IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 560 OF 2017

1. Shri Kapurchandji Sethiya,]
Aged about 61 years, Occ : Business,]
Residing at 92, Ruganta Chawl (bhavan),]
4th Floor, Sitaram Poddar Marg, Fanaswadi]
Mumbai 400 002.]

2. Shri Nagesh Kapurchandji Sethiya,]
Aged about 31 years,]
Residing at 92, Ruganta Chawl (bhavan),]
4th Floor, Sitaram Poddar Marg, Fanaswadi]
Mumbai 400 002.]

...APPLICANTS/ ACCUSED.

Versus

1. Shri Keshavji K. Bhanushali,]
Age : 72 years,]
Residing at Jaya Apartment, Cama]
Galli, Near Fatima High School,]
Ghatkopar (W), Mumbai 400 086]

2. The State of Maharashtra]
Through its Public Prosecutor]
Criminal Side, High Court,]
Mumbai.] ...RESPONDENTS

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Mr. R.S. Tripathi for Applicant.
Mr. Anil Dubey for Respondent No. 1.
Mr. A.R. Patil, APP for Respondent – State.

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CORAM : S.S. SHINDE, J.
RESERVED ON : 16th JULY 2019
PRONOUNCED ON : 25th JULY 2019

ORAL ORDER:-

1. This application takes an exception to the order dated 18th December 2014 passed by the Learned Metropolitan Magistrate, 49th Court, Vikhroli, Mumbai and order dated 8th August, 2016 passed by the Sessions Judge, Bombay dismissing the Revision application No. 285 of 2015 of the applicant and confirming the issuance of process against the applicants.

2. It is the case of the applicants that, the applicants are accused in Case No. 185/SW/2014 filed by the Respondent No. 1 – Original Complainant in the Court of learned Metropolitan Magistrate under Section 420 r/w. Section 34 of the Indian Penal Code.

3. It was alleged in the complaint that, the complaint is filed by the complainant against both the above named accused for the offence having committed under Section 420 r/w. 34 of the Indian Penal Code. The said offence is committed to the total tune of Rs. 4,56,000/-. It is contended that, the complainant is engaged in business of Metal works from last several years. Complainant as friends applicants from many years. The applicants were in need of money and sought urgent financial help from the Respondent No. 1

herein and since the applicants were known to the Respondent No. 1 and that after he received assurance and promise from the accused to repay the amount he parted with an amount of Rs. 4,56,000/- by cash without doubting the intention of the accused, which accourding to the complainant was dishonest and fraudulent to cheat him since the inception. It is contended that, on the dishonest and fraudulent representation of the accused the complainant has been cheated, and the complainant has fallen prey of the inducement from the accused and has been a victim of this hoodwink. The complainant believed into false representation of the accused of returning back the amount and on their troth the complainant helped the accused which was duly acknowledged by the accused on a promissory note dated 11.04.2011 and 25.06.2011 respectively. It is further contended that, on the inducement of both the applicants, Respondent No. 1 paid a sum of Rs. 2,31,000/- to the applicant no. 1 and Rs. 2,25,000/- to the Applicant no. 2 totaling the sum of Rs. 4,56,000/- by cash that intentionally deceived the Respondent No. 1. The applicants orally promised to repay the amount in a span of one year. Despite a year passed the accused never returned the amount nor showed any intention to repay it. Thereafter, several attempts were made with a request to the accused to return back the amount, and simultaneously the applicants gave several false promises and assurances since both the applicants never had the intention to pay the amount back to the complainant, from the inception. On back to back attempts made to recover the money from both the applicants, applicant no. 2 issued a cheque in favour of the complainant drawn on the Bank of Maharashtra. The said cheque when presented to the complainant's bank was dishonored for the reasons cited as Account Closed.

4. It is alleged that, both the applicants had taken loan individually and issued the cheque from the company wherein both are directors for which offence under Section 138 of the Negotiable Instruments Act, 1881 will not be attracted. The applicants very much had the intention to deceit the Respondent No. 1 which is crystal clear from the cheque issued and dishonored. The Respondent No. 1, once again made an oral request to both the applicants. Both the applicants have induced the Respondent No. 1 to part with the sum of Rs. 4,56,000/- with an assurance to repay the amount, the Respondent No. 1 would not have parted with the aforesaid amount had their not been a inducement and false representation from both the accused. Hence, the Respondent no. 1 has suffered wrongful loss and the

accused have wrongfully gained the aforesaid amount.

