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

CRIMINAL APPLICATION (APL) NO. 659 OF 2016

Sayeed Rashid Sayeed Salar,
Aged about 49 years, Occ. - Business,
R/o Akbar Plot, Akot File, Akola,
Tq. and Dist. Akola. .... **APPLICANT**

VERSUS

1) State of Maharashtra,
through P.S.O., Akot File, Akola.

2) Mh. Faiyyaz Noor Mohammad,
Aged about 50 years, Occ. - Business,
R/o Haji Nagar, Akot File, Akola,
Tq. and Dist. Akola. .... **NON-APPLICANTS**

Mr. D.R. Khapre, Counsel for the applicant,
Mr. S.S. Doifode, Addl.P.P. for non-applicant 1/State,
Mr. U. Deshpande, Counsel h/f. Mr. M.G. Sarda for non-applicant 2.

CORAM : ROHIT B. DEO, J.
DATED : 21st JANUARY, 2021

ORAL JUDGMENT :

The issue involved is whether the learned Sessions Judge, Akola committed an error in setting aside the order of discharge rendered by the Judicial Magistrate First Class, Court 6, Akola in Regular Criminal Case 962/2010.

2. The relevant facts are :

Non-applicant 2, who shall be referred to as the informant, lodged report dated 07-11-2009 with Akot File Police Station, Akola. It is alleged that the applicant, who shall be referred to as the accused, approached the informant on 28-9-2005, claimed to be the owner and, therefore, entitled to sell, Plot 59, admeasuring 1000 square feet with construction thereon forming part or portion of Survey 38/2 (herein after referred to as "plot"). It is alleged that the accused visited the residence of the informant on several occasions and ultimately the informant agreed to purchase the said plot. An agreement came to be executed between the informant and the accused in which a recital was incorporated that the sale-deed shall be executed as soon as the order of stay of the civil Court is vacated. It is alleged that the informant had, prior to the execution of the said agreement, entered into an agreement with one Shaikh Wasim Shaikh Ismail to purchase the said plot. However, the accused represented that he had purchased the plot and the construction from Shaikh Wasim Shaikh Ismail and induced the informant to pay Rs.51,000/- as earnest. It is finally alleged that by falsely representing to be the owner and/or the person authorized to sell the plot, the accused cheated the informant.

The Akot File Police Station registered crime under Sections 420 and 423 of the Indian Penal Code and upon culmination of the investigation, final report under Section 173 of the Criminal Procedure Code ('Code' for short) was submitted in the jurisdictional Court.

3. The accused preferred application dated 06-10-2020 (Exhibit 11) seeking discharge. It would be apposite to note the relevant averments in the said application.

Paragraph 3 of the application reads thus :

> *"3. It is most humbly submitted that, the police have supplied copies of Final Report alongwith copies of some documents and amongst them, a copy of computer typed police report, a copy of agreement, dated 28-09-2005 and copy of Judgment and Decree dated 18-09-2009 passed by the Hon'ble Civil Judge, Sr. Dn., Akola in Special Civil Suit No.78/2008 have been supplied to the accused. So also, copy of the evidence of Shaikh Wasim Shaikh Ismail in said Civil Suit No.78/2008 has been also supplied to the accused."*

The averments in paragraph 3 reveal that the copy of the deposition of Shaikh Wasim Shaikh Ismail in Special Civil Suit 78/2008 is supplied to the accused. The said averment is of some significance, and which shall be duly considered at a later stage in the judgment.

In paragraph 4 of the application, it is averred that on the face of the record no case is made out to frame charge.

Paragraph 5 of the application avers that there is a contradiction in the oral report and the typed written report.

The alleged contradiction are spelt out in paragraphs 5 and 6.

In paragraph 8 of the application, the accused refers to the condition in the agreement that the sale-deed shall be executed after the stay order is vacated. It is then averred that the informant entered into an agreement dated 10-2-2005 with Shaikh Wasim Shaikh Ismail and that since Shaikh Wasim Shaikh Ismail attempted to sell the property, the informant instituted Special Civil Suit 78/2008, prior to the execution of the agreement dated 28-9-2005 between the informant and the accused.

In paragraph 5, reference is made to the evidence of Shaikh Wasim Shaikh Ismail in Special Civil Suit 78/2008.

In paragraph 10, it is alleged that the civil suit was decided on 18-9-2009 and the report is lodged subsequently, without explaining the delay. In paragraph 11, it is averred that the dispute is purely civil in nature and that there was neither dishonest intention nor inducement. It is specifically averred that the informant was aware of the facts and circumstances and, therefore, there is no material on record to frame charge.

