IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 611 OF 2015

Dr. Kirtikumar M. Shah
R/o. 401, Rameshwar Tower,
Shimpoli Road, Borival (w),
Mumbai- 92. ....Applicant
(Ori. Accused No.2)

v/s.

C.B.I. (A.C.B.), Mumbai and Another ....Respondents

Mr. Ashok Bhatia, for applicant/accused.
Mr. Hiten Venegaonkar, Spl. P.P. a/w. Mr. Kunal Nawale for Respondent-CBI.
Mrs. Madhavi Mhatre, APP for Respondent-State.

CORAM : N.J. JAMADAR, J.
Judgment reserved on : 21st September 2020
Judgment Pronounced on : **07th December 2020.**

JUDGMENT :

1. The applicant assails the legality, propriety and correctness of an order passed by the learned Special Judge (C.B.I.), Greater Bombay dated 20th December, 2013 on an application for discharge (Exhibit 43), in Special C.B.I. Case No. 36 of 2009, whereby the prayer of the applicant (accused No. 2) for discharge came to be rejected.

2. The background facts leading to this revision application can be stated in brief as under:

(a) The applicant/accused No. 2 is the Karta of Kirtikumar M. Shah (HUF). The applicant had acquired units bearing Nos. 3 and 2, ground floor in the building Vasundhara Co-operative Housing Society Limited (the Society), in his individual capacity and as Karta of Kirtikumar M. Shah (HUF) from M.V. Corporation. Mr. Pramoda K. Shah, the wife of the applicant had acquired Unit No. 1 from M.V. Corporation. Mrs. Pramoda Shah claimed to have acquired an area admeasuring 1100 sq.ft carpet/(1700 sqft super built-up) on the basement of the said building. The applicant, being a Doctor by profession, conducted a Hospital and Maternity Home from the said premises under the name and style "Shah Surgical Hospital and Maternity Home".

(b) The Oriental Bank of Commerce, a nationalized Bank (the Bank), had issued an advertisement to purchase a suitable property to house its Borivali (w) branch, on 16th February, 1998. In response thereto, the applicant submitted an offer, on 9th February, 1998 to sale the aforesaid property at the ground floor and the basement along with open space in front of the said three units, on the ground floor, and the terrace portion, to the Bank. Post negotiations, the applicant proposed to sale the aforesaid property for a consideration of Rs. 3,50,00,000/- to the Bank. Ultimately, the Bank decided to purchase the aforesaid property for a consideration of Rs.

3,35,00,000/- Conveyances were executed on 23rd January, 1999. A sum of Rs. 2,60,00,000/- was paid to the vendors towards consideration. Later on, it transpired that the basement was not in exclusive possession of the applicant. The entitlement of the applicant to the exclusive use of the terrace above, and the open space in front of, the three units came to be contested by the third party, including the Society. Thus, the amount of Rs. 75 lacs was withheld as the vendors could not deliver the possession of the portion of the basement and the terrace. Eventually, it transpired that by making false representation and submitting false documents the applicant had sold the property over which the applicant had no title. The applicant had dishonestly induced the Bank to believe that the applicant had title over the entire property, sold under conveyances dated 23rd January, 1999, by forging the documents in pursuance of a criminal conspiracy with the officers of the Bank and its empanelled valuers and advocate.

(c) Based on source information, crime was registered at RCBA 1/2005/A0009 by CBI, ACB Mumbai- Respondent No. 1. After completion of investigation, charge sheet came to be lodged against the applicant/accused No. 2; Surendra Arora (A1), the then Assistant Regional Manager of the Bank; Mr. Anmol Shekhari (A3) and Mr. Anil Korgaonkar (A4), the empanelled valuers and Mr.

Bharat Chinchlikar (A5), the legal adviser. Mr.Chacko Verghase; the then Branch Manager of the Borivali branch was not sent for trial for want of sanction.

