IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 263 OF 2017

Sanjaykumar S/o Suganchand Kasliwal
Age : 47 years, Occ : Business,
R/o Chintamani Colony, Aurangabad
and having Office at 215/216,
1st Floor, Building No.3, Apna Bazar,
Jalna Road, Aurangabad.

..PETITIONER

-VERSUS-

1) The State of Maharashtra
Through :
Government Pleader

2) Police Station, Incharge,
Kranti Chowk Police Station,
Aurangabad.

3) Nooruddin Sher Mohammad Charniya
Age : 62 years, Occ : Business,
R/o Plot No.B-6/7,
Yuvan Co-operative Housing Society,
Gut No.63, Padegaon,
Behind Police colony, Aurangabad.

4) The Head Constable,
Economy Offence Cell,
Aurangabad City, Aurangabad.

5) The Branch Manager,
HDFC Bank,
Akashwani Branch,
Jalna Road, Aurangabad.

..RESPONDENTS

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Advocate for petitioner :Mr. A.S. Bajaj
APP for Respondent/State : Mr. S.P. Deshmukh
Advocate for respondent no.3 : Mr. A.S. Gandhi
Advocate for respondent no.5 : Mr.M.D. Narwadkar
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CORAM : S.S. SHINDE &
K.K. SONAWANE, JJ.

RESERVED ON : 12th April, 2017
PRONOUNCED ON : 20th April, 2017

JUDGMENT (PER S.S. SHINDE, J) :-

Rule. Rule made returnable forthwith and heard finally with the consent of the learned counsel appearing for the parties.

2. This Petition is filed seeking quashment of F.I.R. bearing Crime No.1329/2016 registered at Krantichowk Police Station, Aurangabad under section 420 r/w 406 of the Indian Penal Code and also communications dated 4th February, 2017 holding of the Bank account of the petitioner and asking for details and particulars etc.

3. The brief facts leading for filing the Petition, as disclosed in Petition, are as under :-

Respondent No.3 filed a complaint on 24th December, 2016 alleging that, the petitioner in the year 2014 offered for sale of his land admeasuring 2 H 19 R part of Gat No.240 situated at village Nipani, Tq. & Dist. Aurangabad and he expressed his willingness to purchase the said land. An agreement to sale was executed on 7th October, 2014 in respect of the said land for sale consideration of Rs.32 Lakhs and out of that amount, the amount of Rs.5,51,000/- were paid through cheque bearing No.46276 drawn on Malkapur Urban Co-operative Bank, and that, the remaining amount was to be paid at the time of execution of the sale deed and the sale deed was to be executed within one year of execution of the agreement. It has been alleged that, in the month of October, 2015, he requested the petitioner to execute the sale deed. However, the petitioner avoided to do so on one or other pretext. Respondent no.3 further thought that, as the sale deed was to get executed in the month of October, 2015 itself and as such on 12th October, 2015 by paper publication in daily Divya Marathi and Dainik Lokmat, invited objections, if any to the proposed transaction. He did not receive any objection from anybody till date.

4. Respondent no.3 further alleged that, the petitioner on 26th October, 2015 though entered into an agreement for sale of the land, instead of executing the sale deed, wrote to return the amount paid and as such he sent the said cheque back to him through post. He therefore alleged that, the petitioner had entered into an agreement on 27th October, 2014 for sale of 2 H 19 R land part of Gat No.240 situated at village Nipani, Tq. & Dist. Aurangabad by accepting the cheque of Rs.5,51,000/-, still did not execute the sale deed as agreed and as such has committed breach of trust and has cheated him. Hence the respondent no.2 registered Crime No.1329/2016 under section 406 and 420 of Indian Penal Code.

5. The learned counsel appearing for the petitioner submits that, Respondent No.3 did not disclose in his complaint or otherwise to Respondent No.2 etc, the fact that he has already filed Special Civil Suit No.288 of 2015 (Mr. Nooruddin Sher Mohammad Charniya V/s Mr. Sanjaykumar S/o Suganchand Kasliwal) for the specific performance of the agreement of sale etc, and that suit is pending. It is submitted that, surprisingly

the Police authorities with hidden motive carried a search of his house without any prior intimation as required and contemplated under the provisions of the Criminal Procedure Code, or otherwise. It is submitted that, Respondent No.4 addressed a letter to the Branch Manager, H.D.F.C. Bank, Akashwani Branch, Jalna Road, Aurangabad, wherein there is account of the petitioner bearing Account No.08261000019292 stating that, there is huge financial scam in the aforesaid crime and sought detail information/documents, which was absolutely unwarranted in relation to the aforementioned offence registered against the petitioner. The Petitioner submits that the police authorities do not have any power and authority to hold the bank account of petitioner and the said act on the part of police authority is in fact abuse of the process of law. It is submitted that, the act of asking the bank to hold the account is arbitrary without authority of law and ultra virus and excessive use of the power by the police authority. It is submitted that, the manner in which the so called investigation is carried out creates doubt on the bonafide of the police authorities and it appears that there is some hidden agenda behind it.

