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

CRIMINAL APPLICATION NO. 103 OF 2007

Vijay s/o Ramdas Sakkarwar,
Age: 28 years, Occ: Builder,
R/o. Shop No. 207, Labh Chambers,
Station Road, Aurangabad. ..APPLICANT

VERSUS

1. Arun s/o Dagdu Madukar,
Age: 46 years, Occ: Business,
R/o. Flat No.A-3, Amrut
Vaibhav Apartment, Jalan Nagar,
Near Railway Station,
Aurangabad.
2. The State of Maharashtra ..RESPONDENT

Mr A.P. Bhandari, Advocates for applicant;
Mr C.K. Shinde, Advocate for respondent No.1;
Mr S.M. Ganachari, Addl. Public Prosecutor for
respondent No.2;

CORAM : N.W. SAMBRE, J.

DATE : 31st JANUARY, 2017

ORAL JUDGMENT :

Heard.

2. Liberty to amend questioning the
substantiality of proceedings initiated vide
complaint case at Annexure-D. Amendment be carried

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out forthwith.

3. This application is under Section 482 of the Code of Criminal Procedure read with Article 227 of the Constitution of India questioning the proceedings at Annexure-D and order dated 16th November, 2006 passed by 2nd Joint Judicial Magistrate, First Class, Aurangabad issuing process against the applicant for offence punishable under Sections 423, 427 of the Indian Penal Code and under Section 13 of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (hereinafter shall be referred to 'Maharashtra Act' for the sake of brevity).

4. The facts as are necessary for deciding present application are as under :-

Respondent No.1, original complainant purchased flat No. A-3 for consideration of Rs.5,00,000/- bearing CTS No.19048/1/1 at Jalan Nagar near flyover bridge, Paithan road, Aurangabad situated at stilt first floor. It is the case of

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complainant, area of the said flat was not as per what has been provided in the information brochure and excess amount was recovered from him. It is also claimed that sale deed of the said flat came to be executed on 7th October, 2005 by the applicant in favour of the complainant, and in agreement to sell dated 19th September, 2005 the area of the said flat was shown to be 675 sq. feet. Excess amount is charged towards the area, installation of electric meter etc. as compared to which has been stated in agreement.

5. The applicant, as such, filed complaint being Regular Criminal Case No. 1253 of 2006 before learned Judicial Magistrate, First Class, Aurangabad styling the same under Section 13 of the Maharashtra Act for offence punishable under Section 406, 423, 427, 430 read with Section 34 of the Indian Penal Code.

6. Learned Magistrate, vide order dated 16th November, 2006 issued process based on the contents

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of the complaint, verification, statement and photo copies of the documents on record only for the offence punishable under Sections 423 and 427 of the Indian Penal Code and under Section 13 of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963.

7. Present application, as such, questioning the above referred proceedings.

8. Mr. Bhandari, learned counsel for the applicant, while inviting my attention to the provisions of the Maharashtra Act, would submit that perusal of Section 1 of the Maharashtra Act makes clear that same came into force on the date of notification in the Government Gazette i.e. 16th December, 1963. According to him, rest of the provisions of the Act are not given effect to in the area of Marathwada, particularly Aurangabad district, where the disputed property is situated. According to him, there is no notification

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notifying the applicability of the remaining provisions of the Act but for Section 1 in Aurangabad area and as such, learned Magistrate, while issuing process, has committed illegality. According to him, the prosecution of the applicant is based on the provisions which are not holding the field.

9. Next limb of submission of Mr. Bhandari, learned Counsel for the applicant is, the sale deed of the flat in question was executed in favour of the complainant on 7th October, 2005, whereas the complaint in question came to be initiated some time in August, 2006 i.e. after lapse of about one year. He would raise plea of limitation pursuant to the provisions of Section 468 of the Code of Criminal Procedure, as according to him, offence for which process is issued is punishable under Sections 423 and 427 of the Indian Penal Code for period of two years. According to learned Counsel for the applicant, upon plain reading of the contents of the complaint, offence punishable under

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Sections 423 and 427 of the Indian Penal Code is not attracted, particularly when the ingredients thereof are not satisfied from the contents of the complaint. Mr. Bhandari, learned Counsel would then invite my attention to the proceedings taken out by the complainant before learned District Consumer Redressal Forum through Complaint No.166 of 2006 for the similar relief and would rely upon the decision in the said complaint delivered on 25th May, 2008 and subsequent decision of the State Consumer Redressal Forum arising out of the said proceedings. He would urge that there was no criminal intention or motive on the part of the applicant to commit crime in question, as according to him, purely civil suit is sought to be given colour of criminal proceedings. He would then urge that this Court pursuant to the *dictum* of the Apex Court in the matter of **Mohammed Ibrahim and others vs State of Bihar and another**, reported in **2009(8) SCC 751** should ensure that criminal proceedings are not misused for settling scores or pressurizing the applicant to settle civil dispute.