3. The prosecution formulated the charge against the applicant/accused No. 2 as under :

> *" ....*
>
> ***That Dr. Kirti Mangaldas Shah,*** *owner of premises in question, private person has used the forged measurement certificate which was not issued by B.M.C. to show exaggerated area. He has also used a forged NOC which was not given by the Secretary of the Vasundhara Society. As such he has sold premises namely the basement, the terrace and the area in front of the 3 units over which he had no ownership. He has sold excess area. Indulged in conspiracy with the bank officials and sold premises not owned by him, forged documents and generated false documents with the intention to cheat the bank.*

4. The applicant preferred application (Exhibit 43) for discharge on the ground that there was no material to make out a prima facie case against the applicant. The dispute which arose between the applicant and Oriental Bank was of purely civil nature. The Bank had examined all the documents before entering into the transaction. The Bank had availed the advise of its empanelled valuers and advocate. The property was sold to the Bank on unit basis and the consideration was not fixed on the basis of the area of the distinct units. The consideration for the transaction was lump-sum. Yet, the Bank withheld part consideration; Rs. 75 lacs. The applicant was thus constrained to institute a suit for recovery of the said amount. To give a counter blast to the action initiated by the applicant, the officers of the Bank have falsely alleged that the applicant committed cheating. The allegations of cheating and forgery were made after a lapse of almost 7 years of the transaction. The measurement certificates and no objection certificate of the society, which have been allegedly forged, were never tendered by the applicant. Nor they were seized from the custody of the applicant. Thus, the questions of forgery of documents and using forged documents as genuine for the purpose of cheating, do not arise at all.

5. The application was resisted by the Respondent No. 1 -CBI. It was contended that there was overwhelming evidence to indicate that applicant/accused No. 2 falsely claimed to be the owner of the premises at the basement and on the terrace. The applicant created false documents to buttress the said claim. There are statements of the witnesses, who have categorically stated that the applicant had forged the documents especially the measurement certificates, purported to be issued by the society and B.M.C, and the no objection

certificate, purported to be issued by the society. The applicant deceived the Bank to believe that the applicant was absolute owner of the property, which the applicant offered to sale vide response dated 9th February, 1998 to the advertisement floated on behalf of the Bank dated 6th February, 1998.

6. After consideration of the report under section 173 of the Code of Criminal Procedure (the Code), the material on record and the submissions canvassed on behalf of the applicant and Respondent No. 1, the learned Special Judge was persuaded to reject the application. The learned Special Judge was of the view that the material on record indicated that the applicant had dishonestly offered to sale the area in excess of the property actually owned by the vendors. In the face of the statements of witnesses that measurement certificate, purported to have been issued by B.M.C., and the 'no objection certificate' purported to have been issued by the society, were forged, the learned Special Judge could not persuade himself to agree with the submission on behalf of the applicant that the charge was groundless.

7. Being aggrieved by and dissatisfied with the impugned order the applicant has invoked revisional jurisdiction of this Court.

8. I have heard Mr. Ashok Bhatia, the learned counsel for the applicant/accused No. 2 and Mr. Hiten Venegaonkar, the learned Speical P.P for Respondent No. 1-CBI.

9. Mr. Bhatia would urge that the learned Special Judge committed a manifest error in rejecting the prayer for discharge despite there being no material to make out a prima facie case against the applicant. It was submitted that the case of cheating the Bank is preposterous as the Bank was already in occupation of the premises as a lessee thereof and was aware of the dimensions of the property. Moreover, the transaction was preceded by a prolonged exchange of correspondence and due diligence on the part of the Bank. The agreements for sale executed on 23rd January, 1999 reveal that the property was sold on unit basis. Thus, now the prosecution cannot be permitted to contend that the Bank was deceived to enter into the transaction and part with more amount on the premise that the applicant had sold the property in excess vendors ownership. The allegations of forgery were also stated to be bald and unsustainable as the allegedly forged documents were not seized from the custody of the applicant. In fact, the prosecution does not claim that the applicant himself had forged those documents. Thus, according to Mr. Bhatia, the instant prosecution,

which has been initiated with a view to give a counter-blast to the proceeding initiated by the applicant for recovery of the sum of Rs. 75 lacs, which has been unjustifiably withheld by the Bank, is nothing but an abuse of legal process.

10. In contrast, Mr. Venegaonkar, would urge that the material on record indicates that the applicant had left no stone unturned to deceive the Bank and cause wrongful gain to himself. Apart from the witnesses, who have specifically stated that the measurement certificate and 'no objection certificate' relied upon by the applicant to substantiate the claim as regards the area and components of the property sold to Bank are forged, there are statements of witnesses as well as documents which show that the applicant had all along been claiming title over the property which vendors did not own. Mr. Venegaonkar took the Court through the statements of the witnesses and the relevant documents in support of the aforesaid submissions. In the backdrop of such grave incriminating material, it would be hazardous to draw an inference that there is no ground to proceed against the applicant, urged Mr. Venegaonkar.

