IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT AURANGABAD

937 CRIMINAL WRIT PETITION NO.1042 OF 2018

1. Kotak Mahindra Bank Ltd. ...**PETITIONER**
through its authorized Officer
Shri Prashant Prakash Dhokne,
Age-42 years, Occu-Service,
R/o. C/o. Kotak Mahindra Bank Ltd,
4th Floor, Zone II, Nyati Untree Building,
Gunjan Chowk, Ahmednagar Road, Pune

VERSUS

1. Shri Abhijit Dilip Barhate, ...**RESPONDENTS**
Age-34 years, Occu- Service,
R/o. C/o. Dilip Namdev Barhate
'Pitruchhaya', Plot No. 69,
Hedgewar nagar, Dharangaon,
Taluka Dharangaon, Dist. Jalgaon

2. The State of Maharashtra,
Through Office In-charge,
Jilla Peth Police Station,
Jalgaon, Dist. Jalgaon

Mr. Mukul S. Kulkarni, Advocate for the petitioner
Mr. Madhav M. Bhokarikar, Advocate for the respondent No.1
Mr. Y. G. Gujrathi, APP for the respondents/State

CORAM : KISHORE C. SANT, J.
DATE : 21st DECEMBER, 2022

JUDGMENT:

1. Heard the learned advocate for the respective parties.

2. Rule.

3. Rule made returnable forthwith, with the consent of the parties.

4. A complaint is filed by respondent No.1 in the court of learned Chief Judicial Magistrate, Jalgaon dated 02-08-20210. The learned court was pleased to issue process against all the accused persons by order dated 29-08-20211. Against the said order accused No. 4-present petitioner preferred a revision to the Sessions Court at Jalgaon bearing Criminal Revision No. 287/2013. Revisional Court by impugned judgment and order dated 15-05-2018 dismissed the said revision holding that the process is rightly issued. The original accused No. 5 i.e. Branch Manager of another financial institution namely Gruha Finance has also filed criminal revision application No. 211/2011 and the same came to be allowed by judgment and order dated 23-07-2013 holding that allegations are not sufficient to proceed against accused No. 5. Learned advocate for the petitioner submits that reading the complaint as whole there is nothing in the complaint to make out the case for the offences under Section 420, 468 of the Indian Penal Code. Taking the averments in the complaint as it is, it does not show that in any manner this petitioner has induced the complainant-respondent to do anything or has committed any forgery and thereafter the order

of issuing of process ought to have been set aside by the learned revisional court.

5. The learned advocate for respondent No.1-original complainant submits that the courts below have rightly passed the orders. The learned JMFC, before passing an order was pleased to call for a report from the police and it is only after the submission of the report by the police, process is issued. Learned advocate for the respondent-complainant prays for rejection of the petition.

6. The complainant alleged in the complaint that accused present petitioner had advanced loan to accused No.1 for purchasing a property. The complainant had purchased a flat on 12-07-2008 from the accused No. 1-Manoj by obtaining loan from accused No.5 i.e. Gruha Finance. Before purchasing of property he had seen 7/12 extract of the property and other documents and was satisfied that the property is without any encumbrance. It is alleged that accused No. 2 and 6 were witnesses to the sale deed. It is alleged that there was already a loan granted by the accused No. 4 and the property was mortgaged with them by way of equitable mortgage. It is further alleged that it was necessary for accused No. 4 to get necessary entries in the revenue record and specifically in 7/12 extract. The allegations is that deliberately this was not done and thus cheated the complainant.

7. The police made investigation pursuant to the order passed by the learned JMFC. There is no specific role attributed to the accused No. 4. The basic allegations are against accused Nos. 1, 2 and 6. It is inferred that title documents were deliberately suppressed that title documents are with accused No.4 except that there is no material appearing in the report submitted by the police. The learned JMFC has still passed the order issuing process against all the accused except accused No. 3.

8. In the revision filed by the accuse No. 5 the Sessions Court has held that there was suppression of the material that property is mortgaged with accused No. 4. No allegation is made out against accused No. 5 and the revision was allowed. So far as the revision application preferred by this petitioner, it is held that accused No. 4 has not taken entry in the revenue record. Had it been taken probably there was no occasion for the complainant to purchase the property. It is further observed that these entries were deliberately not taken with common intention. Further consideration on which the learned revisional court has proceeded is that the complainant is not at fault and it is negligence of either of the accused that he was put into trouble. Thus, at the most what is observed is that bank was negligent in taking entries in its name.

