

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

63 CRIMINAL APPLICATION NO.1587 OF 2021

GAFFAR KHAN HAMID KHAN AND ANOTHER
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

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Advocate for Applicants : Mr. Syed G R
APP for Respondents : Mr. M M Nerlikar
Advocate for Respondent 2 : Mr. Bagal Vishal A.

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CORAM : V.K. JADHAV & SANDIPKUMAR C. MORE, JJ.
Dated : December 06, 2021

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PER COURT :-

1. Heard finally with consent at admission stage.
2. The applicants/original accused are seeking quashing of the FIR bearing Crime No.286 of 2021 registered with Nanalpeth Police Station, Parbhani, District Parbhani for the offence punishable under sections 420, 406, 34 of the Indian Penal Code.
3. The respondent no.2 is a owner of house No.294/1 and he wanted to construct five rooms over first floor of the said house. Thus, he had given contract to the present applicants for construction of the said house and, accordingly, agreement to that effect came to be
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executed between the parties on a bond of Rs.100/- on 8.6.2018. It has been contended in the said agreement that the respondent no.2 has agreed to pay the construction charges to the applicants @ Rs.95/- per square feet, of which total amount comes to Rs.4,74,000/- and construction was to be completed on or before 30.1.2019. It has been alleged in the complaint that entire amount has been paid to the applicants, however, though the applicants have made constructions of said five rooms up to slab level, however, thereafter, they did not continue with the work nor refunded the amount to the respondent no.2. On the basis of these allegations, crime came to be registered.

4. Learned counsel for the applicants submits that the entire dispute is of a civil nature and there is no criminal liability, as such. Learned counsel submits that the applicant no.2 Hamid Khan Ahmed Khan has filed the Misc. Criminal application No.8 of 2020 before the Chief Judicial Magistrate, Parbhani against

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respondent no.2 herein for having committed an offence punishable u/s 323, 452, 504, 506(2), 34 of the IPC and u/s 16,17 and 18 of the Maharashtra Money Lending (Regulation) Act, 2014. Though, the learned Judge of the trial court has not given any directions for registration of the crime, however, by order dated 1.1.2020 in M.A.No.509 of 2018 directed that the matter be sent to the Assistant Superintendent, C.J.M. Parbhani to register the application as a private complaint otherwise then on police report. Learned counsel submits that said complaint is pending before the said court.

5. Learned counsel for respondent no.2 submits that in terms of the agreement dated 8.6.2018 though respondent no.2 has paid entire amount to the applicants in presence of the witnesses and even though it was agreed in the agreement that construction was to be completed on or before 30.1.2019, however, the applicants herein have left the said construction work without completing it as agreed in the agreement and also not refunded the amount to respondent no.2.

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Learned counsel submits that the civil liability as well as criminal responsibility both stands attracted. Learned counsel by pointing out various proceedings initiated by the applicants submits that the applicants are in habit of initiating the proceedings against the respondent no.2 to pressurize him by various means. Learned counsel submits that there is no substance in this criminal application and the same is liable to be dismissed.

6. Learned counsel for the respondent no.2, in order to substantiate his contentions placed reliance on a judgment in the case of **M/s Medchi Chemicals and Pharma Pvt. Ltd., Vs. M/s. Biological E. Ltd and others** reported in AIR 2000 Supreme Court 1869.

7. We have also heard the learned APP for the respondent-State.

8. It appears that in terms of the agreement between the parties, construction work of the residential house of respondent no.2 was allotted to the applicants herein

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with the specific conditions as detailed in the agreement. In the event, if those conditions are not fulfilled, respondent no.2 herein can enforce those conditions by approaching the civil court. However, it is not the case of the respondent no.2 that despite execution of an agreement and payment of the entire amount as fixed in the agreement, the applicants herein have not carried out the construction at all and, as such, there was intention of cheating since inception. On the other hand, it appears from the allegations made in the complaint that the applicants have constructed the said house up to slab level. It further appears from the various proceedings between the parties that the relations between the parties have become strained. Thus, the possibility cannot be ruled out that the present complaint is the outcome of said strained relations between the parties. It is true that for the same allegations civil as well as criminal liability both attract at the same time. However, in the instant case, we do not find any criminal liability. Ingredients of section 420 and 406 are lacking in the instant case and

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it is open for the respondent no.2 to avail civil remedy to enforce the agreement.