11. Before adverting to deal with the aforesaid rival submissions, it may be apposite to note that at the stage of determining an application 239 of the Code, the Court is not supposed to delve deep into the merits of the case. Meticulous evaluation of the material on record, which is necessary to arrive at the conclusion of guilt or otherwise, is not warranted. A detail scrutiny of the material relied upon by the prosecution, as if to weigh it in golden scale, is impermissible. The Court has to consider whether the charge against the accused is "groundless". A true test to determine whether the charge is groundless is to consider whether the material, even if unrebuted, makes out no offence whatsoever against the accused.

12. In the case of **Century Spinning & Manufacturing Co. Ltd. vs. State of Maharashtra**[1] a three judge Bench of the Supreme Court, in the backdrop of the corresponding provisions of the Code, 1898 observed that, *"reading the two sub-sections together it clearly means that if there is no ground for presuming that the accused has committed an offence, the charges must be considered to be groundless, which is the same thing as saying that there is no ground for framing the charges".*

13. A useful reference can also be made to a judgment of

1 AIR 1972 SUPREME COURT 545

Supreme Court in the case of **State of Bihar vs. Ramesh Singh**[2] wherein in the context of the provisions contained in section 227 and 228 the Code, 1973 the legal position was illuminatingly postulated in the following words:

> *Reading the two provisions together in juxta position, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under section 227 or section 228 of the Code. At that stage the Court is not to 'see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the, initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. if the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination*

2 (1977) 4 Supreme Court Cases 39

> *or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the, trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But, if, on the other hand, it is so at the initial stage of making an order under section 227 or section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under section 228 and not under sec. 227.*
>
> (emphasis supplied)

14. As the learned Special Judge has assigned adequate reasons to reject the prayer for discharge, the question of justifiability of the exercise of revisional jurisdiction by this Court also comes to the fore. Indubitably, the revisional jurisdiction is of limited nature and cannot be exercised in a routine manner, for the mere asking. Revisional jurisdiction can be legitimately invoked where the impugned order is grossly erroneous, suffers from non compliance with statutory provisions, the finding is based on either no evidence or in ignorance of material evidence or judicial discretion is exercised arbitrary or perversely.

15. In the case of **Amit Kapoor vs. Ramesh Chander and Another**[3] the Supreme Court culled out certain principles (para 27)

3 (2012) 9 Supreme Court Cases 460

to be considered for proper exercise of jurisdiction particularly with regard to quashing of charge either in exercise of jurisdiction under section 397 or 482 of the Code or together. The principles stated in paragraph Nos. 27.2 to 27.4 are relevant. They read as under:

> *27.2] <u>The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.</u>*
>
> *27.3] The High Court should not unduly interfere. <u>No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.</u>*
>
> *27.4] Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts <u>even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.</u>*
>
> (emphasis supplied)

16. On the aforesaid touchstone, reverting to the facts of the case, it is imperative to note that the gravamen of the indictment against the applicant is that the applicant represented the vendee (Oriental Bank) that the vendors have proprietary title over area in excess of the property they actually owned and thereby deceived the Bank to part with excess consideration. It is alleged that the applicant conspired with the officers of the Bank and its empanelled valuers and advisers and also forged documents to bolster up the false claim of ownership.

17. Indisputably, the applicant had offered to sale the premises in response to an advertisement dated 6th February, 1998 issued on behalf of the Bank. The communication dated 9th February, 1998 described the property which the applicant offered to sale.

