

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 467 OF 2019

- | | | | |
|----|-----------------------------------|---|----------------|
| 1. | Shri. Rajesh Kalidas Khisti |] | |
| | Age: 51 years, Occ: Business. |] | |
| | |] | |
| 2. | Shri. Praveen Kalidas Khisti |] | |
| | Age: 45 years, Occ: Business. |] | |
| | |] | |
| 3. | Sou. Arundhati Praveen Khisti |] | |
| | Age: 44 years, Occ: Business. |] | |
| | All R/o. B-201, R.K. Pride, New |] | |
| | D.P. Road, Near Guruganesh Nagar, |] | |
| | Kothrud, Pune- 411 038. |] | ...PETITIONERS |

VERSUS

- | | | | |
|----|--------------------------------------|---|---------------|
| 1. | Shri. Vijay Bhagoji Kadam |] | |
| | Age: 51 years, Occ: Business, |] | |
| | R/o- Flat No. 09, Building No. 15 |] | |
| | Vishrant Co-op. Housing Society, |] | |
| | Vishrantwadi Chowk, Vishrant Wadi, |] | |
| | Alandi Road, Pune- 411 015. |] | |
| | |] | |
| 2. | State of Maharashtra |] | |
| | Through Vishrantwadi Police Station, |] | |
| | Pune. |] | ...RESPONDENT |

APPEARANCES:-

Mr. S.R. Borulkar a/w. Mr. Nilabh Toshniwal i/b. Mr. Manoj A. Patil for Petitioners.

Mr. Omkar V. Warange for Respondent No. 1.

Mr. N.B. Patil, APP for Respondent-State.

CORAM : S. S. SHINDE J.
 DATE : 22nd August 2019.

JUDGMENT

1. Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2. This writ petition is filed with the following substantive prayers:-

b. This Hon'ble Court be pleased to issue appropriate writ, order and or direction and to quash and set aside the impugned judgment and order dated 19/12/2018 passed by the Hon'ble Additional Sessions Judge at Pune in Criminal Revision Application No. 413/2018 and also to quash and set aside the impugned order dated 7/6/2018 passed by the Hon'ble J.M.F.C. Khadki-Pune below Exhibit 15 in R.C.C. No. 17/2017.

c. This Hon'ble Court be pleased to issue appropriate writ, order and or direction and to discharge the Petitioners for the offences punishable u/s 420, 504, 506 r/w. 34 of the Indian Penal Code in R.C.C. No. 17/2017 [in C.R. No. 199/2016] in the interest of justice.

3. Brief facts leading to the filing the present writ petition are as under:-

It is the case of the Petitioners that, Respondent No. 1/complainant filed Criminal Misc. Application No. 316/2016, under Section 156 [3] of the Code

of Criminal Procedure (for short “Cr.P.C.”), in the court of J.M.F.C. Khadki-Pune, against the Petitioners/Accused persons for the offences punishable under Section 420, 504, 506 read with 347 of the Indian Penal Code (for short “IPC”). The complainant alleged that, the Petitioners decided to purchase the land admeasuring 1 Hectar 69 R of Survey No. 69 Hissa No. 1/E situated at Aahir, Tal-Mahabaleshwar, Dist. Satara for total consideration of Rs. 1,25,00,000/-. It was decided to develop the subject land in question, and for that purpose it was also decided to form a Limited Liability Partnership and accordingly fixed the respective shares of the parties. It is averred by the Petitioners that the Petitioners/Accused persons paid an amount of Rs. 25 Lakhs and remaining amount was decided to be paid at the time of execution of sale deed. The Understanding Agreement was executed on 06/01/2010 in between the complainant and Petitioners/Accused persons. The Limited Liability Partnership firm was formed by the complainant and Petitioners on 14/01/2016.

4. It is the allegation of the complainants in the complaint that the Petitioners/Accused persons forced and convinced the complainant to execute the Conveyance Deed/Sale Deed. The complainant alleged that, the Petitioners cheated the Complainant by not paying 1 Crore Rupees. The Petitioners issued several cheques which were bounced. It is alleged that, inspite of the request of

the complainant the Petitioners have not paid the agreed amount therefore, the complainant issued notice to the Petitioners. The complainant alleged that, the Petitioners threatened the Complainant therefore, the complainant filed Criminal Misc. Application No. 316/2016 under Section 156 (3) of Cr.P.C. in the court of JMFC, Pune for the offences punishable under Section 420, 504, 504 read with 34 of IPC against the Petitioners.

