IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1723 OF 2017

Rajnikant s/o Ramnarayan Pandey,
Age 50 years, Occupation Business,
R/o. 819 Shivaji Chowk, Nandgaon
Rural, Manmad Tq. Manmad
Dist. Nashik. .. Petitioner.

VS.

1) The State of Maharashtra,
Through Police Station Officer
Jinsi Police Station
Tq. Dist. Aurangabad.

2) Kamlakant s/o Ramnarayan Pandey,
Age 60 years, Occupation Business,
R/o. Plots No.321/322, CIDCO N-3,
Aurangabad. .. Respondents

Mr. Shrimant Munde, Advocate for petitioner.
Mr. S. W. Munde, Additional Public Prosecutor for respondent No. 1 / State.
Mr. P. P. Uttarwar, Advocate for respondent No.2.

CORAM : PRASANNA B. VARALE &
SMT. VIBHA KANKANWADI, JJ.
DATE : 02-04-2018

ORAL JUDGMENT (Per Smt. Vibha Kankanwadi. J.)

1. Rule. Rule made returnable forthwith with the consent of learned counsels for the parties, the petition is heard finally.

2. Present petition has been filed by the original accused by

invoking the powers of this Court under Article 226 of the Constitution of India and under Section 482 of the Code of Criminal Procedure for quashment of the First Information Report (hereinafter referred as 'FIR') lodged against him at the instance of respondent No.2.

3. Respondent No.2 is the real brother of the petitioner. Respondent No.2 approached Jinsi Police Station, Aurangabad on 05-09-2017 and reported that he runs 'Paras Fertilizer and Company' which is in existence since 1979. His brother Rajnikant Pandey i.e. present petitioner was serving as supervisor in the said company. The company stores fertilizers and processes it, thereafter distributes it under the supervision of agricultural officer. He also submitted that the working of the company has been stopped since October 2016, however the remaining material containing Urea, Stitching Machine, Power Generator etc were kept in godown. The particulars of the said material is given to the agricultural department. He had gone to Mumbai on 11-08-2017 and due to ill health he remained there till 20-08-2017. After he came to Aurangabad, he went to the shop at about 10.00 a.m. on 25-08-2017. he found that the various fertilizers and other articles were missing. When he made enquiry about the same in the neighbourhood, he was informed by watchman of one Shraddha Gas Godown that one Dadarao Kadam, present petitioner and truck

driver with the help of five to six labourers had taken entire machinery and material in one truck. It was informed by petitioner to that watchman that, on the say of the informant he is taking the entire material to Manmad. Therefore, it was the say of the informant that the material and the machinery has been taken away by the petitioner without the informant's wish, and thereby he has cheated him. On the basis of such averments, Jinsi Police have registered offence punishable under Section 420, 406 read with 34 of the Indian Penal Code.

4. The petitioner has contended that, the contents of the first Information Report lodged against him do not disclose any offence. He was not in-charge of any material. He was not entrusted with the material by the informant. The FIR is the outcome of the civil disputes. The ulterior motive for making vengeance can be seen from the lodgment of the said report. In fact Paras Fertilizers and Company itself is a Hindu joint family property/ business. The informant is the '*Karta*' of the Hindu undivided family. The family has various movable and immovable properties, various civil disputes are pending between parties regarding those properties. The petitioner has share in Paras Fertilizer and Company, and therefore, there cannot be a criminal prosecution in respect of the property owned by him as a co-sharer. He therefore prayed for quashment of the report.

5. Respondent No.2 has appeared through advocate. Heard advocate Shri Shrimant Munde for petitioner, learned Addl. Public Prosecutor Shri S. W. Munde for State - respondent No.1 and learned advocate Shri P. P. Uttarwar for respondent No.2 - original informant.

6. It has been submitted on behalf of the petitioner that, the petitioner is the co-sharer of the business run under the name and style Paras Fertilizers. In fact the business was owned by their father and after the demise of father it has devolved on all the heirs. When the capacity of the petitioner is a co-owner then he cannot be prosecuted for taking articles belonging to the company, even if it is accepted for the sake of argument that petitioner has taken away the articles. He further submitted that even the petitioner has filed Special Civil Suit No. 446 of 2010 for declaration. He has deposed in the said matter and in his cross-examination he has given vital admissions, showing that his father was the partner in the business and after demise of father, he was acting as 'Manager' and '*Karta*' of the family of himself and defendants. Learned advocate appearing for the petitioner also submitted that, even if we considered the contents of the report, they do not constitute offence punishable under Section 420, 406 read with 34 of the Indian Penal Code.

7. It has been submitted on behalf of the respondents that, petitioner was serving as supervisor in Paras Fertilizers and

Company, and by giving an impression to the watchman of adjoining business i.e. Shraddha Gas Godown that the material is being moved on the instruction of the informant, the accused had taken away the material and the machinery, and therefore *prima facie* offence is made out. It is absolutely not necessary to quash and set aside the FIR.