> *a] 2900 sqft. Super builtup area on the ground floor touching main S.V. Road.*
> *b] 1767 sqft. Super builtup area in the basement with regular required height.*
> *c] 1500 sqft. Open independent compound adjoining the premises exclusively.*
> *d] Independent terrace of 2000 sqft. Open to the sky is also available.*
> *e] It is unique, independent premises exclusively with separate entrance giving it a look of a private owned bungalow/office.*
>
> (underline mine)

18. Pursuant to the aforesaid offer and negotiations, ultimately the conveyance in respect of unit Nos. 1, 2 and 3 admeasuring 716 sqft. each on the ground floor and basement admeasuring 1100 sqft carpet (1700 sqft super built-up) came to be executed on 23rd January, 1999. It is pertinent to note that in the conveyances in respect of unit Nos. 1 to 3 in addition to the aforesaid area of 716 sqft (carpet) each, it was mentioned that the open space in front of the unit and terrace thereon, open to the sky, were also transferred thereunder. There is not much dispute over the fact that supplemental agreement came to be executed on 11th June, 1999 and it was recorded therein that the transferor could not deliver vacant peaceful possession of the portion of the basement, in the occupation of M/s. Mega Safe Deposits Pvt. Ltd, and the terrace portion, which was occupied by third party, the sum of Rs. 75 lacs was to be retained by the transferee and the transferor agreed to put the transferee in vacant possession of those portions of the property within six months of the said supplemental agreement.

19. Evidently, the vendor could not deliver the possession of half portion of the basement which was in the occupation of M/s. Mega Safe Deposits Pvt. Ltd. and the terrace over which the third party laid claim. The question that crops up for consideration is whether it was a case of mere failure to perform the contract and to deliver the possession of the property sold by the vendor or there was dishonest intention since the inception of the transaction. The prosecution alleges that the applicant had falsely claimed ownership over the aforesaid portion of the property despite being aware of the fact that the applicant was not owner thereof. To this end, the applicant made false representations so as to deceive the bank.

Contemporaneous record and correspondence were pressed into service.

20. It is incontrovertible that vendors had acquired the property, which was sold to the bank, from M/s. M.V. Corporation. The copies of the instruments dated 24th June, 1995, which form part of the record, reveal that the applicant was allotted Unit No. 3 on the ground floor admeasuring 475 sqft and Mr. K.M.Shah(HUF) was allotted Unit No. 2 admeasuring 475 sq.fts. Mrs. Pramoda Shah was allotted Unit No. 1 admeasuring 475 sq.fts. It would be contextually relevant to note that by the agreements for sale dated 23rd January, 1999, the vendors professed to sale the aforesaid three units admeasuring 716 sq.fts. In addition, the vendors professed to transfer the open space in front of each of the units and the terrace above. Prima facie, the vendors appeared to have sold area in excess of the area which came to be allotted to them under the instruments dated 24th June, 1995 executed by M/s. M.V. Corporation.

21. The prosecution alleged that the documents were forged to bolster up the aforesaid claim. A measurement certificate purported to be issued by Vasundhara Cooperative Housing Society dated 3rd January, 1999, allegedly relied upon by the applicant, was allegedly forged by the applicant. In the said certificate, in addition to the area on ground floor (2148.50 sq.ft.) basement was shown to consist of two parts i.e. basement, 642.80 sq.fts., and basement with vault, 656.41 sq.fts. It was shown to have been issued by Dr. R.V. Ghate, the then Secretary of the society. Dr. Ghate (P.W.22) categorically asserted that the said certificate was not issued by him. He was neither authorized nor competent to issue such certificate. Dr. Ghate (P.W.22) has further stated that only three units were allotted to Dr. K.M. Shah, Mr. Pramoda Shah and Dr. K.M. Shah(HUF) in 'A' annexe building and there was no mention of the terrace open to sky as the terrace on the top of the annex belonged to the society. Dr. Ghate (P.W.22) further stated that the 'no objection certificate' dated 30th November, 1998 was not issued by him and it might have been forged by Dr. K.M. Shah as blank society letter heads were given to Dr. K.M. Shah by the then Chairman, late Shri K.S.Reddy.

22. A certificate dated 4th January, 1999, purportedly issued by B.M.C to certify the measurement of the property as per the record of extract of Book No. 15-C maintained by B.M.C., allegedly falsely created by the applicant in support of the ownership claim, was relied upon by the prosecution to demonstrate that the applicant had claimed the ownership over the excess area on the strength of false documents. Mr. Repal S. Prabhakar (P.W.32), the then Engineer, attached to Kandivali Building Proposal Department of B.M.C, in his statement dated 3rd October, 2006, gave reasons as to why the aforesaid certificate dated 4th January, 1999, purported to be issued by B.M.C, is a false document. It was stated, inter alia, that no register or Book No. 15-C, from which the contents of the said certificate purport to have been extracted, is not maintained by the B.M.C. Likewise, Mr. Telson P. Charles (P.W.33), the then Executive Engineer, Building Proposals, (Western Suburbs), R-ward, B.M.C., in his statement dated 6th December, 2006, categorically stated that the said certificate dated 4th January, 1999, from its intrinsic evidence, appears to have been fabricated.