4. The learned Magistrate was pleased to discharge the accused

vide order dated 10-4-2013. The learned Magistrate held that on the face of the documents placed on record ingredients of cheating are not disclosed. The learned Magistrate held that the accused did not suppress the fact that his interest was limited and that the agreement records that the accused shall execute the sale-deed since the accused has agreed to purchase the plot from Shaikh Wasim Shaikh Ismail. The relevant consideration by the learned Magistrate is discernible in paragraph 9 of the order of discharge, which reads thus :

> *"9. In the present matter the core allegations against the accused are that, he fraudulently and dishonestly deceiving the informant intentionally induced him to do some act, i.e., to enter into agreement of sale by parting with earnest amount consideration of Rs.51,000/-. It is for the prosecution to prove this basic ingredients of cheating as envisaged under Section 415 of the Indian Penal Code. If they comply with this requirement, then only the question of invoking the liability of Sec. 420 or 423 as alleged would come in to picture and not otherwise. In my view, with utmost and humble respect to said authority, facts in the present case and of that case are totally different. In that case, the police personnel were indicted for the offence of murder with conviction. There was no prima facie direct evidence pertaining to the assault by the police personnel. However, the present case materially hinges on the agreement in question. Whenever, the allegations of cheating is made, the intention of the accused to deceive from inception, i.e. the date when the agreement was executed is of vital importance. In the present case, even without touching to any defence document, considering the document placed by the prosecution, the ingredients of cheating are not made out. For sake of redundancy, as per the statement of Sk.Wasim he has agreed to sale the disputed property to the informant. He has not suppressed the fact of his limited interest. In the agreement itself, he disclosed that he will execute the sale-deed as he has agreed to purchase the property from*

Sk.Wasim. There appears no intention to deceive on his part. It is not the case that he has purchased the disputed property from Sk. Washim and then reneged from his promise. Therefore, the alleged fraudulent or dishonest intention is prima facie missing. Moreover, the informant with knowledge of such agreement, with knowledge that the Court has granted stay, in a case in which he was also the party, with the knowledge that Sk. Wasim has also allegedly agreed to sale him the disputed property, entered into the agreement in question shows that he tried to suppress some true state of transaction. The civil dispute and the criminal dispute in a given case may run simultaneously. However, the emerging facts palpably reveals that the present matter pertains only with the civil dispute. The ingredients of cheating are not attracted to frame any charge. It also appears that by way of this belated report the informant is trying to settle his exclusive civil dispute which is not permissible. Aftermath, keeping in mind, the earlier discussed criteria for framing the charge, for want of any prima facie ingredients, in my view, the application would succeed. Hence, I answer point no.1 in the affirmative and in answer I pass the following order.

Order

1. The accused is discharged of the offence punishable under Sections 420 and 423 of the Indian Penal Code under Section 239 of the Code of Criminal Procedure.

2. His bail bond shall stands cancelled."

5. The informant preferred Criminal Revision 80/2013, which is allowed by the learned Sessions Judge, Akola vide judgment dated 24-6-2016, which is impugned herein.

6. The relevant consideration by the learned Sessions Judge is discernible in paragraphs 11, 12, 13 and 14, which read thus :

"11. In my opinion, the question as to whether the accused had any intention to deceive the complainant can also be

examined and appreciated only at the time of trial on merits and not while dealing with the application for discharge. As already observed, learned Magistrate has not only dealt with this aspect but also came to the conclusion that there was no material to draw any inference that the accused had any intention to deceive the complainant. On this aspect, learned advocate Shri Sarda representing the complainant has also heavily relied upon the decision, "State of Tamilnadu .vs. N. Suresh Rajan and others (2014 ALL MR (CRI) 781 SC)". I have gone through the judgment delivered by Hon'ble Apex Court. In that case also, the aforesaid legal position has been reiterated and observed that the Court while considering the application for discharge, is only required to see whether there exists prima facie case against the accused. It is also observed that the Court cannot appreciate the evidence and discharge the accused as if it was passing order of acquittal. In this backdrop, I feel that the observations made by the learned Magistrate that the accused had no intention to deceive the complainant-informant, cannot be sustained. On the contrary, the aspect whether accused-respondent 2 had any dishonest intention can be only a matter of evidence and cannot be decided at the threshold.