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10. Mr. Shinde, learned Counsel for respondent No.1 has tried to support the order of learned Magistrate and submits that it is upon satisfaction of the ingredients of the relevant Sections, process came to be issued. He would invite attention of this Court to the conduct of the applicant, particularly in regard to the transaction qua purchase of flat and submits that the issue as to applicability of the provisions of Maharashtra Act can be gone into at appropriate stage i.e. either by applying for discharge or at the time of final hearing of the trial. He would then urge that findings recorded by Consumer Redressal Forum speaks voluminous about the conduct of present applicant, particularly *mens rea* and submits that proceedings are liable to be dismissed.

11. Having considered the rival submissions of the parties, it is required to be noted that present respondent-complainant purchased flat

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No. A-3 for consideration of Rs.5,00,000/- from property CTS No. 19048/1/1 at Jalan Nagar near fly over bridge, Paithan Road, Aurangabad situated at stilt first floor admeasuring 860 sq. feet. It is claimed that excess amount for registration of the sale deed and electric meter was recovered. It is then claimed that area of the flat was less as compared to what was agreed to sell. Quality of construction is also objected.

12. In the said complaint, on 28th May, 2008, Consumer Redressal Forum partly allowed the complaint, awarded Rs.5000/- towards cost of window pan and also ordered payment of Rs.500/- towards costs.

13. If compared the contents of the complaint before the Consumer Redressal Forum with that of in the criminal complaint, there appears to be almost similarity in the allegations and on civil side, said allegations were duly examined, gone into and order came to be passed by learned Forum. Though

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the said complaint was initiated in 2006, there appears to be criminal complaint, in 2006 initiated before learned Magistrate, alleging commission of offence, which have prompted the Magistrate to pass order of issuance of process. What is required to be noted is, the issue which has been already examined by the learned Consumer Redressal Forum is formed to be a basis for initiation of criminal complaint. In my opinion, the reliance placed by learned Counsel for the applicant upon the judgment of **Mohammed Ibrahim and others**, cited supra, is worth referring to, particularly paragraph-8 thereof, which reads thus:

"8. This Court has time and again drawn attention to the growing tendency of the complainants attempting to give the cloak of a criminal offence to matters which are essentially and purely civil in nature, obviously either to apply pressure on the accused, or out of enmity towards the accused, or to subject the accused to harassment. Criminal courts should ensure that proceedings before it are not used for settling scores or to pressurize parties to

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settle civil disputes. But at the same time, it should be noted that several disputes of a civil nature may also contain the ingredients of criminal offences and if so, will have to be tried as criminal offences, even if they also amount to civil disputes (See G. Sagar Suri vs State of UP (2000) 2 SCC 636. Let us examine the matter keeping the said principles in mind."

14. The fact that nature of dispute is having civil colour, could be inferred from the conduct of the respondent, as the respondent has approached Consumer Redressal Forum over the same issue. Apart from above, this Court is required to ensure that proceedings before the Court below are not used for settling scores or pressurize the parties to settle the dispute. It is to be noted that no other offences are pending against the applicant of similar nature. In view thereof, prosecution against the applicant initiated vide complaint being Regular Criminal Case No. 1253 of 2006 at Exhibit-D is not sustainable.

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15. So far as the next contention of the present applicant that Maharashtra Act is not made applicable to the Marathwada region, particularly Aurangabad city, where the property is located and as such, prosecution under the Maharashtra Act is not maintainable. It is not in dispute that the said Act was not given effect to under which the prosecution of the applicant is sought, as is apparent from the notification dated 17th February, 2009, 16th December, 1963. As such, it has to be inferred that the prosecution under the provisions of Maharashtra Act, particularly order of issuance of process to that effect is not sustainable, as the Act itself was not made operational, hence the order cannot be sustained.

16. Apart from above, offence under Sections 423 and 427 of the Indian Penal Code deal with dishonest or fraudulent execution of deed of transfer containing false statement of consideration and mischief causing damage to the amount of Rs.50/-.

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17. If the pleadings against the applicant in criminal complaint compared with that of complaint before the Consumer Redressal Forum, in my opinion, the claim that necessary ingredients for the offence punishable under Sections 423 and 427 of the Indian Penal Code are satisfied, cannot be *prima facie* inferred, particularly in the factual matrix.

18. In view thereof, in my opinion, the prosecution against the present applicant is not sustainable and also not maintainable under the provisions of Maharashtra Act and as such, same is liable to be quashed and set aside. The prosecution initiated against the applicant being Regular Criminal Case No. 1253 of 2006 at Exhibit-D is hereby quashed and set aside.

19. Criminal Application stands allowed in above terms.

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(N.W. SAMBRE, J.)

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