IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.6122/2019

MICHAEL GABRIEL .... **PETITIONER.**
Age 71 years, Indian Inhabitant
residing at Gabriel & Company
Gabriel Saw Mill, Laxmi Udyog
Nagar, Opp.NCH Colony, LBS
Marg, Kanjurmar (W),Mumbai-78

VERSUS

1. **THE STATE OF MAHARASHTRA**
Through Public Prosecutor, High
Court, Bombay.

2. **SETH BUILDERS PRIVATE LIMITED**
A Company incorporated under
The Companies Act, 1956 having
its registered office at 202,
Kala Mandir, Vile Parle(E),
Mumbai-400057.

3. **HASHMUKH DALICHAND SHETH**
Age adult, Indian Inhabitant,

4. **ALPESH HASMUKH SHETH**
Age adult, Indian Inhabitant,

5. **RATNESH HASMUKH SHETH**
Age adult, Indian Inhabitant

6. **MEENA HASMUKH SHETH**
Age adult, Indian Inhabitant,

Accused nos. 3 to 6 are the Directors
of Defendant no.2 having office
address at office at 303, 3rd floor,
Esquire building, Subhash road
above SBI bank, Vile Parle(E)
Mumbai 400 057. .....**RESPONDENTS/ ORIGINAL ACCUSED.**

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Mr.Subhash Jha alongwith Nilofer Sayed alongwith Harekrishna Mishra alongwith Shaila Tawre i/b Shweta Rathod and Prashant Mairale for the petitioner.

Mr.J.S.Kini i/b Sapna K. for respondent nos.2 to 6.

Mr.A.R.Patil APP for the State.

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CORAM : A. M. BADAR, J.

DATE : 18TH DECEMBER 2019.

ORAL JUDGMENT:

1. Heard.

2. Rule. Rule is made returnable forthwith. Heard finally by consent of the parties.

3. By this petition, the petitioner/original complainant

Michael Gabriel is challenging the Order dated 19/11/2019 passed by the learned Additional Sessions Judge, thereby rejecting his Criminal Revision Petition No.973/2019. By said revision petition, the petitioner Michael Gabriel had challenged the Order dated 3.07.2019 passed by the learned Metropolitan Magistrate, 64th Court, Esplanade Mumbai, thereby rejecting application under Section 156(3) of the Criminal Procedure Code and disposing the C.C. No.1069/Misc/2019 filed by him. By filing said criminal case, the petitioner Michael Gabriel had prayed for issuance of directions under section 156(3) of the Criminal Procedure Code, 1973 to Azad Maidan Police Station, Mumbai for investigation of offences alleged by him. The offences punishable under Section 177, 182 , 193, 196, 199, 200, 209, 420, 423, 464, 465, 467, 468, 471, 474 r/w 34 and 120-B of the Indian Penal Code were alleged to have been committed by the accused therein i.e. respondent nos.2 to 6 herein. It is averred in the complaint that petitioner Michael Gabriel is the owner of several plots of land and he had entered into an agreement for development with Respondent Nos. 2 to 6 herein i.e. proposed accused, for total consideration of Rs.15 Crores. The averments regarding filing of civil Suit bearing No.3540/2005 in this Court by respondent Nos. 2 to 6 for specific performance of agreement for development were also made in the said complaint. The petitioner contended that he received the summons in the said suit and was shocked to see the receipt-Exhibit D with the plaint. It is further contended that the receipt was reflecting payment of Rs.17 lakhs to the petitioner and therefore, he filed separate suit No.1526/2008 before this Court for declaring that development agreement as well as fabricated receipt for Rs.17 lakhs is illegal, null and void. The complaint further avers that on 14.1.2019 evidence on the affidavit came to be tendered before this Court and the petitioner i.e. the complainant was shocked to see another fabricated receipt for Rs.17 lakhs purportedly bearing signature of the complainant but the details were filled in by hand writing. It is further averred that however, the complainant was further shocked to read the affidavit which referred said receipt (Exhibit H) to be the same previous receipt as aforesaid inspite of the apparent distinguishing factor. With this, it is alleged that upon comparing both the receipts those appeared to be forged and fabricated as, one receipt contains details of amount, date in typed format and the other one contains those particulars in hand written format but the signatures are exactly at the same location. It is pleaded in the complaint that even if it is assumed that there was a receipt, there can not be two originals of one receipt, in light of the fact that the accused persons themselves have referred only to one receipt of Rs.17 lakhs in the complaint but they had produced copy of similar receipt of same amount subsequently.