23. The situation which thus emerges is that, as regards the basement, M/s. Mega Safe Deposits Pvt. Ltd was in occupation of a portion thereof. Ajay Mittal (P.W.26) has stated that there were negotiations between the applicant and M/s. Mega Safe Deposits Pvt. Ltd. for vacating the said premises. He claimed to have demanded consideration of Rs. 35 lacs towards the assets in the said premises and goodwill. He did not claim ownership thereof, which vested with M/s. M.V. Corporation.

24. There is no instrument to indicate that on the date agreement dated 23rd January, 1999 was executed, covering 1100 sqft. Carpet basement area, the vendor was vested with the ownership over the entire area. In this backdrop, the element of deceit in the representation that the vendors were entitled to the entire basement is, prima facie, evident.

25. Prima facie, the claim of the applicant as regards the terrace is also of contestable nature. In addition to the claim of the society that the applicant was not exclusively entitled to the enjoyment of the terrace porition, Mr. Suresh Mittal (P.W.45), the vendor of the applicant, claimed that clause 33 of the agreement dated 24th June, 1995, wherein it was mentioned that the terrace space over the said premises (unit No. 2) is for the exclusive use of the allottee only, was forged.

26. In order to appreciate the veracity of the aforesaid allegation, which bears upon the claim of the vendors of exclusive right to use the terrace portion, it may be apposite to extract clause No. 33 of the instruments in respect of Unit Nos. 1 and 3 and Unit No. 2. Clause No. 33 in respect of Unit Nos. 1 and 3 reads as under:

> *33. It is also understood and agreed by and between the parties thereto that the terrace space*

in front of /or adjacent to terrace flats in the said building, if any, shall belong exclusively to the respective purchasers of the terrace flat and such terrace spaces are intended for the exclusive use of the respective terrace Allottees.

Evidently the aforesaid clause makes it abundantly clear that the respective purchasers of the terrace flats shall be entitled to the exclusive use of the terrace spaces.

27. In contrast, the clause No. 33 of the instrument dated 24th June, 1995 in respect of Unit No. 2 reads as under:

33. It is also understand and agreed by and between the parties hereto that the terrace space over the said premises is exclusive use of Allottee only. They can use it, repair and maintain it in proper condition as per allottee's wish. Allottee can keep water tank etc. on it.

By the aforesaid clause, M/s. M.V. Corporation is shown to have transferred exclusive right to use the terrace over the Unit No. 2 to Mr. K.M. Shah (HUF). The aforesaid stipulation is conspicuous by its absence in the instruments in respect of Unit Nos. 1 and 3. This militates against the claim of the vendors of Unit Nos. 1 & 3 that they had exclusive right to use the terrace above the respective units.

28. In the light of the aforesaid material, at this juncture, it would be audacious to come to the conclusion that there is no sufficient material against the applicant to frame charge for the offences of cheating and forgery. From the offer dated 9th February, 1998, indisputably given by the applicant, it becomes abundantly clear that the applicant claimed ownership over the property which, ex facie, did not entirely vest in the applicant. The question as to whether the documents namely the certificate, purportedly issued by the society on 3rd January, 1999, the certificate purportedly issued by the B.M.C on 4th January, 1999, and the 'no objection certificate' purportedly issued by the society on 30th November, 1998, were forged is a matter for trial. Likewise, the question as to whether the applicant used forged documents as genuine despite having known that the documents were forged is again a matter for trial. It would be suffice to note that there is ample material in the form of documents and the statements of the witnesses to sustain a strong suspicion against the applicant of having committed offences.

29. In the light of the aforesaid consideration and the foregoing reasons, it cannot be said that the learned Special Judge committed an error in rejecting the prayer for discharge. No fault can be found with the impugned order. Thus, the application deserves to be dismissed. Hence, the following order.

ORDER

The Revision Application stands dismissed.

(N.J. JAMADAR, J.)

V. S. Parekar

Digitally signed by V. S. Parekar
Date: 2020.12.07 16:05:57 +0530