

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION 1071 OF 2017

Shaikh Mukhtar s/o. Shaikh Musa,
 aged about 49 yrs, Occ. Business,
 r/o. Gandhi Nagar, Pusad, Tq. Pusad,
 Dist. Yavatmal

..... **PETITIONER**

...V E R S U S...

1. Abdul Matin s/o. Abdul Majid,
 aged about 47 yrs, Occ. Business,
 r/o. Dudhe Lay Out, Pusad,
 Tq. Pusad, Dist. Yavatmal
2. State of Maharashtra,
 through the Government Pleader,
 High Court of Bombay, Bench at
 Nagpur

... **RESPONDENTS**

 Shri C.A. Joshi, counsel for petitioner.
 Shri A.M. Kukdey, counsel for respondent 1.
 Mr. N.R. Rode, APP for respondent 2.

CORAM: ROHIT B. DEO, J.

RESERVED ON :18.12.2020

PRONOUNCED ON : 22.12.2020

JUDGMENT:

The petitioner is arraigned as accused in Regular Criminal Case 399 of 2015, instituted by respondent 1, seeking prosecution and punishment for offence punishable under section 420 of Indian Penal Code.

2. The learned Magistrate found it necessary to call for the report of the Police Station Officer, Vasant Nagar, Pusad under section 202 of the Code of Criminal Procedure. The learned Magistrate issued process vide order dated 5.1.2017, which the petitioner challenged in Criminal Revision 7/2017. By judgment dated 28.7.2017, the Additional Sessions Judge, Pusad dismissed the revision.

3. Mr. C.A. Joshi, the learned counsel for the petitioner would submit that even if the entire complaint is taken at face value, no case is made out for issuance of process. The thrust of the submission is, that in the absence of averments, expressed or inferential, that the petitioner intended to cheat the complainant from the very inception, the learned Magistrate could not have issued process. In order to consider the said submission, it would be necessary to note the averments in the complaint.

4. The complaint avers that the complainant and the accused entered into an agreement to sell dated 30.1.2013 and the accused handed over three post dated cheques dated 25.3.2013. The next averment is that all the three post dated

cheques dishonoured.

5. The next averment is that the three cheques were issued as consideration to purchase land admeasuring 1477 sq.ft. which is described in paragraph 3 of the complaint alongwith the construction standing thereon. It is then alleged that the accused took possession of the said land and building and the complainant also executed saledeed dated 4.2.2013. In paragraph 3, it is alleged that since the accused did not pay the consideration, the saledeed is tainted with deception and the complainant is cheated of Rs. 14 lacs.

6. It is further averred in the complaint that since the three post dated cheques bounced, the complainant lodged report which the police ignored, and therefore, the complainant is instituting the private complaint.

7. In the entire complaint, there is no averment which is expressly made or from which the necessary inference can be drawn that when the accused entered into the transaction, the intention to cheat was present. It is true, as argued by Mr. A.M. Kukdey, the learned counsel for the respondent 1 that

intention is a matter of inference from facts and attending circumstances. But then, it would be next to impossible to draw said inference in the absence of either express averments or averments suggesting inferentially that the dispute is not purely civil or contractual and that there is an element of *mens rea* as would bring into play the provision of section 420 of Indian Penal Code.

8. It is not in dispute that the respondent 1 has filed a civil suit seeking a declaration that the saledeed is illegal and sought appropriate relief. The respective contentions shall be undoubtedly looked into by the civil Court which is the appropriate forum to do that. However, permitting the prosecution to continue, in my considered view, would be an abuse of the process of law.

9. In *Hridaya Ranjan Prasad Verma and Ors..vs.. State of Bihar and anr, (2000)4 SCC 168* , the Apex Court observed thus:

“15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot

give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.

16. Judged on the touchstone of the principles noted above, the present case, in our considered view warrants interference inasmuch as the ingredients of the offence of cheating punishable under [section 420 IPC](#) and its allied offences under [sections 418](#) and [423](#) has not been made out. So far as the offences under [sections 469](#), [504](#) and [120B](#) are concerned even the basic allegations making out a case thereunder are not contained in the complaint. That being the position the case comes within the first category of cases enumerated in [State of Haryana v. Bhajan Lal](#) and as such warrants interference by the Court. Reading the averments in the complaint in entirety and accepting the allegations to be true, the ingredients of intentional deception on the part of the accused right at the beginning of the negotiations for the transaction has neither been expressly stated nor indirectly suggested in the complaint. All that the respondent No. 2 has alleged against the appellants is that they did not disclose to him that one of their brothers had filed a partition suit which was pending. The requirement that the information was not disclosed by the appellants intentionally in order to make Respondent 2 part with property is not alleged

expressly or even impliedly in the complaint. Therefore the core postulate of dishonest intention in order to deceive the complainant-respondent 2 is not made out even accepting all the averments in the complaint on their face value. In such a situation continuing the criminal proceeding against the accused will be, in our considered view, an abuse of process of the court. The High Court was not right in declining to quash the complaint and the proceeding initiated on the basis of the same”.

10. In this view of the matter, the order of issuance of process dated 5.1.2017 is quashed and Regular Criminal Case 399 of 2015 is dismissed.

11. The Petition is allowed in the aforestated terms.

Judge

Belkhede RS