4. The trial Magistrate rejected the prayer for sending complaint for investigation by order dated 03.07.2019.

4. Feeling aggrieved by the order of the learned trial Magistrate, the petitioner/original complainant preferred revision petition before the learned Additional Sessions Judge. The learned Additional Sessions Judge in paragraph 16 of the impugned order has observed about the report of the police officer and about the observations of the learned Metropolitan Magistrate showing that the civil disputes are pending before this Court. It is observed by the Revisional Court that therefore, specific order/directions are required from High Court for processing the complaint. The learned Judge observed that he fails to find any illegality or perversity in the impugned order of the learned Trial Magistrate. It is observed in para 21 of the Judgment by the Revisional Court that the complaint is not only pre-matured but the Investigating Officer has kept open the question of ascertaining it before the learned Metropolitan Magistrate by way of miscellaneous application.

5. I heard learned counsel appearing for the petitioner at sufficient length of time. By drawing my attention to the averments made in the plaint, it is argued that once commission of cognizable offence is reflected in the complaint made to the police station Officer, there is no alternative but to record information as per Section 154 of the Criminal Procedure Code by registering the crime. It is further argued that one transaction may give cause of action for civil matter but the very same transaction can also create a penal offence. Reliance is placed on the Judgment of the Apex Court, in the matter of ***Rajesh Bajaj Vs. State NCT of Delhi and Others***[1] to buttress his submission by pointing out observations in paragraph nos.10 and 11, which reads thus;

> 10. It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions. One of the illustrations set out under Section 415 of the Indian Penal Code is worthy of notice now.

1 (1999)3 Supreme Court Cases 259

> "(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."

> 11. The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in descerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that the respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that the respondent after receiving the goods had sold them to others and still he did not pay the moey. Such averments would prima facie make out a case for investigation by the authorities.

6. By relying on the Judgment of the Apex Court, in the matter of ***State of Haryana and others Vs. Bhajan Lal and others***[2]**,** and Lalita Kumari Vs. Government of UP[3] it is argued that when any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said

2 1992 Supp (1)Supreme Court Cases 335
3 (2014)2 SCC 1

police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. With this, my attention was drawn to the complaint in writing lodged by petitioner with Senior Inspector of Azad Maidan Police Station. It is submitted that the said complaint was disclosing commission of cognizable offence and therefore, the police machinery ought to have registered the offence. The concerned officer has made himself liable for inaction despite the law laid down by the Supreme Court. Order of the learned Trial Magistrate is criticized by stating that mere pendency of civil dispute between the parties do not preclude the Magistrate to exercise his jurisdiction when commission of cognizable offence is reflected from the averments made in the complaint.

7. As against this, the learned counsel appearing for respondent nos.2 to 6 vehemently argued that the respondents never claimed that they made payment of Rs.34 lakhs to the petitioner/original complainant. Their stand is to the effect that, they made payment of Rs.20 lakhs only as part consideration of development agreement. It is urged that respondent nos. 2 to 6 had filed civil suit bearing no.3540/2005 way back in the year 2005 before this court for specific performance of Contract by annexing receipt dated 9.04.2005, reflecting payment of Rs.17 lakhs to the petitioner. This receipt was typed because alongwith the plaint, typed documents are required to be filed. He further submitted that while adducing evidence on affidavit original copy of such receipt (which was earlier filed with the plaint) was tendered with the affidavit and therefore, instead of type-written portions, hand written portions appears on that receipts. It is further argued that even receipt filed with the plaint reflecting payment of Rs.17 lakhs to the petitioner came to be challenged by the petitioner in Suit No.1362/2008 for declaration and injunction before this Court. There is no question of cheating or fabrication of evidence because it is not claimed that payment of Rs.34 lakhs is made by the respondent/accused to the petitioner/original complainant.

8. The learned APP contended that the petitioner i.e. the complainant was informed by the concerned Police Station Officer that there is no wrongful loss even if it is assumed that contents of receipts are not tallying with each other.

9. In reply, the learned counsel for the petitioner submitted that bare perusal of both receipts shows that those are printed from the same Printer. Therefore, it is hard to digest that same printer would have been used by the respondent for a period of 3 years.

10. I have carefully considered the submissions so advanced and also perused the material placed on record.

11. At the outset it needs to be mentioned that the

petitioner/original complainant had alleged commission of offences punishable under Sections 177, 182, 193, 196, 199, 200 and 209 of the Indian Penal Code by accused persons/respondents herein. These are offences falling under Chapter X and XI of the Indian Penal Code. These offences are relating to contempts of lawful authority of public servants and of false evidence and offences against public justice. As per provision of Section 195 of the Criminal Procedure Code cognizance of these offences can not be taken by the learned Magistrate in the complaint of the nature filed by the petitioner before the trial Court. Cognizance of such offences is required to be taken only on the basis of complaint in writing by the concerned Court or by authorised Officer of the Court made in writing. The cognizance of such offences can also be taken by some other Court which is sub-ordinate to the Court alleging commission of such offences.

