

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

APPEAL NO.433 OF 2017

WITH

APPLICATION NO.978 OF 2016

IN

APPEAL NO.433 OF 2017

Vijay Baburao Ghel & Ors.

.... Appellants

Vs.

Chandrakala Vaijnath Raut & Anr.

.... Respondents

Ms Aarti Bhonsle with Mr. Siddharth Mehta &

Ms Tejaswini Girase for the Appellants.

Mr. Kuldeep U. Nikam for Respondent No.1.

Mr. J.P. Yagnik, APP, for the Respondent-State.

CORAM: S.C. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.

DATE : MARCH 01, 2018

P.C:

1. By this appeal, the original accused Nos.3 to 5 have challenged an order dated 28-3-2016 passed by the learned Special Judge, Pune in MPID Case No.4 of 2013.

2. The first respondent to this appeal is the original

complainant.

3. We have heard the Advocate appearing for the appellants as also the Advocates for the respondents.

4. On 16-11-2013, a criminal complaint was filed against the appellants by the first respondent to this appeal (original complainant) through her Power of Attorney holder Rajesh Ramchandra Belhekar. The offences alleged are punishable under Sections 4, 7 and 8 the Maharashtra Protection of Interest of Depositors (in Financial Establishments) Act, 1999 (for short, "the MPID Act").

5. This complaint was then numbered as MPID Case No.4 of 2013. The present appellants have been arrayed as accused Nos.3, 4 and 5 in the said MPID case. On the very day, namely, 16-11-2013, the complainant filed an application (Exhibit-6) seeking to attach the properties of the accused. That was traceable to the powers conferred in the MPID Court vide Sections 7 and 8 of the MPID Act. The properties were mentioned in para 16 of the application (Exhibit-6).

6. On such an application, the statement of the complainant was recorded on 14-12-2013. Prior to that the learned Judge had passed an order issuing process only against accused No.2. That order was passed on 5-2-2014. However, the learned Judge held that *prima facie* accused No.2 with an ulterior motive transferred the property by executing a Release Deed in favour of accused Nos.3 to 5/the present appellants, as they are his brothers. That is how the Special Judge issued a warrant of attachment of these properties with further directions to execute that warrant and report to the Court. The copy of the order passed, dated 5-2-2014, is annexed to the Memo of Appeal (Exhibit-F).

7. On 6-3-2014, the complainant's Advocate informed the Special Judge that the law requires a show cause notice to be issued to the transferee before attaching the property. On perusal of Section 8 of the MPID Act, the learned Judge came to the conclusion that the properties cannot be attached directly and hence, on 6-3-2014, he issued a notice to the

appellants/accused Nos.3 to 5 as to why the properties listed in para 16 of the application (Exhibit-6) should not be attached.

8. On 20-4-2014, the appellants through their Advocate appearing before the Special Judge sought time to file reply. Though the learned Judge granted time, he was pleased to direct that until the application (Exhibit-6) was decided, the present appellants should not create any third party interest in the property.

9. It is conceded before us that after a reply was filed to this application (Exhibit-6), copy of which is at Exhibit-H to the Memo of Appeal, this application remains undecided. It is still pending.

10. In the meanwhile, the present appellants filed an application on 20-11-2015 (Exhibit-9), raising a preliminary issue that the Special Case is not maintainable. Several contentions were raised and with regard to the power to attach and the maintainability of the special case itself.

11. The learned Judge dismissed this application on the ground of the locus of the present appellants. That is why the instant appeal.

12. From a perusal of the order under challenge, it is evident that the learned Judge considered the application (Exhibit-9) as only raising a preliminary objection to the maintainability of the case. However, the complainant, while meeting the point of maintainability, filed a detailed reply/say (Exhibit-10). The complainant contended that all these persons, who are appellants before us, are closely related to the main accused No.2. The accused No.2 is absconding. The present appellants/accused Nos.3 to 5 have got a share in the properties and that is how the Release Deed was executed and its execution brought about by the parties. Thus, this Release Deed apart, this is nothing but a collusive attempt and the intention is *mala fide*. That is to cheat and mislead the complainant and the other investors. That is how the share of accused No.2 in the property needs to be attached and should be sold irrespective of what is stated in the Release Deed.