12. During the course of arguments, learned advocate Shri Sarda has also produced certified copy of statement of Sk. Wasim recorded on oath. Learned advocate Shri Goenka representing the respondent no.2 has also placed several documents viz. certified copies of plaint and evidence in other cases. Shri Sarda has drawn my attention to the fact that Sk.Wasim had made a statement on oath before the Court that he did not enter into agreement with Sayyad Rashid. However, this fact has not been taken into account by the learned Magistrate. Bare perusal of the copy of statement of Sk.Wasim on oath of shows that he has categorically denied that any agreement had taken place between him and Sayyad Rashid. Learned advocate Shri Goenka representing the respondent no.2 has countered this submission and argued that this document statement of Sk.Wasim cannot be taken into account as it is filed at belated stage. Secondly, he has submitted that the informant complainant in spite of full knowledge that there is a stay in the civil proceeding, has entered into an agreement with accused Sayyad Rashid and so by no stretch of imagination, it can be said that accused

Sayyad Rashid had any intention to deceive or cheat the complainant. He has drawn my attention to the copies of several documents which are filed with the list Exh.11. Respondent no.2 has filed documents to show that complainant Mohd. Fayyaz had also filed a Civil Suit bearing RCS No.94/2011 against accused Sayyad Rashid for recovery of the amount. Apart from it, the other documents placed on record go to show that a civil dispute was going on between the parties relating to the same property. In this regard, the learned Magistrate has rightly observed that the civil dispute would run parallel to the criminal case. So far as the contention of Shri Sarda, learned advocate for the petitioner relating to the statement of Sk.Wasim is concerned, I feel that this question can also be decided only at the time of trial on merits. As already observed, it was not open to the learned Magistrate to enter into appraisal or appreciation of evidence while dealing with the application for discharge and the question of intention can be examined only at the time of trial on merits.

13. During the course of hearing, learned advocate Shri Goenka has also placed reliance upon following authorities-

[1] "B. Suresh Yadav Vs Sharifabee and another [AIR 2008 SC 210]",

[2] "M/s Indian Oil Corporation Vs M/s NEPC India Limited and others [AIR 2006 SC 2780]"

[3] "All Cargo Movers [I] Pvt. Ltd. Vs Dhanesh Badarmal Jain and another [AIR 2008 SC 247]"

[4] "Harmanpreet Singh Ahluvalia and others Vs State of Panjab and others [2009 Cri.L.J. 3462]"

[5] "Haridaya Rajan Pd Varma and others Vs State of Bihar and another [2000 ALL MR [Cri] 1490 SC]".

14. I have carefully gone through these authorities [cited supra]. At the outset, the learned advocate Shri Goenka has relied upon the case of B. Suresh Yadav Versus Smt. Sharifabee and another and also the case of M/s Indian Oil Corporation Vs M/s NEPC India Limited and others. In the case of B.Suresh, Hon'ble Apex Court was dealing with the case of cheating where inconsistent stand was taken in civil as well as criminal proceeding. It was observed that though the liability of a person can be both civil and criminal, no case of *cheating was made out. In that case, the Hon'ble Apex Court was dealing with the criminal complaint under S.138 of NI Act. In the case of M/s Indian Oil Corporation, it was observed by the Hon'ble Apex Court there was a tendency to convert civil dispute into criminal case. Further, the learned advocate Shri Goenka relied upon the case of All Cargo Movers [I] Pvt. Ltd. Vs Dhanesh Badarmal Jain and another as well as Harmanpreet Singh Ahluvalia and others Vs State of Panjab and others. I have gone through the judgment in both the cases [cited supra] on which reliance is placed. No doubt, in the case of Harmanpreet Singh Ahluvalia and others, it was observed that the complainant has to show that the accused had fraudulent intention at the time of making promise or representation. But as already pointed out by me, in the case in hand, accused-respondent no.2 had filed an application for discharge and the question of intention cannot be decided at the threshold when the evidence is yet to be led. I have also gone through the case of Haridaya Rajan Pd Varma and others Vs State of Bihar and another [cited supra]. In that case also, it was observed by the Hon'ble Apex Court that the intention to cheat must be present at the beginning of the transaction. But as already pointed out earlier by me, in the present case in hand, the learned Magistrate was dealing with an application for discharge when the evidence was yet to led. The question of intention can be decided only at the time of trial on merits and it was not open to the learned Magistrate to go into that aspect and record a finding to that effect. In such circumstances, I feel that the cases [cited supra] on which reliance is placed by the learned advocate Shri Goenka will not in any way help the case of the respondent no.2"*

