

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 4598 OF 2013

M/s. Ganaraj Enterprises

.....Petitioner

V/s.

Vithal Jayram Gavali and Ors.

.....Respondents

* * * * *

Mr. A.G. Damle, Senior Counsel a/w. Mr. Rupesh Ramchandra Lanjekar, Advocate for the petitioner.

Mr. Niranjan Mundargi, Advocate for respondents no.1 to 25.

Mr. Omkar Mulekar, Advocate for respondent no.26.

Mr. V.B. Konde Deshmukh, APP for respondent, State.

CORAM :- SMT. R.P. SONDURBALDOTA, J.

DATED :- 10TH JANUARY, 2017.

P.C. :-

1). The petitioner is a Builder by profession. Respondents no.1 to 25 are the owners of the land at Survey No.11, Hissa No.11 situated at Mauje-Kulgaon (hereinafter referred to as “the owners”). On 14th April, 1999 the petitioner entered into a development agreement with the owners for development of their property. They

also executed a power of attorney in favour of the representative of the petitioner and handed over possession of the property. The petitioner claims to have paid a sum of Rs.2,00,000/- to the owners and a sum of Rs.6,00,000/- to the earlier developer with whom the owners had entered into similar agreement. The earlier developer is a confirming party to the agreement between the petitioner and the owners. According to the petitioner, during the period 1999 to 2009, it had paid various amounts to the owners totalling to Rs.18,000/-. Subsequently, on 7th October, 2010, the owners have allegedly executed a similar agreement respondent no.26. This act on the part of the owners, according to the petitioner, amounts to criminal breach of trust as defined under Section 405 Indian Penal Code and cheating as defined under Section 415 Indian Penal Code for which they are liable to be convicted and punished under Section 406 Indian Penal Code and Section 420 Indian Penal Code.

2). The trial Court, by its order dated 27th July, 2011, after perusing the complaint, the documents and the verification statements on behalf of the petitioner had directed the police to investigate into the complaint under Section 202 Criminal Procedure Code. The police filed report stating that the investigation disclosed commission of offence by the owners under Sections 420, 406 read with Section 34 Indian Penal Code. By the order dated 7th November, 2012 the trial Court accepted the report of the police and issued process for the offences punishable under Sections 406, 420 read with Section 34 Indian Penal Code against the owners. Being aggrieved by the order, the owners approached the Sessions Court with Criminal Revision Application No. 48 of

2015. By the order dated 19th September, 2013 the Sessions Court allowed the Revision Application and recalled the process issued the owners which order has been challenged in the present petition.

3). The impugned order records that the order dated 7th November, 2012 passed by the trial Court accepting the police report is an absolutely vague and non-speaking order. It does not consider whether the facts of the case disclose the ingredients required to establish the offences punishable under Section 406 and 420 Indian Penal Code. Therefore, there is non-application of mind. The other reasons stated therein are as under :-

“ . If there is a flavour of civil nature, the same cannot be agitated in the form of criminal proceeding. If there is huge delay and in order to avoid the period of limitation, it cannot be resorted to a criminal proceeding. This aspect has not been considered by the Magistrate that there has to be dishonest intention to deceive another person at the time of execution of transaction as it was not pleaded by the complainant, I am of the opinion that, both the sections alleged by the complainant against the petitioners are not attracting and therefore there is necessity to interfere with the order of learned J.M.F.C. as it is illegal and improper.”

Further, the Sessions Court at para-11 of the order, has considered the ingredients of the offences punishable under Sections 406 and 420 Indian Penal Code to hold that, none of the ingredients are satisfied.

4). Mr. Damle, the learned Senior Counsel appearing for the petitioner submits that, the act on the part of the owners of entering into development agreement, executing power of attorney in favour

of the representative of the petitioner and handing over possession amounts to entrustment of the property owned by them to the petitioner and their further act of entering into agreement with respondent no.26 on 7th October, 2010 would amount to misappropriation and conversion of the property entrusted to the petitioner to their own use. This argument needs to be only stated to be rejected. The transaction of development of the property by execution of development agreement, execution of the power of attorney and handing over of possession of the property for that purpose, cannot amount to entrustment of the property by the owner to the petitioner. In any case, the offence of criminal breach of trust can be committed by the person to whom the property is entrusted and complainant in such case would be the person entrusting the property to another. Therefore, there is no question of commission of offence punishable under Section 406 Indian Penal Code by the owners.

5). As regards the offence punishable under Section 420 Indian Penal Code, Mr. Damle concedes that, it cannot be said that entering into agreement in the year 2010 would amount to deceit by which the petitioner was induced to make the payment during the period 1999 to the year 2009 as alleged in the complaint. In that case, the first ingredient of the offence of cheating is clearly not established. He, however, submits that, the act of the owners of execution of development agreement on 7th October, 2010 has caused damage to “body, mind, reputation” of the petitioner. Therefore, there is commission of the offence of cheating. Even, if this claim is to be accepted, that by itself, cannot be sufficient to

fulfill the requirements of the definition of cheating. Thus, there is no infirmity in the impugned order. It is clear from the facts of the case that, the dispute between the parties is a civil dispute which is being given a criminal colour. As such, the complaint filed by the petitioner is nothing but an abuse of process of law. The petition is therefore dismissed.

(SMT. R.P. SONDURBALDOTA, J)