9. Looking to Section 420 of the IPC it is seen that there has to be inducement at the hands of the accused by deceitful tactics. There is no allegation that it is this accused No. 4 who has induced the complainant to purchase the property. Section 420 of the IPC which is reproduced below:

> *Section 420- Whoever **cheats and thereby dishonestly induces the person deceived to deliver any property to any person**, or to make, alter or destroy the whole or any part of the valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*
> *(emphasis supplied)*

10. Reading the Section 420 it is clear that there has to be inducement by the person and further there has to be delivery of property. Both are absent in this case.

11. Coming to the definition given in Section 463 which is reproduced herein below.

> *Section 463- Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.*

Going through the definition also this court does not find that accused No. 4 has committed any act of forgery for the purpose of cheating.

12. At this stage, the learned advocate for respondent No.2 relied upon the judgment reported in *AIR 2019 SC 2499 in the case of State of Gujrat Vs Afroz Mohammed Hasanfatta*. In para 3 of the said judgment it is sen that there was allegation against the accused persons therein of hatching a conspiracy wherein the accused had submitted the bills which were found to be forged and bogus and entries were also found to be bogus. It is in facts of that case the Hon'ble Apex Court held that offence of cheating is made out and thus the said judgment is not applicable to the facts of the present case.

13. Learned advocate for the respondent further relies upon another judgment reported in *AIR 2011 SCC 20 in the case of Iridium India Telecom Ltd. Vs Motorola Incorporated and Ors*. In para No. 42 of the said judgment the Hon'ble Apex

Court has clearly observed that there has to be two ingredients present that first is deception by the accused of the person deceived, must be fraudulent or dishonest and secondly such deception must induces the person deceive to either; (a) deliver property to any persons or (d) Consent that any person shall retain any property. Second part also requires that the accused must by deception intentionally induces the person deceived either to do or omit to do anything which he would not do or omit. Thus, this court finds that in the present complaint these ingredients are totally absent. Coming to the third judgment relied by the learned advocate for respondent No.2 reported in *AIR 2013 SC (Supp) 1056 in the case of Rajiv Thapar Ors Vs Madal Lal Kapoor*. In this judgment the Hon'ble Apex Court has laid down consideration for exercising the power under Sections 482, 202 of the Code of Criminal Procedure and Section 227 of the Constitution of India,

14. In the judgment reported in *AIR 2017 SC (Supp) 298 in the case of Prabhu Dutt Tiwari Vs State of Uttar Pradesh*

and Ors it is held by the Hon'ble Apex Court that for quashing of order of summons, it should be seen as to whether the Magistrate is satisfied that there is sufficient ground to proceed against the accused. Then no interference is called for.

15. This court has to consider as to whether there was sufficient material before the Magistrate to issue process. In this case, before the Magistrate material for consideration was firstly a complaint and secondly there was a report submitted by the police. Considering both these things, it is clear that there is nothing to attract the ingredients of the Sections 420 & 468 of the IPC issuance of process itself is need to be granted.

16. At last, learned advocate for the respondent relies upon the judgment reported in *AIR 2014 SC (Supp) 1516 in the case of Vinod Raghuvanshi Vs Ajay Arora and Ors*. The Hon'ble Apex Court has held that court has only to see whether the allegations make out prima face case to issue summons against the accused persons.

17. As already observed, this court does not find that there was sufficient material to proceed against the accused persons. Even the allegations taken as it is do not make out any case under Sections 420 or 468. This court finds that the learned Sessions court has failed to appreciate the matter properly. Merely because there is negligence on the part of the accused cannot be said to be sufficient to come to a conclusion that there is cheating. As it is there are no allegations about the forgery, if at all, those are against accused Nos.1, 2 and 6 & certainly not against the accused No. 4 i.e. the present petitioner. In view of that this court finds that no case is made out against the petitioner and therefore, order dated 29-08-2011 to the extent of present petitioner of issuance of process and subsequent order dated 15-05-2018 passed by the learned Sessions Judge in revision are set aside.

18. Rule is thus made absolute in above terms.

[KISHORE C. SANT, J.]