5. The complainant filed complaint under Section 420 r.w. 34 of the IPC in the Court of 49th Learned Metropolitan Magistrate of Vikhroli, Mumbai. On 18th December 2014 the learned Metropolitan Magistrate issued process against both the applicants for the offence punishable under Sections 420 r/w 34 of the IPC.

6. Being aggrieved by order dated 18th December 2014 passed by the learned Metropolitan Magistrate the applicants preferred an Criminal Revision Application before the Sessions Court for setting aside the order passed by the learned Metropolitan Magistrate.

7. On 8th August 2016 learned Sessions Court by impugned order, confirmed the order of the learned Metropolitan Magistrate of issuance of process against the applicant. Hence this application.

8. Learned counsel appearing for the applicants submitted that, the learned Metropolitan Magistrate ought to have appreciated that, the Respondent No.1 has instituted proceedings under Section 138 of the Negotiable Instruments Act and the same was pending in the Court of learned Metropolitan Magistrate, which have been

abandoned by the Respondent No. 1. Respondent No. 1 has dishonestly and fraudulently filed the complaint under Section 420 of the Indian Penal Code by suppressing the fact that he has already filed proceedings under Section 138 of the Negotiable Instruments Act, 1881. It is submitted that, the learned Metropolitan Magistrate ought to have appreciated that in the legal notice dated 28.12.2012 of the Respondent No. 1 there is no iota of evidence or allegations that the sum of Rs. 4,56,000/- by cash was friendly loan given to the applicants and there was no intention to pay the same by the applicants. Obviously, the ingredients of the Section 415 of Indian Penal Code, do not get attracted even if the complainant's versions to be accepted in toto. In fact there are inconsistent averments and statements of complainant from the documents annexed to the said complaint.

9. It is further submitted that, the learned Metropolitan Magistrate erred in issuing the process against the applicants, when there is no material or there is no inducements as alleged by the complainant thus the complaint ought to have been dismissed and thus issuance of process order is liable to be set aside. It is submitted that, learned Metropolitan Magistrate erred in not applying the judicial mind while coming to the conclusion of recording *prima facie*

satisfaction. There was no material on record for issuance of process. It is submitted that, the learned Metropolitan Magistrate ought to have appreciated that none of alleged offence has been committed by the accused and there is no *prima facie* case made out in the complaint. In fact the learned Metropolitan Magistrate committed manifest error of law and facts resulting in flagrant miscarriage of justice and thus the impugned order is liable to be set aside and the present application be allowed. It is submitted that, learned Sessions Judge erred in holding that, the nature of the documents as alleged by the Respondent No. 1 holds *prima facie* that the applicants committed an offence of the cheating and issuance of process is proper and just. It is submitted that, both the courts below failed to appreciate that there are no averments in the complaint or material on record so as to issue process. Therefore, learned Counsel for the applicants prays that application may be allowed.

Legal Submissions On Behalf Of Respondent No. 1

10. Firstly, the Respondent respectfully submits that, the applicants has willfully and deliberately with malice approached the Respondent for financial assistance and in repayment issued a cheque

of his company's account to cheat the Respondent which would restrain him to launch any prosecution under the Negotiable Instruments Act. The Hon'ble Apex Court in '***Laxmi Dyechem Vs. State of Gujrat and Ors. 2012 SCC ONLINE SC 970*'.** dealt with such identical situation in paragraph no. 22 of the judgment reads as under:

> *"The legislature intends to punish only those while incorporating the provisions of Chapter XVII, Sections 138 of 142 inserted in the NI Act (by the Banking, Public Financial Institutions and Negotiable Instrument Laws (Amendment) Act, 1988) intends to punish only those who know fully well that they have no amount in the bank and yet issue a cheque in discharge of debt or liability already borrowed/incurred-which amounts of cheating, and not to punish those who refused to discharge the debt for bona fide and sustainable reason. Therefore, complaint filed in such a case although might not be quashed at the threshold before trial, heavy onus lies on the court issuing summons in such cases as the trial is summary in nature."*

The Hon'ble Apex Court has acknowledged and said in the aforesaid judgment which could be referred in the case notes 'B'. on page no. 1 that, to wrongfully gain by issuing cheques which they do not intend to honour amounts of cheating and have put forth two contingency in such situations, the first being “Either because of the amount of money standing to the credit of that account is insufficient to honour the cheque” held in a genus and dishonour for reasons and as 'Account closed, payment stopped, referred to the drawer, signatures do not match or image not found are only species of that genus. Therefore, it is very essential of materialize the facts and the commission of offence can only be determined at the trial stage by leading evidence.