13. It is in these circumstances, the objection to the maintainability was tried to be replied. The learned Judge on hearing both sides, framed the point for consideration as under:-

"Whether accused Nos.3, 4 and 5 have got any locus to raise the preliminary objection regarding maintainability of the case?"

14. At the same time, while assigning reasons, the learned Judge says that the Special Court after recording the statement of the complainant and perusing the documents arrived at a conclusion that a *prima facie* case is made out to proceed against accused No.2. He is the proprietor of the two entities whose names are listed in para 6 of the order under appeal. At the same time, the learned Judge, while issuing process, expressed an opinion that the present appellants and two others, namely, original accused Nos.3 to 7, cannot be said to have committed the offence punishable under Section 3 of the MPID Act. The order issuing process only against accused No.2 Rajendra Baburao Ghel has not been challenged by either the complainant or the said Ghel.

15. The complainant moved an application (Exhibit-5) regarding attachment and on that application the learned Judge issued a warrant of attachment. He issued notice to the present appellants to appear before the Court to show cause as to why the order should not be made absolute. This order was passed on 5-2-2014 but came to be modified, as stated above, on 6-3-2014 and the modification is that, a show cause notice be issued to the present appellants/non-applicants 3 to 5 as to why the five properties listed in para 16 of Exhibit-5, allegedly transferred to them by accused No.2, should not be attached. When this application is pending, we find there was no necessity for the learned Judge to have then expressed any opinion, particularly with regard to the stand of the appellants. As we have held above, this application is pending, there is an exhaustive reply given by the appellants to the contents of the same and the learned Judge has in the meanwhile restrained the present appellants from creating any third party rights in respect of the properties mentioned and listed in para 16 of the application of the complainant (Exhibit-5). Thereafter, the

matter was adjourned from time to time but the appellants moved the instant application.

16. After having perused the order under appeal and considering the submissions of the appellants' Advocate, we are of the firm opinion that the present appeal is entirely misconceived. It deserves to be dismissed because the issue of maintainability of the special case has been raised presently by the appellants, who are termed as accused Nos.3 to 5 but no process has been issued against them till date. The only person summoned to answer the charge is accused No.2. *Prima facie* and at best, he could have raised the issue of maintainability of the proceedings or the special case. The appellants had an apprehension that their properties may be attached and they would be freezed till the special case is disposed of. They have all the opportunities to oppose the continuance of the order restraining them from creating third party rights or making the attachment notice absolute. Unless and until all objections of the appellants before us are considered and dealt with by a reasoned order, the learned Judge cannot confirm the attachment nor

could he make it absolute. Thus, a cause for attachment of the properties has to be made out by the complainant and on satisfaction in that regard being reached alone, the learned Judge can direct attachment of the immoveable properties and as claimed by the present appellants. These objections are distinct from the issue of maintainability which was raised and dealt with by the order under appeal. With this clarification, we are disinclined to entertain this appeal. With the further clarification that any observation or finding by the learned Judge on the issue of maintainability of the case shall not influence the outcome of the pending application (Exhibit-5) nor can affect adversely the contentions and the stand of the appellants therein, we dismiss the appeal. Equally, we clarify that all submissions by the complainant to the contrary are kept open.

17. The learned Judge shall decide the application for attachment and the objections thereto strictly in accordance with law and particularly bearing in mind the language of Sections 7 and 8 of the MPID Act.

18. In view of dismissal of the appeal, Criminal Application No.978 of 2016 preferred therein does not survive and it accordingly stands disposed of.

(PRAKASH D. NAIK, J.)

(S.C. DHARMADHIKARI, J.)