

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

CRIMINAL WRIT PETITION NO.1243 OF 2021

Govind Gambhirrao Khambote.

... **Petitioner**

Versus

1. Nimba Gambhirrao Khambote (Nhavi).

2. The State of Maharashtra.

... **Respondents**

...

Mr. A. D. Khot, Advocate for Petitioner.

Mr. D. A. Mane, h/f Mr. P. A. Bharat, Advocate for Respondent No.1.

Mr. P. G. Borade, APP for Respondent No.2/ State.

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CORAM : **SHRIKANT D. KULKARNI, J.**

RESERVED ON : 25th August, 2022.

PRONOUNCED ON : 26th August, 2022.

ORDER:

. Heard finally with consent of both the sides at admission stage.

2 The petitioner is challenging the order of issue process passed by the learned Judicial Magistrate First Class, Chopda in Regular Criminal Case No.76 of 2018 and confirmed by the learned Additional Sessions Judge, Amalner in Criminal Revision Application No.15 of 2019.

3 The factual scenario giving rise to this petition in narrow compass is as under:

 The petitioner and respondent No.1 are real brothers *inter-se*. Respondent No.1 has filed a private complaint against the petitioner vide Regular Criminal Case No.76 of 2018 contending that the petitioner has relinquished his right in their property by executing an agreement for a sum of Rs.18,50,000/-. Respondent No.1 has paid Rs.14,50,000/- to the petitioner, but the petitioner did not comply his part as per the agreement and thereby committed an offence punishable under Sections 420 and 406 of the Indian Penal Code. Respondent No.1 has also prayed for forwarding the complaint to police for investigation under Section 156(3) of the Code of Criminal Procedure.

4 The learned Judicial Magistrate First Class, Chopda, was pleased to turn down the prayer for investigation through police under Section 156 (3) of the Code of Criminal Procedure and directed to respondent No.1 to examine himself or his witness under Section 200 of the Code of Criminal Procedure.

5 The learned Judicial Magistrate First Class after perusing the verification statement of respondent No.1 and documents on record, was pleased to issue process against the petitioner for the offence punishable under Sections 420 and 406 of the Indian Penal Code.

6 Feeling dissatisfied by the said order of issue process, the petitioner has filed Criminal Revision Application No.15 of 2019 before the learned Additional Sessions Judge, Amalner, District Jalgaon. The learned Additional Sessions Judge, was pleased to dismiss the criminal revision application.

7 The petitioner has challenged both the impugned orders by way of this writ petition.

8 Mr. Khot, learned counsel for the petitioner invited my attention to the copy of complaint (page No.16) and copy of agreement / memorandum of understanding / agreement of compromise. He submitted that in view of the terms and conditions embodied in the said agreement, it was agreed between the parties that respondent No.1 shall pay Rs.18,50,000/- to the petitioner to relinquish his right in the entire property. Accordingly, respondent No.1 has paid Rs.14,50,000/-. However, respondent No.1 did not pay the remaining amount and not ready to comply the remaining part of agreement arrived between the parties. The petitioner is ready to execute relinquishment-deed soon after getting the remaining amount from respondent No.1. But respondent No.1 instead of paying the remaining amount, filed private complaint against the petitioner. Both the Courts below have completely overlooked the fact that the dispute between the brothers is of a purely civil nature. He submitted that the offences punishable under Section 420 or 406 of the Indian Penal Code are not *prima-facie* made out even if allegations levelled in the complaint are taken at its face value. He submitted that it would be an abuse of process of law if criminal prosecution filed against the petitioner is continued. He, therefore, urged to quash the order of issue process passed against the petitioner.

9 Mr. Mane, learned counsel for respondent No.1 supported the impugned orders passed by both the Courts below. He submitted that the learned Magistrate after applying his judicial mind, was pleased to issue process against the petitioner under Sections 420 and 406 of the Indian Penal Code in view of nature of allegations made in the complaint. He submitted that the petitioner has cheated his brother respondent No.1 by accepting Rs.14,50,000/-. Now, the petitioner has taken 'U' turn and denying to execute his remaining part of agreement. It is a clear case of cheating and criminal breach of trust.

10 Mr. Mane, learned counsel for respondent No.1 submitted that the petitioner has challenged the order of issue process dated 28th September, 2018. He submitted that there is one more order passed earlier by the learned Judicial Magistrate First Class on 12th June, 2018, whereby the prayer for investigation through police under Section 156(3) of the Code of Criminal Procedure was rejected. He submitted that unless the said order dated 12th June, 2018 is challenged, the order of issue process alone cannot be challenged. Mr. Mane, learned counsel submitted that taking of cognizance should not be confused with issuance of process. The Magistrate has taken

cognizance on 12th June, 2018 and as such, the order of issue process alone cannot be challenged. Mr. Mane, learned counsel has placed his reliance in case of ***CREF Finance Ltd. Vs. Shree Shanthi Homes (P) Ltd. and another***, reported in, ***(2005) 7 Supreme Court Cases 467***.

11 Mr. Mane, learned counsel for respondent No.1 submitted that there is no merit in the petition and it is liable to be dismissed.

12 Mr. Borade, learned APP for the State/respondent No.2 also supported the impugned order passed by the Judicial Magistrate First Class, Chopda and argued on similar lines.