5. After filing Criminal Misc. Application No. 316/2016, JMFC Khadki-Pune, vide order dated 20/9/2016 directed Respondent No. 2 to do investigation under Section 156 (3) of Cr.P.C. Respondent No. 2 pursuant to the order conducted the investigation and filed charge sheet under Section 173 of Cr.P.C. against the Petitioners for the offences punishable under Section 420, 504, 506 read with 34 of IPC. Thereafter, Petitioners filed an application below Exhibit 15 in R.C.S. No. 17/2017 [C.R. No. 199/2016] for seeking discharge under Section 227 of Cr.P.C. for the alleged offences punishable under Section 420, 504, 506 read with 24 of IPC. It is the case of the Petitioners that, Complainant and the Petitioners are the partners in Opal Landmarks (LLP) firm. The Petitioners are in land development business for more than 20 years. One Shri. Mangesh More introduced to the Respondent No. 1 and Shri. Pankaj Salunkhe with the Petitioners, who shown the subject land in question to the Petitioners. The

Petitioners and Respondent No. 1 with Pankaj Salunkhe formed the Opal Landmarks LLP vide partnership Deed dated 14/1/2016. Petitioners are having 54% share while Respondent No. 1 and Pankaj Salunkhe each having 23% share into the said firm. Respondent No. 1 is having 23% share into the entire business of the firm. In the capacity of the partner, the Respondent No. 1 supposed to give an amount of Rs. 24,86,760/- to the firm but the complainant has not paid a single penny. The Opal Landmarks [LLP] firm on 09/2/2016 purchased the subject land in question from the original owners for total agreed consideration of Rs. 81,12,000/- and also paid other charges which calculated in total of Rs. 1,08,12,000/-. The complainant and Respondent No. 1 have not paid any amount of their share. On the contrary, the Petitioners have paid the entire agreed amount to the complainant and to Pankaj Salunkhe by way of cheque and by RTGS. Respondent No. 1 has completely agreed with sale deed, as no grievance/complaint has been lodged by the Respondent No. 1 with regard to the sale deed. As per clause no. 44 of the LLP firm deed, it was mutually agreed and decided with regard to any dispute, in between the parties with regard to the firm business, the said dispute shall be resolved through Arbitrator only, whose decision shall be final. In spite of having knowledge of the same, Respondent No. 1 have not approached to the Arbitrator for his grievance. In addition to the same, the other land owners namely Shri. Pankaj Salunkhe, Shri. Ramesh

Dhanawade, Shri. Shankar Kadam and Shri. Sunil Jadhav have not lodged any complaint or raised grievance against the Petitioners. The entire dispute as raised by Respondent No. 1 is of civil nature and no ingredients of cheating has been set out in the FIR/in complaint of the Respondent No. 1. The requisite ingredients of cheating are missing into the complaint. Therefore, the Petitioners by way of application below Exhibit-15 prayed for discharge for the offences punishable under Section 420, 504, 506 read with 34 of IPC.

6. It is further the case of the Petitioners that, Respondent No. 1 filed reply to the Exhibit-15 and resisted the contents of discharge application. The JMFC Khadki-Pune after hearing the parties vide its impugned order dated 7/6/2018 dismissed the Petitioners discharge application below Exhibit-15 in R.C.C. No. 17/2017. It is also to be noted that, while rejecting the discharge application, the JMFC has not recorded any findings/observations and erroneously dismissed the discharge application. Being aggrieved by the impugned order dated 7/6/2018 passed by the JMFC Khadki-Pune below Exhibit-15 discharge application in R.C.C. No. 17/2017, filed Criminal Revision Application No. 413/2018 before the Sessions Court, Pune. The Petitioners raised several grounds on merit and sought indulgence. Learned Sessions Judge, Pune after hearing the parties, vide its impugned judgment and order dated

19/12/2018 rejected the Criminal Revision Application No. 413/2018 by holding that no interference is required in the order under challenged dated 7/6/2018 passed below Exhibit-15 in R.C.C. No. 17/2017. The Petitioners being aggrieved by the impugned judgment and order dated 19/12/2018 passed by the Additional Sessions Judge, Pune in Criminal Revision Application No. 413/2018 constrain to approach this Court under Article 227 of the Constitution of India.

7. As indicated herein above, the Petitioners have filed a application for discharge before the learned Magistrate. The learned Magistrate upon perusal of charge sheet, and considering the statements recorded during investigation as also other documents placed on record, came to a conclusion that there are sufficient evidence against the accused to frame charge against them and the grounds mentioned in the discharge application are not tenable. The learned Magistrate accordingly rejected the discharge application by order dated 07/06/2018.