7. The learned Counsel for the accused would reiterate the submissions which found favour with the learned Magistrate, who discharged the accused. The learned Counsel would submit that the revisional order suffers from a jurisdictional error. It is further submitted that the judgment impugned is liable to be set aside on the

short ground that the revisional Court allowed production of additional documents in revision, which were not on the record of the learned Magistrate. It is further submitted that the findings recorded by the learned Sessions Judge are factually incorrect and are indeed perverse. A specific ground is raised in the memo of application that the deposition of Shaikh Wasim Shaikh Ismail recorded in Special Civil Suit 3408/2007 was not on the record of the trial Court. It is averred that the deposition in the said case was recorded on 02-9-2015, after the order of discharge. It is further contended in the memo of application that Shaikh Wasim Shaikh Ismail did not depose that he has not entered into an agreement with the accused and that the observation of the learned Sessions Judge that such is the deposition in Special Civil Suit 78/2008, is factually incorrect. Be it noted, that even according to the accused, the deposition in Special Civil Suit 78/2008 was on the record of the learned Magistrate.

8. It is then contended in the memo of the application that the learned Sessions Judge failed to appreciate the statements of Shaikh Wasim Shaikh Ismail, Sajid Khan, Munaf Khan and Mohd. Fayyaj Noor Mohd., which were filed alongwith the final report. It is further contended in the memo of appeal, and strenuously argued, that the dispute is of civil nature and no offence is made out.

9. The learned Counsel for the informant would support the judgment of the learned Sessions Judge. It is argued that the learned Magistrate committed factual error in observing that the agreement in question discloses the limited interest of the accused. The learned Counsel for the informant would emphasize that the settled law is that even a strong suspicion based on some material is sufficient to frame charge. The extension of the submission is, that the accused specifically represented that he has entered into an agreement to purchase the plot from Shaikh Wasim Shaikh Ismail and that the sale-deed shall be executed no sooner the stay of the civil Court is vacated. The learned Counsel for the informant invites my attention to the testimony of Shaikh Wasim Shaikh Ismail in Special Civil Suit 78/2008, which is filed alongwith the final report. Perusal of the said testimony reveals that Shaikh Wasim Shaikh Ismail, who was the defendant in the civil suit instituted by the accused, categorically denied having executed any agreement to sell in favour of the accused.

10. It is finally submitted that the learned Magistrate clearly erred in discharging the accused and the revisional Court did not commit any error in interfering.

11. Before considering the relative merit of the rival submissions, it

would be apposite to note the provisions of Sections 239 and 240 of the Code, which read thus :

> *"**239. When accused shall be discharged** – If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.*
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> ***240. Framing of charge** – (1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.*
>
> *(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried."*

12. The duty of the Magistrate is to ascertain, upon consideration of the police report and the documents under Section 173 of the Code, whether the charge is groundless, and to discharge the accused if he considers the charge to be groundless. However, if the Magistrate is of the opinion that there is a ground for presuming that the accused has committed an offence which he is competent to try, the Magistrate is required to frame a charge.

13. It is trite law that at the stage of framing the charge, the Court is

not expected to act as a mere post office. A limited sifting of material on record is expected, the purpose of which is to ascertain whether there is a case for proceeding with the trial. The Magistrate is not expected to conduct a mini trial. The material on record need not be sifted meticulously or minutely to assess the relative probability of acquittal or conviction. Indeed, existence of strong suspicion, which is not subjective, but is based on some material, is sufficient to frame charge.

14. The observations of the Supreme Court in ***Dipakbhai Jagdishchandra Patel vs. State of Gujarat, (2019) 16 SCC 547*** in paragraph 23 are relevant, and read thus :

> *"23. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the Court is expected to do is, it does not act as a mere post office. The Court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the Court dons the mantle of the Trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the Court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that accused has committed the offence. Strong*

suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence."