13 I have considered the submissions of both the sides, perused the copy of complaint filed by respondent No.1 against the petitioner in the Court of Judicial Magistrate First Class, Chopda vide Regular Criminal Case No.76 of 2018, copy of compromise/ memorandum of understanding / agreement of compromise arrived at between the parties, order of issue process dated 28th September, 2018 and order dated 12th June, 2018 whereby the prayer for investigation through police under Section 156(3) of the Code of Criminal Procedure came to be rejected.

14 The petitioner has challenged the order of issue process passed against him under Sections 420 and 406 of the Indian Penal Code dated 28th September, 2018.

15 First I shall deal with the legal point raised by Mr. Mane, learned counsel for respondent No.1. According to the learned counsel for respondent No.1, the order of issue process alone cannot be challenged. The petitioner ought to have also challenged the order of rejection of prayer for investigation through police under Section 156(3) of the Code of Criminal Procedure, since it was the first order of taking cognizance by the learned Magistrate.

16 In ***CREF Finance Ltd.*** (*supra*), it is held by the Honourable Supreme Court that one should not confuse taking of cognizance with issuance of process. Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the Court decides to proceed against the offenders against whom a *prima-facie* case is made out. It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue

process only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath, the Court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint.

17 Having regard to the above legal position, it is very much clear that taking cognizance of the complaint and issuance of process are two different things and one should not confuse.

18 The order dated 12th June, 2018 passed by the Judicial Magistrate First Class, Chopda speaks that the learned Magistrate was pleased to turn down the prayer for investigation through police under Section 156(3) of the Code of Criminal Procedure. It is obviously after taking cognizance and after application of mind. But the learned Magistrate was pleased to direct to the complainant to examine himself or his witnesses under Section 200 of the Code of Criminal Procedure. Accordingly, the complainant has examined himself under Section 200 of the Code of Criminal Procedure. The learned Magistrate after application of mind, was pleased to issue process against the present petitioner under Sections 420 and 406 of the Indian Penal Code observing that there are sufficient grounds for proceeding against the petitioner. Obviously the order of issue

process is the only order passed against the petitioner and the petitioner has rightly challenged the same before the learned Additional Sessions Judge, Amalner. There was no adverse order against the petitioner on 12th June, 2018. As such, there was no reason for the petitioner to challenge the same. There is no legal defect to challenge the order of issue process in the above factual scenario. I do not find merit in the submissions of Mr. Mane, learned counsel for respondent No.1.

19 Now, coming to the merits of the petition. It is an admitted position that the petitioner and respondent No.1 are real brothers *inter-se*. There was agreement / memorandum of understanding / agreement of compromise between the parties. It was agreed by the petitioner to relinquish his right in the property for consideration of Rs.18,50,000/-. Both the parties have not disputed such terms and conditions of the agreement / memorandum of understanding arrived at between the parties. The petitioner has admitted that he has received Rs.14,50,000/- towards part of the consideration amount. Remaining balance amount of Rs.4,00,000/- is remained to be paid by respondent No.1 when dispute arose. On going through the copy of complaint (page No.16), it would reveal that the contents of the agreement of compromise / memorandum of understanding are

reproduced in the complaint. On that basis, it is alleged by respondent No.1 that the petitioner has committed an offence of cheating and criminal breach of trust. On the face of allegations levelled in the complaint against the petitioner, it is crystal clear that the dispute between the parties is of purely civil nature. Respondent No.1 has attempted to give colour of criminal case by approaching the Court of Judicial Magistrate First Class instead of availing the appropriate civil remedy. In case of ***State of Haryana and others Vs. Ch. Bhajan Lal and others***, reported in, ***AIR 1992 Supreme Court 604***, the Honourable Supreme Court has laid down the categories of cases, whereby the High Court may exercise its power under Article 226 of the Constitution of India or under Section 482 of the Code of Criminal Procedure, may interfere in the proceedings relating to cognizable offence to prevent abuse of the process of any Court or otherwise to secure the ends of justice. The following are the categories of cases, wherein the Court may exercise its power under Section 482 of the Code of Criminal Procedure:

- “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 F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under S.156(1) of the Code except under an order of a Magistrate within the purview of S.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 F.I.R. 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 S.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.”

20 Having regard to the guidelines laid down by the Honourable Supreme Court, if the allegations levelled in the complaint filed by respondent No.1 against the petitioner are taken at its face value, it is difficult to accept the case of making out offence under Section 420 or 406 of the Indian Penal Code. The dispute between the parties appears to be of purely civil nature. Respondent No.1 has attempted to give a colour of criminal case by filing private complaint against the petitioner. The learned Judicial Magistrate First Class, Chopda and the learned Additional Sessions Judge, Amalner as well committed grave error in entertaining the case of respondent No.1. The private complaint filed by respondent No.1 against the petitioner is nothing but an abuse of the process of Court. The case of petitioner is covered by clause I / item I of ***Ch. Bhajan Lal and others*** (supra).

21 Having regard to the facts and circumstances of the case in hand and in view of dispute of civil nature between the parties, it is a fit case to quash the proceedings against the petitioner. In the result, the following order is passed:

ORDER

- I. The criminal writ petition stands allowed in terms of prayer clause (B).
- II. No order as to costs.
- III. The criminal writ petition is accordingly disposed of.

[SHRIKANT D. KULKARNI, J.]

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