further states that on 6th May, 2011, ARCIL took back possession of the secured assets from the possession of the custodian, issued a sale confirmation letter to one M/s. Shreeji Fibre P. Ltd. and on 2nd July, 2011 issued a sale certificate

to one M/s. Shreeji Krupa Spinners P. Ltd. and handed over possession of the assets of M/s. GSL (India) Ltd. to the said M/s. Shreeji Krupa Spinners P. Ltd. The accused No.1 company further stated that vide handing over possession of the assets of company to Shreeji Krupa, ARCIL unlawfully handed over possession of the documents and records of M/s. GSL(India) Ltd. since incorporation, including computers with all the data stored in the computer. As a result, the company was unable to provide the necessary information and documents required by the complainant company. The accused No.1 company also informed complainant company that they had challenged the entire auction sale conducted by ARCIL and the sale certificate issued in favour of M/s. Shreeji Krupa Spinners P. Ltd. and that vide order dated 1st August, 2011, the DRT has already distracted the auction purchaser from selling, alienating, or creating any third party interest in respect of the schedule property. The accused No.1 company therefore informed the complainant company that the auction purchaser -M/s. Shreeji Krupa Spinners are liable and responsible for the liabilities of M/s.GSL (India) Ltd. and furnish the address of auction purchasers and submitted that the entire liability has to be paid by the auction purchaser.

17. The above uncontroverted facts clearly indicate that the

secured creditors of accused No.1 company had assigned their security interest in favour of ARCIL in the year 2004 i.e. even before present Applicants had become the directors of the accused No.1 company. Furthermore, the Applicants herein were not involved in selling the assets of the company, on the contrary records reveal that ARCIL had issued notice under Section 13(2) of the SARFESI Act and had further given public notice of sale of assets and thereafter issued sale certificate in favour of auction purchasers.

18. Having gone through the complaint and the relevant documents in my considered view, the averments in the complaint do not disclose the essential ingredients of offence under Sections 406 and 420 of the IPC as against these applicants.

19. Under such circumstance, compelling the accused to face criminal prosecution, would be nothing but abuse of process of law. Hence, this is a fit case to invoke the powers under section 482 of the Cr.P.C. to secure the ends of justice. In view of discussion supra, the application is allowed. The impugned order dated 29th April, 2013 is set aside qua these applicants.

(ANUJA PRABHUDESSAI, J.)