

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

CRIMINAL APPLICATION (APL) NO. 157 OF 2021

Santosh w/o Suresh Maheswari
vs.
State of Maharashtra and another

With
CRIMINAL APPLICATION (APL) NO. 573 OF 2021

Subhashchandra s/o Harnarayan Laddha
vs.
State of Maharashtra and another

Office Notes, Office Memorandum of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. N. R. Tekade, Advocate for applicants in both the applications.

Ms. S. Z. Hyder, APP for respondent No.1 State in both the applications.

Ms. S. N. Maniyar, Advocate for contesting respondent No.2 in both applications.

CORAM : MANISH PITALE J.

DATED : 08/07/2021

Hearing was conducted through Video Conferencing and the learned counsel agreed that the audio and visual quality was proper.

2. Both these applications are taken up for consideration together for the reason that they arise out

of the same complaint lodged by the respondent No.2 in both these applications.

3. The applicants in these two applications are seeking quashing and setting aside of the complaint filed by the respondent No.2 against them and other accused persons for alleged offences under Sections 420, 465, 468 and 471 read with Section 34 of the Indian Penal Code (IPC). In the said complaint, on 31/01/2018, the Chief Judicial Magistrate at Washim had issued process against all the accused persons, including the applicants before this Court.

4. The learned counsel for the applicants has contended before this Court that the respondent No.2 in the present case filed the complaint belatedly, after having taken part refund of the amount paid to a partnership firm called Balaji Developers, of which the applicants are partners. It is submitted that bare perusal of the complaint itself would show that the allegations are specifically against one of the partners i.e. Mahendra Ganpatrao Khetan and that as against the applicants before this Court there is hardly any allegation. Apart from this it is submitted that the dispute, if at all, is of civil nature, as the respondent No.2 and his wife had breached their obligation in respect of the booking of certain shops. The learned counsel for the applicant specifically invited attention of this Court to a judgment and order dated 03/03/2020, passed in **Criminal Application (APL) No.1015 of 2019, (*Kamalkishor s/o.***

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pertaining to co-accused No.2. By the said judgment and order, this Court quashed the order of issuing process and dismissed the complaint. It was submitted that the contentions raised in these applications are identical to those raised and accepted by this Court in the said application. On this basis, the learned counsel for the applicants submitted that the present applications deserved to be allowed.

5. On the other hand, Ms. Maniyar, learned counsel appearing for the contesting respondent No.2 submitted that the judgment and order dated 03/03/2020 passed in **Criminal Application (APL) No.1015 of 2019, (*Kamalkishor s/o. Sitaram Agrawal vs. State of Maharashtra and another*)** was clearly distinguishable for the reason that the applicant in the said application was not a partner in the said firm and yet he had been arrayed as an accused. It was further submitted that a proper appreciation of the contents of the complaint would show that the allegations were against all the accused persons, being partners of the said firm and that there was no substance in the contention raised on behalf of the applicant that the allegations of fraud etc. were only against one of the partners i.e. Mahendra Ganpatrao Khetan. It was submitted that the matter deserved to go to trial to ascertain whether the applicants before this Court were justified in claiming that despite being partners of the firm they could not be

held criminally liable. It is further submitted that insofar as delay in lodging the complaint is concerned, although there were no such averments in the complaint or statement in the verification on behalf of the respondent No.2, on instructions it was submitted that the respondent No.2 was suffering from serious medical issues, due to which he could not immediately lodge the complaint.

6. Having heard the learned counsel for the rival parties, this Court is of the opinion that the distinction sought to be raised on behalf of the respondent No.2 between the case of the applicant in **Criminal Application (APL) No.1015 of 2019** (*Kamalkishor s/o. Sitaram Agrawal vs. State of Maharashtra and another*) and the applicants before this Court in these two applications, is not sustainable.