15. In ***State (NCT of Delhi) v. Shiv Charan Bansal, (2020) 2 SCC 290***, while considering the scope of Sections 227 and 228 of the Code, which are *pari materia* provisions governing trial before a Court of Sessions, the Supreme Court articulates thus :

"39. *The Court while considering the question of framing charges under Section 227 of the Cr.P.C has the power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case has been made out against the accused. The test to determine prima facie case would depend upon the facts of each case. If the material placed before the court discloses grave suspicion against the accused, which has not been properly explained, the court will be fully justified in framing charges and proceeding with the trial. The probative value of the evidence brought on record cannot be gone into at the stage of framing charges. The Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the ingredients constituting the alleged offence. At this stage, there cannot be a roving enquiry into the pros and cons of the matter, the evidence is not to be weighed as if a trial is being conducted. Reliance is placed on the judgment of this Court in State of Bihar v. Ramesh Singh where it has been held that at the stage of framing charges under Sections 227 and 228 CrPC, if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused had committed the offence, then the court should proceed with the trial.*"

16. The learned Counsel for the accused is relied on the decisions in ***S.W. Palanitkar and others v. State of Bihar and another, (2002) 1 SCC***

241, Dalip Kaur and others v. Jagnar Singh and another, AIR 2009 SC 3191, P. Vijayan v. State of Kerala and another, AIR 2010 SC 663 and ***Laxman Vithoba Jadhav and others v. State of Maharashtra and others, 2016(1) Bom.C.R. (Cri.) 167*** .

17. In *S.W. Palanitkar and others v. State of Bihar and another*, it is held that the fraudulent or dishonest intention must be shown to exist at the time of making of the inducement to attract Section 420 of the Indian Penal Code. Similar is the articulation in *Dalip Kaur and others v. Jagnar Singh and another.* In *P. Vijayan v. State of Kerala and another,* the Supreme Court enunciates that Judge is not a mere post office to frame charge and that exercise of judicial mind to facts in order to determinate whether a case for trial has been made out by the prosecution, is necessary. *Laxman Vithoba Jadhav and others v. State of Maharashtra and others* is rendered by the Division Bench of this Court on the factual matrix. The backdrop was that the issue regarding the document of partition was directly and substanally involved in the civil suit/s and, therefore, the Division Bench did not allow parallel criminal proceedings to continue on the premise that whether the document is forged shall ultimately be adjudicated by the civil Court. The said decision does not advance the case of the accused, any further.

18. Reverting to the thinking process of the learned Magistrate who discharged the accused, the observation is that Shaikh Wasim Shaikh Ismail clearly stated that he did enter into an agreement to sell the plot to the accused. Perusal of the statement of Shaikh Wasim Shaikh Ismail which is filed alongwith the final report, reveals that the observation of the learned Magistrate is contrary to record. *Au contraire,* Shaikh Wasim Shaikh Ismail deposed in the civil suit that he did not enter into an agreement to sell with the accused. The reference in the statement dated 27-5-2010, which is referred to by the learned Magistrate, is not to an agreement to sell, the reference is to an agreement of construction. In my considered view, the learned Magistrate clearly erred in observing that the accused disclosed in the agreement that his interest in the plot was limited. *Prima facie*, the material filed alongwith the final report would indicate that the accused did not have the authority to sell the plot and that the accused did not even hold an agreement to sell. This is apart from the settled legal position, that an agreement to sell creates no interest in the property.

19. I am satisfied, that the learned Sessions Judge is justified in the view that considering the material on record the charge is not groundless and whether there was in existence dishonest intention when the accused entered into an agreement, will have addressed after

the evidence is adduced.

20. I do not intend to refer muchless consider, the documents placed on record by the accused alongwith the application under Section 482 of the Code since the legality of the discharge order will have to be tested on the basis of the report and the material placed on record alongwith the final report under Section 173 of the Code. I have scrutinized the record and the material placed alongwith the final report, and having done so, I am satisfied that there is a case to proceed against the accused and that the charge is not groundless.

21. The submission that the dispute is essentially of civil nature merits rejection. A transaction may have civil as well as criminal overtones. Notably, it is not even the case of the accused that there is a civil litigation pending between the accused and the informant and the reference which is made is to the litigations between the informant and Shaikh Wasim Shaikh Ismail. Be that as it may, considering the allegation that as representation was made that the accused held an agreement to sell and was authorized to sell the property, which representation appears to be *prima facie* false, as would appear from the material filed alongwith the final report, the accused shall have to face the trial.

22. No interference is necessary in the judgment impugned, in exercise of inherent powers under Section 482 of the Code.

23. It is made abundantly clear that every observation made herein is a *prima facie* observation made for the limited purpose of deciding whether the revisional judgment holding that a case is made out for framing charge, is vitiated. Needless to record, the trial Court shall not be influenced by any observation in this judgment, during the course of trial.

24. The application is dismissed.

JUDGE

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