8. Being aggrieved by the order of the learned Magistrate, the Petitioners filed Criminal Revision Application No.413 of 2018. The learned Additional Sessions Judge, Pune after considering the rival contentions of the parties, and after perusing the material on record, did not deem it appropriate to

interfere with the order passed by the learned Magistrate. The learned Additional Sessions Judge has dealt with the contention of the Petitioners that there is arbitration clause in the limited liability partnership, and therefore, the criminal complaint is not tenable. The learned Additional Sessions Court has observed that the arbitration clause takes care of the civil liabilities and civil disputes between the parties, the criminal liabilities are not covered by the arbitration clause. By order dated 19/12/2018 the learned Additional Sessions Judge rejected the revision application filed by the Petitioners. It is the said order dated 19/12/2018 which is taken exception to my way of the above Writ Petition.

9. The learned counsel for the Petitioners submits that the complainant has executed a sale deed on 09/02/2016 and in view of the limited liability partnership, the complainant was to contribute 23% as per his share, but he did not pay the said amount. It is submitted that out of total consideration amount, the complainant was supposed to pay Rs.24,86,760/- but he did not pay single paisa in the firm and even after receiving initial amount has filed the false complaint. It is further submitted that there is an arbitration clause in the limited liability agreement, and therefore, the complaint filed by the complainant is not tenable. The dispute in question is of civil nature. The ingredients of offence of cheating as alleged are not fulfilled. The learned counsel further submits that

there is a delay in filing the FIR. The Petitioners have paid Rs.25,00,000/- of their 54% share of the amount of consideration. The Petitioners have no dishonest intention. It is further submitted that there is no evidence placed on by the Petitioners so as to convict them and, therefore the Petitioners are liable to be discharged. It is further submitted that both the Courts below did not appreciate the material on record properly and erroneously come to conclusion that there are sufficient evidence against the Petitioners. It is also submitted that the orders passed both the Courts below are not sustained in the eyes of law and the same are required to be quashed and set aside. In support of aforesaid contentions, Petitioners placed reliance on the judgment of Hon'ble Supreme Court in the case of State of Madhya Pradesh Versus S.B. Johari, reported in 2000 DGLS (DV)113. He therefore submits that the writ petition deserves consideration.

10. On the other hand the learned counsel appearing for Respondent No.1 Complainant submits that the Petitioners have suppressed material fact from this Court. It is submitted that the Petitioners are silent about the MOU executed on 06/01/2016 and the said MOU is a pre-incorporated contract between the complainant and the Petitioners which gives birth to LLP firm. It is submitted that as the Petitioners did not have sufficient funds for total consideration of land therefore they proposed Rs.25 Lakhs, which was spent by the complainant for

development of land, and Rs. One Crores on or before sale deed and 23 percent shares to the complainant and Mr. Pankaj Salunkhe each by forming the said LLP on 14/01/2016. The learned counsel for the Petitioners submits that right from beginning by contravening the conditions mentioned in the said MOU executed on 06/01/2016, the Petitioners started cheating the complainant, and therefore, question of arbitration of LLP does not arise. It is submitted that the Petitioners could not complete their part to pay the consideration as also they intentionally get the cheques given to the complainant towards consideration bounced. It is submitted that the accused intentionally cheated the complainant since beginning and therefore the both the Courts below have rightly rejected the discharge application filed by the Petitioners. He, therefore, pray that the Writ Petition deserves no consideration.

11. Heard the learned counsel for the parties. With their able assistance I have perused the pleadings and grounds taken in the Writ Petition as well as the annexures thereto, as also the reasoning recorded by both the courts below.

12. It is an admitted fact that memorandum of understanding came to be executed between the the complainant and the Petitioners on 06/01/2016, and thereafter on 14/02/2016 they have entered into Limited Liability Partnership

(LLP) Agreement of Opal Landmarks LLP. So it is clear that the parties have entered into the memorandum of understanding prior to entering into the LLP Agreement. The said memorandum of understanding is a notarized document signed by all the Petitioners as well as the Complainant. It is specifically mentioned therein that the builder i.e. the Petitioners approached the land owner i.e. the complainant with an intention to purchase the land for total consideration of Rs.1,25,00,000/-. The Petitioners have agreed to pay Rs.25,00,000/- to the complainant which is to be paid by the complainant towards the Development on or before the said MOU and rest of the amount of Rs. One Crore is to be paid by the Petitioners while executing the Sale Deed. It is also mentioned in the said MOU that the complainant and the Petitioners have decided to form a limited liability partnership firm. Accordingly they entered into the said LLP Agreement on 14/01/2016. In between a Sale Deed came to be executed on 09/02/2016 showing the consideration of Rs.81,12,000/-. From the perusal of the material on record it can be said that the said MOU is the base of the transaction. It is tried to contend on behalf of the Petitioners that the Petitioners/Accused had no dishonest intention, as they had already paid their share of consideration as mentioned in LLP agreement, and in it was the complaint who was in default by not contributing his share. In this context it would be apposite to revisit the terms and conditions mentioned in the said MOU. It is agreed by and between