7. A perusal of the judgment and order passed by this Court in **Criminal Application (APL) No.1015 of 2019**, (*Kamalkishor s/o. Sitaram Agrawal vs. State of Maharashtra and another*), would show that the application has not been allowed on the ground that the said applicant was not even a partner in the said partnership firm. In fact, this Court has gone into great detail as regards the averments made in the complaint and findings have been rendered to the effect that there does not appear to be specific allegation against the applicant in the said application. It is then held that the complaint is highly belated for which no explanation is

forthcoming and also the dispute essentially is of civil nature.

8. The relevant portion of the said judgment and order reads as follows :-

“8. Shri N.R. Tekade, the learned counsel would submit that the fact that the complaint is preferred in the year 2016-17 is clear manifestation of the intent to abuse the process of law by a person who accepts the refund of the part consideration in March 2008 and then decides to rake up the issue 9 years after the acceptance of the refund. Shri Rohit Vaidya, the learned counsel for the complainant makes a valiant effort to defend the indefensible. Shri Rohit Vaidya could not bring to my notice any averment in the complaint spelling out the role of accused 2 in the transaction. The only accused to whom some role is attributed is accused 3 Mahendra Khetan. However, Shri Rohit Vaidya would submit that certain receipts issued on behalf of the firm in the year 2006 bear the signature of accused 2 Kamalkishor Agrawal. Shri Rohit Vaidya would further submit that accused 2 has issued a communication to the Municipal Council, Washim informing the names of the allottees. Shri Rohit Vaidya would submit that notwithstanding that the complaint is silent on the role of accused, such role is discernible from the documentary material. I am afraid that the submission, convoluted, as the submission is, can be noted only for rejection. Issuance of process and taking cognizance is a serious matter. Jurisdictional fact which clothes the Magistrate with the power to issue process is that the complaint must contain the necessary averments as would make out the offence. The issuance of process, in the absence of necessary averments, and then referring to some material to make out a case to proceed against the accused, is unknown to the statutory scheme of the Criminal Procedure Code, 1973.

9. *I am more than satisfied that even if the averments in the complaint are taken at face value, no offence is made out as against accused 2. That apart, the complaint is preferred by a person, who accepts the refund of the part consideration in March 2008 and then blissfully lets 9 years pass before lodging the complaint in December 2016-17. Neither the complaint nor the verification statement recorded ventures to explain or justify the delay of 9 years in approaching the Magistrate. Perusal of the exchange of correspondence between the complainant and the partners of the firm in 2008 would reveal that the dispute was essentially civil in nature and the builder and developer was contending that it was the complainant, who committed breach of the agreement. Considering the exchange of correspondence took place in 2008, that the dispute was essentially of civil nature and that the complainant accepted the refund of part consideration of Rs.3 lacs in March, 2008, even de hors absence of essential averments in the complaint, I am satisfied that the complaint is a manifest abuse of the process of law. In the light of the discussion supra, the application is allowed.*

10. *Order of issuance of process dated 31.1.2018 in Regular Criminal Case 316 of 2016 is quashed and Regular Criminal Case 316 of 2016, is dismissed as against the applicant – accused 2.”*

9. Considering the view taken by this Court in the case of co-accused No.2 and also because the applicants before this Court in these two applications are identically placed, this Court is inclined to accept the prayer made on behalf of the applicants in the present applications.

10. The reasoning in the above quoted portion of the judgment and order passed by this Court in

Criminal Application (APL) No.1015 of 2019, (*Kamalkishor s/o. Sitaram Agrawal vs. State of Maharashtra and another*) is equally applicable to the applicants in these two applications before this Court. There is no explanation forthcoming as to why the complaint was lodged by respondent No.2 after a delay of nine years. There is also no dispute about the fact that part refund of consideration amounting to Rs.3,00,000/- [Rupees Three Lakhs only] was taken by the complainant as far back as in March, 2008. Therefore, there appears to be substance in the contention raised on behalf of the applicants that the dispute, if any, between the parties is essentially civil in nature and that filing of the aforesaid complaint is an abuse of process of law.

11. In view of the above, the applications are allowed and consequently the Regular Criminal Case No. 316 of 2016, pending before the Magistrate is quashed as against the applicants before this Court in these two applications.

JUDGE