9. In a case of **State of Haryana and others Vs. Bhajanlal and others** reported in 1992 Supp. (1) Supreme Court Cases 335, the Supreme Court has set out the categories of cases in which inherent powers under section 482 of the Cr.P.C. can be exercised. The Supreme Court in paragraph no.102 of the judgment has made following observations :-

“102. In the backdrop of the interpretation of the various relevant provisions [of the Code](#) under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under [Article 226](#) or the inherent powers under [Section 482](#) of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under [Section 156\(1\)](#) of the Code except under an order of a Magistrate within the purview of [Section 155\(2\)](#) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no

investigation is permitted by a police officer without an order of a Magistrate as contemplated under [Section 155\(2\)](#) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions [of the Code](#) or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in [the Code](#) or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

The present case falls under 2, 3 and 5th category as set out in the aforesaid paragraphs of the judgment of the State of Haryana Vs. Bhajan Lal’s case.

11. In a case of **Prof. R.K.Vijayasarthi and another Vs. Sudha Seetharam and another** reported in (2019) 16 Supreme Court Cases 739, the Supreme Court in paragraph no.28 has made the following observations :-

“28.The jurisdiction under [Section 482](#) of the Code of Criminal Procedure has to be exercised with care. In the exercise of its jurisdiction, a High Court can examine whether a matter which is essentially of a civil nature has been given a cloak of a criminal offence. Where the ingredients required to constitute a criminal offence are not made out from a bare reading of the complaint, the continuation of the criminal proceeding will constitute an abuse of the process of the court.”

12. In a case of **Anand Kumar Mohatta and another Vs. State (NCT of Delhi)**, Department of Home and

another reported in (2019) 11 Supreme Court Cases 706, in paragraph nos.25, 26 and 27 the Supreme Court has made following observations :-

- “25. Having given our anxious consideration, we are of the view that assuming that there is a security deposit of Rs. One Crore and that he has misappropriated the dispute between the two parties can only be a civil dispute.
- 26. [In Indian Oil Corporation v. NEPC India Ltd. and others](#), this Court observed as follows: -
- “13. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged.....”
- The Court noticed a growing trend in business circles to convert purely civil dispute into criminal cases.
- 27. We find it strange that the complainant has not made any attempt for the recovery of the money of Rs. One Crore except by filing this criminal complaint. This action appears to be mala fide and unsustainable.”

13. In a case M/s Medchi Chemicals and Pharma Pvt. Ltd., (supra), relied upon by the learned counsel for respondent no.2, in paragraph no.16 of the judgment the Supreme Court has referred the State of Haryana Vs. Bhajanlal, however, also referred the observations made in the Case of [Rajesh Bajaj v. State NCT of Delhi](#) (1999 (3) SCC 259), wherein it is observed that merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. In paragraph no.17 in the facts of the said case the Supreme court has observed that “on careful reading of the complaint, it

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cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under [Sections 415](#), [418](#) and [420](#) cannot be said to be totally absent on the basis of the allegations in the complaint.” In this case, the Supreme Court has referred the contents of the agreement, particularly, clause no.9 of the agreement, which prescribes the contents about the schedule of supply of raw materials by the party of the 2nd Part and the delivery of the finished product by the party of the 1st Part as per Annexures. In the facts of the said case, the Supreme Court by referring the clauses of the agreement has observed that there can also be a criminal liability alongwith enforcement of the civil cause.

14. In the instant case, though certain time was fixed for completion of the house and amount has been paid to the applicants, however, the applicants have also carried out the construction up to the slab level. Respondent no.2 has a remedy to enforce the agreement by approaching the civil court, however, in our

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considered opinion, no criminal liability stands attracted. In the given set of allegations, we do not find that right from the inception intention of the applicants was of cheating. Thus, considering the entire aspect of the case, we proceed to pass the following order.

ORDER

- i. Criminal application is allowed in terms of prayer clause “**B**”.
- ii. Criminal application accordingly disposed off.

(**SANDIPKUMAR C. MORE, J.) (**V.K. JADHAV, J.)****

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