IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 6123 OF 2017

Nasir s/o Mohammed Khan,
Age 36 years, Occupation Advocate,
R/o Flat No.2, Modern Apartment,
Nasheman Colony, Mukund Nagar
Tq. Ahmednagar Dist. Ahmednagar. ...Applicant

Versus

Nadeem s/o Nazir Ahmed Shaikh,
Age 36 years, Occupation Business,
R/o Opp. To Dipali Theatre, Zendi Gate
Dist. Ahmednagar. ...Respondent

Mr. Shaikh Mazhar A. Jahagirdar, Advocate for applicant.
Mr. P. K. Lakhotiya, Advocate for respondent.

CORAM : SMT.VIBHA KANKANWADI, J.

Date of reserving the order : 30th July, 2018.

Date of pronouncing the order : 26th September, 2018.

ORAL JUDGMENT : (Per SMT. VIBHA KANKANWADI, J.)

1. Present application has been filed for invoking inherent powers of this Court, by the original accused No. 2 in order to challenge order of issue of process against him in RCC No. 561 of 2016 by Learned Judicial Magistrate First Class, Ahmednagar for the offence punishable under Sec. 420 of Indian Penal Code.

2. Applicant is Advocate by profession. He has contended that respondent had filed private complaint bearing RCC No. 561 of 2016 against applicant and 8 other persons for the offence punishable under Sec. 406, 409, 417, 418, 420, 465, 468, 469, 471 r/w. 34 of Indian Penal Code. After giving story in the complaint, it has been stated that after the verification of the complainant was recorded, the learned Magistrate has issued process against only the applicant under Sec. 420 of IPC. Complaint against other accused persons has been dismissed, so also under other sections against him. Applicant has contended that the said story is false. No specific role has been attributed to him. No ingredients are made out to attract offence of cheating. The alleged document on which the complainant is relying is false and fabricated. The stamp paper is misused by one Javed Khurshid Shaikh with whom applicant was employed in 2008. He had tried to make inquiry with Notary Shri. R. H. Bora and requested him to give a copy of the document. Notary informed him that his register has been destroyed. In fact, he ought to have preserved the register for 10 years. Even on the face of it, the complaint does not disclose any offence. Learned Magistrate has committed wrong in issuing process only against him. He has therefore, prayed for the setting aside the order of issuance of process against him.

3. Heard learned Advocate Shri. Shaikh Mazhar A. Jahagirdar for applicant and learned Advocate Shri. P. K. Lakhotiya for respondent. Perused the documents on record. It has been submitted on behalf of applicant that complainant has stated that he got acquaintance with applicant in Sub-Registrar's office. Applicant had suggested him the plot No. 16 from S. No. 104/A1 admeasuring 295.25 sq. mt. He went to inspect the property with applicant. He says that it was also informed by the applicant to the complainant that the plot is under litigation and those will be cleared soon. If at all there was any such agreement, then it was not binding on the complainant to enter into. It is stated that agreement to sell was executed before Notary Public. Why a registered document was not got executed is a question, when such a huge amount was allegedly parted with. Applicant has tried to collect the document from Notary, but he says that the register is destroyed. Applicant had also approached police, but cognizance has not been taken. There is no question of cheating by applicant, when he has not entered into any such agreement. Learned Magistrate has dismissed the complaint as against other accused persons, when it is alleged that all the accused had cheated him with common intention. Learned Magistrate has not applied mind before issuing process. He therefore, prayed for setting aside the impugned order.

4. Learned Advocate for the applicant has relied on the decision in ***Ganesh Vitthaldas Chandak v/s. State of Maharashtra and Ors. [LEX(Bom) 2017 8 107]*** decided by the Division Bench of this Court, Bench at Nagpur; wherein it has been held that,

> *"The nature of transaction of agreement to sell is civil in nature. There has to be dishonest intention to deceive another person for making out offence punishable under Sec. 420 of IPC. In order to avoid period of limitation under civil law, criminal proceeding cannot be resorted to".*

He further relied on the decision in ***Md. Ibrahim and Ors. V/s. State of Bihar and Anr. [(2009) 8 SCC 751]***; wherein it has been held that,

> *"When it is said that execution of a sale deed by a person, purporting to convey a property which is not his, as his property, is not making a false document and therefore not forgery, it does not mean to hold that such an act can never be a criminal offence. If a person sells a property knowing that it does not belong to him, and thereby defrauds the person who purchased the property, the person defrauded, that is the purchaser, may complain that the vendor committed the fraudulent act of cheating. But a third party who is not the purchaser under the deed may not be able to make such complaint".*