6. The learned counsel appearing for the petitioner submits that, the complaint is made with malafide intention by Respondent No.3 and has set the criminal law in motion to pressurize the petitioner to execute the sale deed, as desired by Respondent No.3. It is submitted that, Respondent No.2 has failed to consider that no case is made out of committing any offence even by reading the complaint. It is submitted that, the police authority has failed to consider that the Respondent No.3 suppressed the fact of filing the suit for specific performance of the agreement in question. It is submitted that, Respondent Nos. 2 and 4 failed to consider that the ingredients of an offence punishable under Sections 420 and 406 of IPC are not at all disclosed, and as such the registering of FIR is totally unwarranted in the facts of the case and in law. It is submitted that, registration of crime against the petitioner on the complaint made by Respondent No.3 tantamount to illegal exercise of power and is violative of the Article 14 of the Constitution of India. It is submitted that, the manner in which the Police authority have termed it as a economic offence and

investigation is entrusted to the economic offence cell and further terming it as a huge financial scam has caused severe prejudice to the petitioner, who is having reputation in the society. It is submitted that, the holding of the account of the petitioner is causing severe prejudice and financial problem to the petitioner.

7. The learned counsel invites our attention to the ingredients of Sections 406 and 420 of the Indian Penal Code and submits that, the ingredients of both the alleged offences are not disclosed. It is submitted that, on similar set of facts like involved in the present case, the Supreme Court in the case of **Dalip Kaur and others V/s Jagnar Singh and another**[1] held that, a pure and simple breach of contract does not constitute an offence of cheating. He invites our attention to the paras 8 to 10 of the said judgment. He further pressed into service the judgment of the Division Bench of Bombay High Court bench at Aurangabad in the case of **Rashami W/o Satish Khandvikar and another V/s State of Maharashtra and another**[2] and in particular, paras 6 and 7 and submits that,

1 (2009) 14 SCC 696
2 2017 All M.R. (Cri.) 937

the Petition deserves to be allowed in terms of prayer clauses `B' and `C'.

8. The learned A.P.P. appearing for the respondent/State, relying upon the investigation papers and the statements of the witnesses and also the other material collected during the course of investigation, submits that, the ingredients of the alleged offences under Sections 406 and 420 of the Indian Penal Code are clearly disclosed, and therefore, the Petition may be rejected.

9. The learned counsel appearing for respondent no.3, relying upon the affidavit in reply filed on behalf of the respondent, submits that, the petitioner executed agreement of sale in favour of respondent no.3 on 27th October, 2014 in respect of suit land for consideration of Rs. 32 lakhs, out of which, the amount of Rs. 5,51,000/- is paid to the petitioner by cheque bearing no.46276 drawn on Malkapur Urban Cooperative Bank. It is agreed that, the sale deed be executed on or before 26th October, 2015. It is submitted that, the petitioner encashed the said cheque and received the amount of Rs.5,51,000/-, but petitioner intentionally

did not file on record the above said documents to suppress these facts and also did not accept that, he has received the said amount towards the consideration as per agreement of sale, which is against the documentary evidence on record and nothing but, criminal breach of trust against respondent no.3. It is submitted that, as per agreement of sale and as per terms of contract, respondent no.3 is ready to purchase the suit property from the petitioner and to perform his part of contract. So also respondent no.3 issued news Paper Publication on 12.10.2015 calling objection from the public at large about the execution of sale deed.