the parties that the total amount of consideration to be paid by the developer/builder was fixed at Rs.1,25,00,000/- and after receipt total amount the land owners have to transfer their rights in the property in the name of LLP farm. As per the said MOU the Petitioners have agreed to pay Rs.25,00,000/- to the complainant for development on or before the said MOU, and rest of the amount to be paid at the time of executing Sale Deed. So from the wording of the said MOU, it is clear that the share of the complainant in the said LLP agreement was in addition to the amount of consideration fixed at Rs.1.25 crores. Why LLP is form, its answer is in MOU. It is clear from copy of the sale deed that the amount of consideration shown therein is Rs.81,12,000/- which is admittedly less than the amount mentioned in the MOU. Moreover the cheques issued by the Petitioners in favour of the complainant, when presented in the bank by the complainant the same bounced and/or dishonoured due to "Payment Stopped by Drawer". By the act of stopping the payment on the part of the Petitioner would reveal that the Petitioners have done so with a view for deceiving and cheating the complainant. Even the complainant issued a legal notice to the accused on 16/08/2016, however, the accused did not pay the amount.

13. It is pertinent to mention that the learned Magistrate, considering the documents and material produced on record, deemed it appropriate that a detail

investigation into the allegations levelled against the accused at the hands of police is necessary, and therefore, referred the complaint to the concerned police station for investigation under Section 156(3) of the Criminal Procedure Code. The Investigating Officer during the course of investigation recorded the statements of the witnesses. The police has recorded a statement of one Vidya Ravindra Salunkhe, who in his statement stated before the police that the accused have cheated her by obtaining amount under the pretext of constructing bungalow over the said land.

14. It is also alleged by the complainant that the accused persons have threatened him that they would not pay the amount and they would beat and kill him. During investigation, the police have recorded the statement of Mr. Pankaj Salunkhe. It is stated by the said Mr. Pankaj Salunkhe that the accused called the complainant on the site at Mahabaleshwar and threatened the complainant. It is also stated that the accused are trying to grab the land. After detailed investigation the Police have filed the charge sheet against the accused under Sections 420, 504 and 506 r/w 34 of the Indian Penal Code.

15. On the face of the complaint, it can be said that since inception the Petitioners have an intention to cheat the Complainant and the grab the entire

land. The act of the Petitioners by stopping the payment of the cheques issued in favour of the complainant would disclose that the Petitioners had dishonest intention to cheat the complainant. The ingredients of Section 420 are therefore attracted in the present case.

16. Upon perusal of the material placed on record, the reasoning assigned by both the Courts below as also the statements of witnesses recorded by the IO during investigation, and the charge sheet filed by the Police against the Petitioners, this Court is of considered view that there is sufficient evidence against the accused to frame the charge against them. Having regard to the facts emerging from the material and documents placed on record, the ingredients of alleged offences have been attracted. So also there is sufficient material on record to proceed against the Petitioners. One Mr. Mangesh Laxman More, whose statement has been recorded by Investigation Officer on 28/10/2016, has supported the allegations made in the complaint. There are other witnesses who have stated that, the Petitioners created 3rd party rights in subject property with an intention to cheat complainant, so also these witnesses from whom Petitioners have collected money and illegally created 3rd Partly rights in the subject property. There is no infirmity found in the findings recorded by both the Courts below. The orders of both the Courts are in consonance with material on record

and do not required interference at the hands of this Court.

17. In the light of aforesaid discussion, this Court is of the considered opinion that, no case for interference by this Court in the impugned orders is made out. There is no merit in the Writ Petition. The Writ Petition is rejected. Rule is accordingly discharged.

18. Needless to state that the observations made herein above are prima facie in nature and confined to the adjudication of the present Criminal Application.

19. At this stage, the learned counsel appearing for the Petitioners pray for continuation of ad-interim relief granted by this Court on 27th June 2019 for a period of eight weeks. The prayer for continuation of ad-interim relief is vehemently opposed by the learned counsel appearing for Respondent No.1. However, in the interest of justice, ad-interim relief granted by this Court, and which is in force till date, shall remain in force/operation for further six weeks from uploading the judgment on the official website of High Court of Bombay.

[S.S. SHINDE, J.]