11. Secondly, the applicant has contended that, the Respondent / complainant did not prosecute the applicants under the provisions of the Negotiable Instruments Act as the cheque was issued by him to Respondent and instead filed a complaint u/s. 420 r/w 34 of the Indian Penal Code. It is submitted that, the applicants have deliberately issued the cheque to the Respondent on his company's account to escape his liability and to cheat the Respondent and now choses to question the choice of prosecution preferred by the respondent. The Respondent places reliance on

the judgment of the Hon'ble Apex Court in '***Sangeetaben Mahendrabhai Patel Vs. State of Gujrat and Anr. 2012 SCC ONLINE SC 368***' wherein the Court has defined that though the issue may be same but the offence can be under different statutes and prosecution under the provisions of the Negotiable Instruments Act, 1881 cannot hamper the prosecution under Indian Penal Code as the both are different statutes and ratio of Double Jeopardy does not arise in such case.

12. Thirdly, the applicants have taken a plea that, there is no mens rea and they have not committed an offence of cheating. Accordingly, the Hon'ble Sessions Court for Greater Bombay have dealt with this issue in Exhibit – E paragraph No. 9 at page no. 32 of the order passed on 08.08.2016. The element of criminality and fraudulent intention of the applicants can only be determined after recording the evidence. The applicant will get ample opportunity of cross-examine the respondent and before reaching to that particular stage, the applicant will not prejudiced. The Learned Trial Court has applied its judicial mind before issuing process as observed by the Hon'ble Sessions Court for Greater Bombay in Exhibit – E paragraph no. 11 at page No. 32 of the order passed on

08.08.2016. The application is devoid of any merits which deserves to be dismissed.

13. Heard learned counsel appearing for the applicants and first Respondent at length. With their able assistance perused the grounds taken in the application, annexures thereto, reply filed by the first Respondent and also written submissions placed on record. So far as contention of the counsel for the applicants that, first Respondent did file the proceedings under Section 138 of the Negotiable Instruments Act, and same proceeding were abandoned and therefore, the present complaint under Section 420 of the Indian Penal Code is not maintainable is concern, it is true that issue is same but the offence can be under different statutes and prosecution under the provisions of Negotiable Instrument Act cannot hamper prosecution under the Indian Penal Code as both are different statutes the ratio of double jeo pardy does not arise in such case. Learned counsel appearing for the first Respondent has rightly placed reliance in the case of ***Sangeetaben Mahendrabhai Patel*** (supra) wherein the Court has defined that though the issue may be same but the offence can be under different statutes and prosecution under the provisions of the Negotiable Instruments

Act, 1881 cannot hamper prosecution under the Indian Penal Code as both the different statutes and ratio of double jeo pardy does not arise in such case.

14. Upon careful perusal of the averments in the complaint filed by the first Respondent an alleged offence of cheating is disclosed it is stated in the complaint that, both the accused have induced the complainant to part with the sum of Rs. 4,56,000/- with an assurance to repay the amount, the complainant would not have parted with the aforesaid amount had their not been a inducement and false representation from both the accused. Hence, the complainant has suffered wrongful loss and the accused have wrongfully gained the aforesaid amount.

It is further stated in the complaint that, both the accused had taken loan individually and issued the cheque from the account of the company, wherein both applicants are directors for which offence under Section 138 of the Negotiable Instrument Act, 1881 will not be attracted. The accused very much had the intention of deceit the complainant which is crystal clear from the cheque issued and dishonored.

15. Upon reading the averments in the complaint in its entirety the alleged offence of cheating is disclosed and therefore no case is made out by the applicants to quash the proceedings. It appears that the applicants taken the money from the Respondent No. 1 and issued him cheque of the account of the company which was already closed even prior to issuance of such cheque, and also loan is taken in the individual capacity, and to deceive first Respondent cheque is issued in the name of partnership firm. In that view of the matter no case is made to entertain the application. Hence application stands rejected.

16. The observations made herein above are prima facie in nature and confined to the adjudication of the present Criminal Application. The trial Court shall not get influenced by the aforesaid observations during the course of trial. All contentions are kept open for being agitated before the trial Court.

(S.S. SHINDE, J.)