10. The learned counsel appearing for respondent no.3 submitted that, after issuance of paper publication, the petitioner issued notice to respondent no.3 on 19th October, 2015 informing that, he never executed agreement of sale in favour of respondent no.3 and the amount, which is received by the petitioner is a hand loan. He also sent cheque of Rs.5,51,000/- dated 26th October, 2015 of Malkapur Urban Cooperative Bank in favour of respondent

no.3. The above said act of the petitioner is noting but, breach of trust of the respondent. Moreover, respondent no.3 inquired with Malkapur Urban Cooperative Bank and took account extract of the petitioner, which reveals that, there was not sufficient amount in the account of the petitioner and despite that, he has issued the cheque. It is submitted that, from the above acts of the petitioner, it is clear that, the petitioner with an intention to deceive respondent no.3 executed the agreement of sale and received the amount from him and thereafter denied the said agreement and handed over the cheque saying that, he took loan from respondent no.3 and for discharge of the said he issued the said cheque. It is submitted that, though petitioner is having knowledge that, there was no sufficient balance in his account to honour the cheque, he has issued the same. Therefore, it is clear that, the act of the petitioner is nothing but to cheat respondent no.3 and the petitioner played fraud.

11. The learned counsel appearing for respondent no.3 submits that, he has replied to the notice dated 19.10.2015 send by the

petitioner on 21.10.2015 and returned back the said cheque to the petitioner and denied all the allegation and contention of the petitioner and requested to execute the sale deed as per agreement by accepting the amount. It is submitted that, thereafter respondent no.3 filed suit for specific performance of contract, in which the petitioner appeared and denied the execution of documents itself. It is submitted that, as the petitioner denied the agreement of sale and denied that, he received the amount as per agreement of sale from respondent no.3 and as such the said act of the petitioner is nothing but cheat respondent no.3 and petitioner breached the trust of respondent no.3 with ill intention to cause harm to respondent no.3 and played fraud on respondent no.3. It is submitted that, there are various disputed question of facts involved in the present matter, therefore, the Petition may be rejected.

12. We have considered the submissions advanced by the learned counsel appearing for the parties. With their able assistance, we have perused the pleadings and grounds taken in the Petition, annexures thereto and reply

filed by respondent no.3.

13. While considering the similar controversy/allegations, the Division Bench of Bombay High Court bench at Aurangabad, in the case of **Rashami (supra)** in paras 6 and 7 held thus:-

> “6 As mentioned in paragraph 10 of the judgment in the case of S.W. Palanitkar (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 the consent that any person shall retain any property; or
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> (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."

14. If the contents of the first information report filed by respondent no.2 are tested on touchstone given in the abovereferred judgment, it would prima facie be clear that, the ingredients of offence of cheating are not disclosed. There is absolutely no mention in the first information report that, since inception, the petitioner had no intention to sell the property, which is subject matter of the agreement to sale. It is also relevant to mention that respondent no.2 has already filed Special Civil Suit No.288 of 2015 (Mr. Nooruddin Sher Mohammad Charniya V/s Mr. Sanjaykumar S/o Suganchand Kasliwal) for specific performance of agreement of sale etc and the same suit is pending. Even the

petitioner herein has filed the written statement controverting the claim of respondent no.2 and specifically pointed out that, no agreement was executed or entered into as alleged. Upon careful reading of the contents of the first information, the same would clearly make a civil dispute between the parties. Even if, we take the allegations as it is, at the highest, it can be said that, the petitioner has committed breach of promise to sale the property, that itself would not attract the ingredients of Section 420 of the Indian Penal Code, in absence of specific disclosure in the first information report that there was inducement on the part of petitioner and the petitioner had an intention to cheat respondent no.2 from the very inception. Issues/contraversy raised in the present Petition is no longer *res integra* and is covered by the authoritative pronouncement of the Supreme Court in the case of **Dalip Kaur (supra),** wherein a view is taken that, if the dispute between the parties is essentially a civil dispute resulting from breach of contract on the part of one of the party by not refunding the amount of advance, the same would not constitute an offence of cheating.

15. In the light of discussion hereinabove, there are no specific grounds to proceed against the petitioner for offence of cheating. At the most, there is a breach of promise on the part of the petitioner. In the circumstances, the continuation of the criminal proceedings on the basis of the first information report lodged by respondent no.2 would be abuse of process of law. Hence, the application is allowed. The first information report bearing C.R. No.1329/2016 registered with Krantichowk Police Station, Aurangabad under sections 420 r/w 406 of the Indian Penal Code is quashed and set. Consequently, the communication dated 4th February, 2017 holding the Bank account of the petitioner and asking for details and particulars etc is also quashed and set aside.

16. Rule made absolute accordingly. The Petition is allowed in the above terms. The observations made hereinabove are prima facie in nature and confined to adjudication of the present Petition only.

(K.K. SONAWANE, J.) **(S.S. SHINDE, J.)**

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