8. It is to be noted that, petitioner is the real brother of the informant. According to petitioner he has share in the business and the property of the business. We are not required to go in this petition as to who can be said to be the owner of the property which is alleged to have been taken away by the petitioner. However, a fact can be noted that a 'Deed of Partnership' in respect of M/s. Paras Fertilizers, Aurangabad has been executed on 1st April 1988. It show that, there were four partners, (1) Smt. Mahalakshmi w/o Vimalkant R. Pandey, (2) Smt. Rita w/o Kamalkant R. Pandey, (3) Shri Kamalkant Ramnarayan Pandey, and (4) Shri Vimalkant Ramnarayan Pandey are the partners. Name of the present petitioner is not included. Thereafter deed of 'Retirement-Cum-Partnership' was also executed on 01st April, 1992. It appears that by this document Shri Vimalkant Narayan Pandey and Mahalaxmi Vimalkant Pandey retired from the partnership, and thereafter, the partnership continued between Kamalkant and his wife Smt. Rita. The petitioner has not stated that, he had ever challenged these

documents, therefore we are not in agreement with the submission on behalf of the petitioner on the first point.

9. Now as regards the FIR on the face of it is not disclosing any offence is concerned. The informant had stated that petitioner was serving as Supervisor but he has not intentionally given any date or period, duration of the service of the petitioner as Supervisor with the Paras Fertilizers. The informant states that since October 2016 the working of the company has come to an end. He has not stated that in spite of the company had come to the closed yet he continued services of the petitioner as a Supervisor and then he was entrusted with the material and the machinery which was kept in the godown. In order to attract offence punishable under Section 506 of the Indian Penal Code, the Section requires -

> *"(1) Entrusting any person with property or with any dominion over property ;*
>
> *(2) The person entrusted (a) dishonestly misappropriating or converting to his own use that property ; or*
>
> *(b) Dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation*
>
> > *(i) of any direction of law prescribing the mode in which such trust is to be discharged, or*
> >
> > *(ii) of any legal contract made touching the discharge of such trust."*
>
> *The word 'entrusted' used in the section is not a term of a law. In its most general significance all it imports is a*

> *handing over of the possession for some purpose which may not imply the conferring of any proprietary right at all."*

The informant has not clarified as to for what purpose the petitioner was given control over the property i.e. the machinery and the material kept in the godown. The petitioner under such circumstance cannot be said to be a person having domain over the property. Therefore, the basic ingredients those are required for attracting Section 406 of Indian Penal Code are missing.

10. Informant has also invoked Section 420 of Indian Penal Code thereby stating that he has been cheated by the petitioner and the other persons who had taken away the material and the machinery. In order to bring the offence punishable under Section 420 of the Indian penal Code we will have to consider the ingredients of Section 415 of the Indian Penal Code. The said section requires,

> *"Deception of any person.*
>
> *(1) (a) Fraudulently or dishonestly inducing that person---*
>
> *(i) to deliver any property to any person; or*
>
> *(ii) to consent that any person shall retain any property; or*
>
> *(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or*

property. There are two separate classes of acts which the persons deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set-forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest."

11. Thus it is to be noted that, under the facts disclosed in the FIR the ingredients of Section 420 and 406 of the Indian Penal Code do not go together. Cheating defers from criminal breach of trust as well as criminal misappropriation. Criminal breach of trust and criminal misappropriation contemplates the property or the thing given in possession lawfully but then either the person retains it or converts it to his own use against the terms of the contract, however in case of cheating the possession of the property is taken by deception. In the present case the informant does not say that, he was deceived before the possession of the material and the machinery was allegedly taken by the petitioner. Therefore, taking into consideration these aspects it would be a futile exercise to continue the prosecution of the petitioner in the case of lodgment of the report filed by the respondent No.2.

12. A broad principals those have been laid down in the case of *State of Haryana and others Vs. Ch. Bhajan Lal and others,* reported in *AIR 1992 Supreme Court 604*, are applicable to the facts of this case, and therefore, we are of the opinion that this is a fit case where we should exercise our powers under Article 226 of the Constitution of Indian and Section 482 of the Code of Criminal Procedure in order to quash and set aside the impugned FIR. Hence, following order.

ORDER

1) The writ petition is hereby allowed.
2) The First Information Report bearing No. 262 of 2017 dated 05-09-2017 registered with Jinsi Police Station, Aurangabad for the offence punishable under Section 420, 406 read with 34 of the Indian Penal Code is hereby quashed and set aside as regards the present petitioner is concerned.
3) Rule is made absolute in above terms.

(SMT. VIBHA KANKANWADI)
JUDGE

(PRASANNA B. VARALE)
JUDGE

vjg/-.