5. Per contra, it has been submitted on behalf of respondent that accused No.2 himself had enter into the agreement to sell with

complainant. He was the person who had made representations and requested the complainant to purchase the property. He had accepted amount of Rs. 30,00,000/- from complainant. The said agreement was enter into in 2007, but then he has fraudulently executed gift deed in favour of accused No. 1 on 22-02-2012. Complainant had taken precaution to see the documents of the property before entering into agreement to sell. The said transfer in favour of accused No. 1 was only with intention to dupe the complainant. It amounts to cheating and therefore, the learned Magistrate has rightly issued process against applicant.

6. Learned Advocate for the respondent has relied on the decision in ***G. S. Fertilisers Pvt. Ltd. And another v/s. Dhanalaxmi Engineering Enterprises and another [2016 DGLS(Bom) 772]***; wherein it has been held that,

> *"At the stage of issuance of process, Magistrate was required to confine himself to allegations in complaint and verification recorded. Probable defence, if any, would not come in picture at the stage of issuance of process. Since a Warrant Triable case instituted otherwise than on police report, applicant gets an opportunity to contest matter and demonstrate that no case for framing of charge is made out. No case is made out for invoking inherent powers under Sec. 482 of Cr. P. C. for quashing of complaint".*

7. In order to appreciate the arguments of both sides, it is necessary to see what are the contents of complaint. Complainant runs business of travels by name Haj Tours and Travels. He has his office at Hendi Gate. He goes oftenly to Sub-Registrar's office in Savedi area in Ahmednagar. He was in need of place for new office. He got acquaintance with accused No. 2. Accused No. 2 suggested plot No. 16 from S. No. 104/A1. Complainant had visited the site and found it suitable. The transaction was fixed at a consideration of Rs.50,00,000/-. Accused No. 2 had disclosed that there are civil as well as criminal disputes pending in respect of plot, but they would come to an end shortly. It was suggested that they should enter into agreement to sell before the litigations come to an end. Therefore, an agreement to sell was entered into on 31-12-2008 between them. He had given earnest amount of Rs.30,00,000/- to the accused No. 2 on that day. It was decided that the rest of the amount would be paid after the litigations are over and on the date of sale-deed. The said agreement to sell was executed before Notary Shri. R. H. Bora. Thereafter also, complainant was in touch with accused No. 2. After some days, accused No. 2 started avoiding to give information regarding the litigations. Complainant came to know about the construction on the plot through one Dr. Deepak. He made inquiry with accused No. 2. Accused No. 2 refused to execute

any sale-deed. Complainant had thereafter made inquiry about the documents. He came to know that accused No. 2 had executed gift-deed in favour of accused No. 1 on 22-02-2012. Accused No. 2 had intentionally executed that document in order to dupe the amount of complainant. Complainant had thereafter taken copies of the document and it was revealed to him that the said plot was sold to accused No. 2 on the basis of a forged power of attorney by father of accused No. 1. Offence vide Cr. No. 145 of 2007 dt. 22-05-2007 was registered against accused No. 2 to 16 by father of accused No. 1. After death of father, accused No. 1 was prosecuting that case. Accused No. 2 had never disclosed the nature of case to the complainant. If he would have disclosed all those facts, then he would not have entered the transaction with accused No. 2. Complainant had therefore, requested accused No. 2 from time to time to return his amount, but he has avoided it. He has refused to cancel the gift-deed also. Thus, he has forged the documents and cheated the complainant. Thereafter, accused No. 1 has sold the property to accused No. 9. Accused No. 9 has further sold the said property to certain medical practitioners. Other accused persons have taken part in the execution of further documents, though they had knowledge about the transaction between him and accused No. 2. Complainant had approached police station with complaint application, but no action was taken by police. Hence, the private complaint is filed.

8. After the complaint was lodged, learned Magistrate has recorded the verification. After the perusal of documents and verification, learned Magistrate has issued process only against accused No. 2 that too only for the offence punishable under Sec. 420 of Indian Penal Code. The complaint was dismissed against accused No. 1, 3 to 9. Accused No. 2 has approached this Court against the said order and prays that inherent powers of this Court under Sec. 482 of Cr. P. C. be invoked for setting aside the said order.

