IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 563 OF 2019

Shivhar @ Shivhari Kathaluappa Chincholkar
Age: 43 years, Occu.: Service,
R/o Widoli, Tq. Mantha,
Dist. Jalna ..PETITIONER

VERSUS

1. State of Maharashtra
   Through Mantha Police Station,
   Tq. Mantha, Dist. Jalna

2. Smt. Anita Ajay Khot
   Age: 39 years, Occu.: Household,
   R/o College-Mahavidyalaya
   Majalgaon Corner, Beed Road,
   Majalgaon, Dist. Beed ..RESPONDENTS

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Mr. D.P. Palodkar, Advocate for petitioner
Mr. S.Y. Mahajan, A.P.P. for respondent no.1 – State
Mr. S.J. Salunke, Advocate for respondent no.2

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CORAM : R.G. AVACHAT, J.
RESERVED ON : 26th NOVEMBER, 2019
PRONOUNCED ON : 05th MAY, 2020

JUDGMENT :

Rule. Rule made returnable forthwith. Heard finally with the consent of learned Counsel for the parties.

2. The challenge in this writ petition is to order dated 29th August, 2015 passed by learned Judicial Magistrate First Class, Mantha, Dist. Jalna

("J.M.F.C.") in Criminal Miscellaneous Application No. 89 of 2014 issuing process against the petitioner – accused for the offences punishable under Sections 416, 419 and 465 of the Indian Penal Code ("I.P.C.") and confirmed by the learned Additional Sessions Judge, Jalna in Criminal Revision Petition No. 87 of 2018 vide order dated 05th March, 2019.

3. Heard. Perused the complaint and report of enquiry made under Section 202 of Code of Criminal Procedure.

4. Mr. Palodkar, learned Counsel for the petitioner would submit that Respondent No.2 (complainant) is the real sister of the petitioner – accused. All is not well between the two. She has filed a suit for partition and separate possession of the properties alleged to have belonged to the joint family of her parents, herself and the petitioner. The alleged offence dates back to 1993. The petitioner was little over eighteen years of age by then. He is alleged to have sold some portion of the land purchased by the father in the name of his deceased elder brother Shivhar (I). According to learned Counsel, the land was purchased by father in the name of his elder son – Shivhar (I), while he was ten years of age. Shivhar (I) passed away on 20th February, 1974. The petitioner was born on 01st January, 1975. The petitioner's father gave the petitioner name of his deceased son – Shivhar as it was then customary to do so. Later on, father sold some portion of the land that was purchased in the name of Shivhar (I). The petitioner executed sale deed at the instance of father.

Respondent No.2 (complainant) is younger to the petitioner by three years. She did not have any right title and interest in the land sold. According to learned Counsel, the learned J.M.F.C. did not take into consideration the report of enquiry made under Section 202 of Code of Criminal Procedure. Learned J.M.F.C. ought not to have issued the process against the petitioner. He, therefore, urged for allowing the petition.

5. Learned A.P.P., representing Respondent No.1 – State supported the impugned orders. Mr. Salunke, learned Counsel for Respondent No.2 would submit that the allegations in complaint are only to be seen. The petitioner cannot place on record any other material at this stage. He can very well lead evidence during trial of the case. As the allegations in the complaint disclose the essential ingredients of the offence alleged against the petitioner, no interference with the impugned orders is warranted. Learned Counsel took me through the allegations in the complaint and submitted that the land was purchased in the name of Shivhar (I). He passed away on 20th February, 1974. Thereafter the petitioner was born. The petitioner, taking advantage of his name similar with that of the deceased, sold the land of Shivhar (I) and thus committed the offence of cheating by personation and forgery as well. According to learned Counsel, since prima facie offence was made out against the petitioner, the process has rightly been issued. No interference with the impugned orders is therefore called for.

6. The Hon'ble Supreme Court in the case of ***Smt. Nagawwa Vs. Veeranna Shivlingappa Konjalgi and Ors., (1976) 3 SCC 736*** has observed thus :-

> " The scope of the inquiry under Section 202 of the Code of Criminal Procedure is extremely limited - limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint - (i) on the materials placed by the complaint before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. It is not the province of the magistrate to enter into a detailed discussion of the merits or demerits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one. In proceedings under Section 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not.
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> However, the magistrate in such proceedings can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case against him. The magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the magistrate has exercised his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the magistrate or to

examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused.

In the following cases an order of the magistrate issuing process against the accused can be quashed or set aside:

(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction or absence of a complaint by legally competent authority and the like. ”

Allegations in the complaint :-

7. Respondent No.2 (complainant) is the sister of the petitioner – accused. He is a teacher in Zilla Parishad School, Jalna. The complainant had one brother – Shivhar (I) born on 28th March, 1962. Shivhar (I) passed away on 20th February, 1974. The petitioner – accused was born thereafter on 01st January, 1975.

The petitioner opened two bank account in the name of Shivhar (I) with District Central Co-operative Bank and Maharashtra State Rural Bank. As such, the petitioner is operating two bank accounts in the name of his deceased elder brother.

While Shivhar (I) was ten years of age, the father purchased some agricultural land in his name on 25th September, 1968. It was the land in Gut No.132. Moreover, land from Gut No. 266 admeasuring 3H 6R was in the name of Shivhar (I). On 21st April, 1993, the petitioner sold 81 R land from Gut No. 266 for valuable consideration and as such the petitioner committed the alleged offence.

