

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 3971 OF 2019

- | | | | |
|----|---|---|----------------|
| 1. | Nirman Raltors and Developers Ltd. |] | |
| | A limited Company formerly known |] | |
| | As m/s. Nirman Constructions (a |] | |
| | Partnership Firm) having its address at |] | |
| | 501, 502, Peninsula Heights, |] | |
| | C.D. Barfiwala Road, Juhu Lane, |] | |
| | Andheri (West), Mumbai – 400058. |] | |
| 2. | Rajendra Madhukar – Sawant |] | |
| | Age : 49 years, Occ : Business, |] | |
| 3. | Ajit Shreeram Marathe |] | |
| | Aged about 49 years, Occ : Business |] | |
| | Both having address at 501, 502, |] | |
| | Peninsula Heights, C.D. Barfiwala Road |] | |
| | Juhu Lane, Andheri (West), |] | |
| | Mumbai – 400058. |] | ...Petitioners |

Versus

- | | | | |
|----|------------------------------------|---|----------------|
| 1. | Amrutlal Premji Patel |] | |
| | Aged about 58 years, |] | |
| | Occ : Civil Contractor, having his |] | |
| | Address at 201, Karmabhoomi, |] | |
| | A Wing Hingawala Cross Lane, |] | |
| | Ghatkopar (E), Mumbai – 400077 |] | |
| 2. | State of Maharashtra |] | ...Respondents |

Mr. Kapil A. Khan a/w. Ms. Sana K. Khan a/w. Mr. Samir Kumar Ghosh i/by
RSK Legal for Petitioners.

Mrs. G.P. Mulekar, APP for Respondent – State.

Mr. Aseem Naphade i/by Legal Chartered for Respondent No. 1.

CORAM : S.S. SHINDE, J.
DATE : 1st OCTOBER 2019

(ORAL JUDGMENT)

1. Rule. Rule made returnable forthwith, with the consent of the parties matters is heard and disposed of finally at the stage of admission.
2. This Writ Petition takes an exception to the order dated 06.09.2018 passed by the learned Judicial Magistrate First Class at Karjat in Criminal Miscellaneous Application No. 150 of 2016 now numbered as C.C. No. 124 of 2018 thereby issuing process against the Petitioner.
3. It is the case of the Petitioner that on 04.04.2018 a development agreement came to be executed between the petitioners and the Respondent along with one Mr. Ishwarbhai Valji Velani having 50% share in the property. As per the development agreement the Respondent was entitled for Rs. 10,500 sq.ft. (built up) area. On 09.07.2010 as the petitioners failed to handover the constructed area to the Respondent, as per the development agreement, the Respondent No. 1 filed Civil Miscellaneous Application No. 72 of 2012, under the provisions of Section 9 of the Arbitration and Conciliation Act, 1996 in District Court Raigad, at Alibaug.
4. It is the further case of the Petitioners that, parties filed consent

terms and alternate site was offered by the Petitioner to the Respondent which was accepted and in the meanwhile it was between the parties with conditioned that petitioners not to sell 77 unsold flats constructed at the said property. The alternate site offered by Petitioners was not acceptable and therefore another Civil Application was filed before Civil Court bearing Civil Miscellaneous Application No. 79 of 2013 before District Court at Raigad, Alibaug. The Petitioners challenged this by way of an appeal before the High Court where the arbitrator was appointed and consequently matter was settled between the parties by way of consent terms. The petitioners were to pay an amount of Rs. 2,81,00,000/- (Rupees Two Crores Eighty One lacs only) to the Respondent in view of the full and final settlement with respect to the providing bungalow / row houses / residential buildings as mentioned in the development agreement.

5. It is further the case of the Petitioners that, the petitioners have paid some installment and thereafter failed to pay future installments of Rs. 28,00,000/- (Rupees Twenty Lacs) each and thereby the Respondent had filed the present complaint alleging the case of cheating against the petitioners.

6. Learned counsel appearing for the Petitioners submit that, the dispute is being settled between the petitioners and the Respondent and if any contravention of terms of the consent terms is alleged, the civil forum shall

have jurisdiction and the same cannot be made into a case of the cheating or criminal breach of trust. It is further submitted that, the Respondent had already filed earlier criminal case. Pursuant to the directions of the Court to investigate under Section 156(3) the FIR No. 55 of 2013 was registered and thereafter a charge sheet had been filed bearing CC No. 80 of 2015. However, Respondent had withdrawn the said case in view of the settlement before the High Court. It is submitted that, the Petitioner has filed the present complaint on the same set of facts on the ground of non payment of dues as per the settlement. It is further submitted that the petitioners cannot be prosecuted twice on the same set of allegations.

7. In support of said contention the learned counsel invites attention of this Court to Article 20(2) of the Constitution of India, Section 26 of the General Clauses Act, Section 300(1) and 320(8) of the Cr.P.C. He submit that, when the civil remedy is provided, the question of filing criminal complaint, that too second time would not arise. In support of his aforesaid contention learned counsel appearing for the Petitioners placed reliance upon the ration laid down in the case of Kolla Veera Raghav Rao Versus Gorantla Venkateshwara Rao and Another¹ and in particular paragraph nos. 3 and 5 thereof. Therefore, learned counsel appearing for the Petitioners relying upon the pleadings in the Petition, grounds taken therein and annexures thereto

1 (2011) 2 Supreme Court Cases 703

submits that, Writ Petition deserves to be allowed.