12. It is seen that in the suit for specific performance

development agreement dated 15.3.2005 came to be filed by respondent nos.2 to 6 against the petitioner in this Court. Receipt dated 09.04.2005 was annexed to the plaint as Exhibit 'D'. Said receipt is mentioning in type written format, the amount and date. Subsequently, evidence on affidavit of respondent Alpesh Sheth came to be filed on 14.01.2019 to which receipt dated 9.4.2005 came to be enclosed. In this receipt amount as well as date is stated to be in hand written format. On this backdrop if plaint in civil suit No.3540/2005 is perused, then it is clear from paragraph 15 that respondent nos.2 to 6 have claimed that they had paid an amount of Rs.17 lakhs to the petitioner/original complainant and others on 9.4.2005. The averments in the plaint filed by respondents/accused nowhere mention that total amount of Rs.34 lakhs was paid by way of part payment of consideration for development agreement dated 15.3.2005 by respondents/accused to the petitioner/complainant.

13. It is further seen that after filing of the suit for specific performance of contract by respondent nos.2 to 6, the petitioner/original complainant has also instituted a Suit for declaration and injunction before this Court which came to be registered as Suit No.1362/2008. In the said suit, prayer is to the effect that the agreement for development, and General Power of Attorney be declared as illegal, null and void. Similarly, Suit claim is also to the effect that receipt dated 9.4.2005 for a sum of Rs.17 lakhs be declared as illegal, forged and void and not binding on the plaintiff i.e. the petitioner herein.

14. One can not dispute that civil transaction can also create criminal offence. It is trite that once complaint reflects allegation of commission of cognizable offence, then the Police Station Officer is duty bound to register the FIR. Similarly, if the Magistrate finds that complaint made to him contains averments regarding commission of cognizable

offence then he is duty bound to proceed under Chapter XII of Criminal Procedure Code by passing appropriate order one of which is to issue directions to the Police Station Officer to investigate the matter. This position is clear from the Judgment of ***State of Haryana and others (supra) and Lalita Kumari (supra)*** relied by the petitioner. However, in case in hand, both parties have filed suits against each other and the receipt in question is also the subject matter of the Suit. The petitioner has not filed any suit for cancellation of receipt of Rs.17 lakhs but relief of declaration of the receipt as null and void is claimed. Order dated 4.10.2006 passed by this Court in Notice of Motion No.2/2006 reveals that this court has noted the contention of plaintiffs therein i.e. respondent nos.2 to 6 herein that amount of Rs.17 lakhs was paid to defendant nos.1 to 4 therein i.e. the petitioner no.1 (original Complainant) herein and other parties to the Development Agreement. Nowhere respondent nos. 2 to 6 have claimed that they had paid an amount of Rs.34 lakhs to the petitioner herein as part consideration for the contract of development entered into between the parties.

15. It is apposite to note that while directing investigation by passing order under Section 156(3) of the Cr.P.C., the accused has no right of audience. In the case in hand, peculiar situation has arisen because of which accused persons got right of audience in the instant matter. The learned trial Magistrate, upon perusal of the complaint application for issuance of directions under Section 156(3) of the Cr.P.C., after hearing the petitioner/original complainant came to the conclusion that the complainant by filing a Civil Suit bearing No.1362 of 2008 has sought relief in respect of receipt dated 9th April 2005 and the challenge is already pending before this court for adjudication. The learned trial Magistrate further observed that the dispute in respect of the Development Agreement is a civil dispute. With such observations, the complaint application seeking direction to

the police for investigation by invoking powers under Section 156(3) of the Cr.P.C. came to be rejected. Feeling aggrieved by this order, the petitioner/original complainant then preferred Revision Petition bearing No.973 of 2019 and that is how the respondent herein/accused persons got an opportunity of putting their say in the matter. Accordingly, they had placed on record of the revisional court their affidavit along with relevant documents which are carefully considered by me, while deciding the instant petition. For the reasons stated in the foregoing paragraphs it is not possible even to infer commission of cognizable offence of preparation of false documents with intent to cause injury or damage to the petitioner. No prima facie case against the respondents for making documents dishonestly or fraudulently in order to believe that those are signed by the petitioner/ original complainant is made out. It cannot be said that the petitioner / original complainant has made out a prima facie case demonstrating that respondents/accused persons had forged documents for the purpose of cheating and for using them as genuine. Basically, respondents/accused are not claiming that they had paid an amount of Rs.34 lakh to the petitioner/ original complainant. It is not their case even in the civil suit instituted by them that this much amount is paid under two different receipts by them to the petitioner/ original complainant and other parties to the Development Agreement. In this view of the matter, no case for interference in writ jurisdiction of this court is made out by the petitioner.

16. The petition as such is devoid of any merit. Therefore, the order.

ORDER

The petition is dismissed.

(A. M. BADAR, J.)