10. The learned J.M.F.C. was pleased to direct the Police Station Officer, Mantha to make enquiry under Section 202 of Code of Criminal Procedure. Accordingly, the enquiry was made and report submitted. The report indicates that the petitioner opened both the bank accounts in his own name on the basis of his voter identity card. The bank authorities have informed accordingly. During investigation, statement of father of the petitioner and Respondent No.2 was recorded. He stated that the land belonged to him. He had purchased it in the name of his elder son – Shivhar (I). Shivhar (I) was born in 1962 and died in 1974. Thereafter the petitioner was born. As a custom, he gave the petitioner name of his deceased son. On the demise of Shivhar (I), since he was the owner of the land, he gave said land to the petitioner and got it

recorded in his name during implementation of the scheme of Prevention of Fragmentation and Consolidation of Holdings Act. Thus, name of the petitioner was recorded as an owner of the land.

11. While issuing process, learned J.M.F.C. observed thus :-

> *"5. Moreover, the father of the complainant and accused in his 202 Cr.P.C. inquiry statement have conceded the alienation of certain land from Gat No. 266 by the present accused, the property which was in the name of deceased. The complainant has also produced the copy of that sale-deed.*
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> *6. The accused does not become automatic owner of Gat No. 266 due to only getting the name of his deceased brother as he is class II heir of entry No. II and inspite of death of deceased brother Shivhar in the year 1974, the present accused alienated the property to third person in the year 1993 by personating as Shivhar, who was his deceased brother. Such a transaction amounts to forgery and making of false documents as per explanation II of Sec. 464 which is punishable U/Sec. 465 of I.P.C.*
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> *7. Moreover, the act of accused also amounts U/Sec.419 of the I.P.C., i.e. cheating by personating. Such a acts of the accused although presumably done with the consent of family members, are not legal and those acts breach law.*
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> *8. Moreover, there is cheating to the government machinery as well as cheating to the complainant who is one of the heir in class II, entry II to inherit the property of the deceased brother and the accused cannot alone automatically become owner of the property of Gat No. 266 and other property which is in name of deceased."*

12. In short, the allegations are that the petitioner opened the bank accounts in the name of his deceased elder brother and operated the same. Moreover, he sold the land that was purchased in the name of his deceased elder brother and thus committed the alleged offence.

13. So far as regards the offence of opening of bank accounts and operating the same in the name of the deceased is concerned, the report of enquiry under Section 202 of Cr.P.C. undoubtedly state that the bank officials have informed that the petitioner himself has opened the bank account in his own name on the basis of his voter identity card. As such, there is no question of the petitioner opening the bank accounts in the name of his deceased elder brother and operate the same. As such, no offence can be said to have been committed in this regard.

14. Let us first have a look at relevant provisions of I.P.C.

> *"S. 463. Forgery – Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.*
>
> *S. 464. Making a false document – A person is said to make a false*

document or false electronic record -

First – Who dishonestly or fraudulently -

(a) makes, signs, seals or executes a document or part of a document;

(b) makes or transmits any electronic record or part of any electronic record;

(c) affixes any electronic signature on any electronic record;

(d) makes any mark denoting the execution of a document or the authenticity of the electronic signature.

With the intention of causing it to be believed that such document or part of document, electronic record or electronic signature was made, signed, sealed executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly – Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with electronic signature either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly – Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his electronic signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration.

Explanation 2. - The making of a false document in the name of a *fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.*

23. Wrongful gain - "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.
Wrongful loss - "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

24. Dishonestly – Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

25. Fraudulently – A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise."

15. The petitioner and Respondent No.2 are brother and sister interse. The petitioner was born on 01st January, 1975. Respondent No.2 (complainant) was born three years thereafter. Their parents are alive. The parents had also been named as accused in the case. Both the petitioner and Respondent No.2 had one brother by name Shivhar (I). He was born in 1962 and died in 1974, at the age of twelve years. During his life time, the father had purchased some agricultural land in his name. The petitioner was named as Shivhar (name of deceased Shivhar) as it was customary to do so. In some record, the name of the petitioner is appearing as Shivhari. Be that as it may,

the allegations in the complaint are that the petitioner sold some portion of the land that was purchased in the name of Shivhar (I). The fact, that the petitioner has sold some portion of the land in the year 1993, is undisputed. It may, therefore, appear that the petitioner has committed the alleged offence as he sold some portion of the land that belong to his deceased brother. Mens rea is an ingredient of the offence of forgery and cheating. One has to look into the allegations in the complaint. Respondent No.2 (complainant) alleged that the land has been purchased by her father. Admittedly, when the land was purchased in the name of Shivhar (I), he was minor. As such, it was the father who was the owner of the land purchased in the name of his minor son Shivhar (I). At the time of demise of Shivhar (I), neither the petitioner nor Respondent No.2 were born. The father, in his statement recorded during enquiry under Secction 202 of Cr.P.C., has stated that the petitioner sold the land at his instance. He recorded the petitioner's name in the revenue record of the land Gut No.266 during implementation of the scheme of Prevention of Fragmentation and Consolidation of Holdings Act. Admittedly, the petitioner has not sold the land in its entirety. Therefore, there is no question of Respondent No.2 having suffered wrongful loss. The petitioner also cannot be said to have gained wrongfully since the land belongs to the father and it was sold at the instance of the father himself. Respondent No.2 has filed complaint twenty one years after the alleged offence. Same indicates vindictiveness.

16. Since the petitioner has sold the land at the instance of his father and his parents having no grievance against him, he can not be said to have sold the land by executing the sale deed fraudulently. As such, mens rea, the basic ingredient of the offence of cheating and forgery, has been lacking in the case. Same is made out from the allegations in the complaint and the report of enquiry under Section 202 of Cr.P.C. The allegations in the complaint and the report of enquiry made under Section 202 of Cr.P.C. do not make out any offence against the petitioner. Interference with the impugned order is, therefore, called for. The petition, thus succeeds and is therefore allowed in terms of prayer clause (B). Rule is made absolute.

(R.G. AVACHAT, J.)

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