9. Thus, first and the foremost point that is required to be considered is that as per the story of the complainant, there was agreement between him and accused No. 2, which was executed on 31-12-2008. Complaint is intentionally kept silent on the point when he came to know from Dr. Deepak that construction is going on the plot. It also silent on the point when he came to know about the sale of plot by accused No. 1 in favour of accused No. 9. He is silent on the point as to why he did not try to get documents of litigation before entering into any agreement. In fact, when he wanted to enter into the agreement, a duty was also cast on him to know whether he would get a clear title. He clearly says that accused No. 2 had disclosed that there are civil as well as criminal litigation in

respect of plot. Why he did not obtain a legal opinion by collecting all the documents. If he had not taken proper precautions before entering into an agreement, he can not just blame other person. He says that he had paid earnest amount of Rs.30,00,000/- to accused No. 2. We can not forget that complainant is a businessman. He used to go to Sub-Registrar's office oftenly. Therefore, when he was parting with such a huge amount, why he did not thought it fit to execute a registered agreement to sell? He could have waited till the outcome of litigations in respect of the plot. When he was knowing the fact that the plot was in litigation before entering into the agreement, he took risk by entering into the agreement and it was subject to the outcome of the litigation. Thus, if we consider the case as it is, still it has many unexplained situations.

10. Another important point is that, when the alleged agreement to sell was entered into on 31-12-2008, why complainant had not taken any legal step of issuing notice to accused No. 2 after a reasonable period, calling upon him to explain the present status of the litigation. He has not filed any suit for specific performance against accused No. 2. Complainant has stated that after he came to know from Dr. Deepak that construction activity is going on the plot (the date of which is intentionally not given), he had contacted accused No. 2 and at that time accused No. 2 had clearly refused to execute sale-deed. Therefore, if at all cause of action for civil suit

would have arisen, it was from the date of said knowledge of refusal. He says that thereafter he had collected the documents (in fact, this activity ought to have been done by him before entering into the agreement) and came to know about the gift-deed, sale by accused No. 2 to accused No. 9 and then again by accused No. 9 to others. That means, the complainant has allowed the limitation to file civil suit to run against him and it is definitely barred on the date of filing of the complaint. Under such circumstance, the ratio laid down in ***Ganesh Chandak***'s case (supra) would be applicable. In that case also agreement was entered into on 07-03-2007 and the report was lodged after ten years i.e. On 28-02-2017. In this case reliance has been placed on the decisions in ***Thermax Ltd. V/s. L. M. Johny [(2012) 2 SCC (Criminal) 650], Inder Mohan Goswami v/s. State of Uttaranchal [AIR 2008 SC 251]*** and ***Nageshwar Prasad Singh v/s. Narayan Singh [1999 CRI. L. J. 598]***; wherein it was held by Hon'ble Supreme Court that a liability, if any, arising out of a breach of contract would be of a civil nature and not criminal. Further in Thermax's case it was observed that with a view to avoid the period of limitation under civil law, criminal proceedings can not be resorted to. In other two cases it was observed that the Court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendentta or with an ulterior motive to pressurize the accused.

11. Facts in the case in G. S. Fertilisers's case are different. Even if the observations are taken note of, yet, we may not look to the defence which applicant has tried to set up now. However, that does not give any kind of advantage to complainant. He has to stand on his own feet. He has intentionally not given clear dates of his knowledge of certain facts. If those facts would have been disclosed by him, learned Magistrate would not have issued process against even accused No. 2. When he had entered into the agreement and parted with the amount without taking proper precautions, then he has to thank himself. It also appears that he was not diligent in pursuing with the transaction. If he would have been, then he would not have wasted such a long time. Learned Magistrate failed to take note of all these things. It appears that learned Magistrate was swayed away with apparent facts. Act of issuance of process is a serious business. It requires due application of judicious mind from all angles. Person or persons should not be made just to face a trial only on the basis of vague and incomplete allegations in the complaint. Learned Magistrate, in fact, had an option to postpone the issuance of process by making inquiry under Sec. 202 of Code of Criminal Procedure, either by himself or by police officer. In such cases, he ought to have resorted to this provision. Only after filtering all the facts and aspects, the order of issuance process ought to have been passed. It appears that there was no due

application of mind by the learned Magistrate in this case. Hence, this order can not be allowed to sustain.

ORDER

1. Application is hereby allowed.

2. Order of issuance of process dated 05-04-2017 by learned Judicial Magistrate First Class, Ahmednagar in RCC No. 561 of 2016 against the present applicant is hereby set aside.

3. The said complaint is hereby quashed and set aside.

4. Rule is made absolute on above terms.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.