8. On the other hand, learned counsel appearing for the first Respondent invites attention of this Court to the list of dates and events and submits that, on multiple occasions the Petitioners cheated the first Respondent. It is submitted that, on more than 1 occasion promise was given to the first Respondent that Petitioners will pay amount of Rs. 2,81,00,000/- (Rupees Two Crores Eighty One lacs only) however, first Respondent received only Rs. 61,00,000/- (Rupees Sixty One lacs only) and thereby Petitioners have committed breach of the consent terms. Learned counsel invites attention of this Court to the averments in the complaint and submits that, the alleged offences are clearly disclosed upon bare reading the allegations in the complaint in its entirety. Learned counsel submits that, merely because civil remedy is available in no bar to file the criminal complaint. In support of aforesaid contention learned counsel appearing for the first Respondent relying on the exposition of the Supreme Court in the case of Trisuns Chemical Industry Versus Rajesh Agarwal and Others² submits that, merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. Therefore, learned counsel appearing for the first Respondent submits that, Petition may be rejected.

² (1999) 8 Supreme Court Cases 686

9. Heard the learned counsel appearing for the Petitioner and learned counsel appearing for the first Respondent at length. With their able assistance perused the pleadings and ground taken in the Petition and annexure thereto and averments in the complaint filed by the first Respondent. Upon careful perusal of the averments in the complaint and in particular paragraph no. 12 onward, an ingredient of alleged offences have been attracted and consequently an alleged offences have been disclosed. The averments in the complaint makes it abundantly clear that the Petitioner induced and cheated the first Respondent by giving promise that he will pay Rs. 2,81,00,000/- (Rupees Two Crores Eighty One lacs only) in installments as stated in the consent terms. It prima facie appears that the applicant induced, cheated and gave false promise that he will abide by consent terms and therefore, the complainant withdrew the earlier complaint. Therefore, it is not open for the Petitioner to contend that, once complaint is withdrawn the second complaint is not maintainable. The petitioners cannot take advantage of his own wrong and contend that the second complaint is not maintainable.

10. Upon perusal of the order passed by the learned Judicial Magistrate First Class, Karjat it appears that, after proper inquiry and considering the averments in the complaint so also after receiving the report under Section 202 of the Code of Criminal Procedure, the Magistrate has

issued the process. The Magistrate has recorded the satisfaction about accepting of prima facie case. It is not necessary to give elaborate reasons. Suffice it to say that if the allegations in the complaint are taken at face value and read in its entirety an alleged offences are disclosed. The Supreme Court in the case of *Sau. Kamal Shivaji Pokarnekar Versus State of Maharashtra and others*³ has taken a view that quashing the criminal proceedings is called for only in a case where the complaint does not disclose an offence, or is frivolous, vexatious, or oppressive. Paragraph nos. 4, 5, 6 and 9 of the said judgment are relevant and the same are reproduced herein under for the sake of ready reference:

4. The only point that arises for our consideration in this case is whether the High Court was right in setting aside the order by which process was issued. It is settled law that the Magistrate, at the stage of taking cognizance and summoning, is required to apply his judicial mind only with a view to taking cognizance of the offence, or in other words, to find out whether a prima facie case has been made out for summoning the accused persons. The learned Magistrate is not required to evaluate the merits of the material or evidence in support of the complaint, because the Magistrate must not undertake the exercise to find out whether the materials would lead to a conviction or not.

3 AIR 2019 SC 847

5. Quashing the criminal proceedings is called for only in a case where the complaint does not disclose any offence, or is frivolous, vexatious, or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same. It is not necessary that a meticulous analysis of the case should be done before the Trial to find out whether the case would end in conviction or acquittal. If it appears on a reading of the complaint and consideration of the allegations therein, in the light of the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for the High Court to interfere.

6. Defences that may be available, or facts/aspects which when established during the trial, may lead to acquittal, are not grounds for quashing the complaint at the threshold. At that stage, the only question relevant is whether the averments in the complaint spell out the ingredients of a criminal offence or not.

9. Having heard the learned Senior Counsel and examined the material on record, we are of the considered view that the High Court ought not to have set aside the order passed by the Trial Court issuing summons to the Respondents. A perusal of the complaint discloses that prima facie, offences that are alleged against the Respondents. The correctness or

otherwise of the said allegations has to be decided only in the Trial. At the initial stage of issuance of process it is not open to the Courts to stifle the proceedings by entering into the merits of the contentions made on behalf of the accused. Criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be of a civil nature. If the ingredients of the offence alleged against the accused are prima facie made out in the complaint, the criminal proceeding shall not be interdicted.

(Underline added)

11. In that view of the matter, no case is made out to cause interference in the impugned order. Hence, Criminal Writ Petition stands rejected accordingly. Rule stands discharged.

(S.S. SHINDE, J.)