

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO. 1489 OF 2018

Gazala Zaheer Shaikh, through Power of Attorney
Holder Farzana Zaheer Shaikh and Anr. ...Applicants

Versus

M/s. Shobha Developers Ltd., Now known as
Shoba Ltd., through authorized signatory
Prakash Kasbe and Ors. ...Respondents

WITH

CRIMINAL WRIT PETITION NO. 140 OF 2019

M/s. Shobha Developers Pvt. Ltd., through
Prakash Kasbe and Anr. ...Petitioners

Versus

Gazala Zaheer Shaikh and Anr. ...Respondents

....

Dr. Uday P. Warunjikar a/w Ms. Sonali R. Chavan, Advocate for
Applicant in Cri. Application No.1489 of 2018 and Advocate for
Respondent Nos.1 and 2 in Cri. Writ Petition No.140 of 2019.

Adv. Harshad. V. Nimbalkar a/w Mr. Abhishek Arote i/by Mr. Satyam H.
Nimbalkar, Advocate for Petitioner in Cri. Writ Petition No. 140 of 2019
and Advocate for Respondent in Cri. Application No.1489 of 2018.

Mr. A.R. Patil, APP for the Respondent – State.

CORAM : PRAKASH D. NAIK, J.
DATE : 27th SEPTEMBER, 2022.

PER COURT:

1. The applicants in Criminal Application No.1489 of 2018 are
the original complainants in RCC No.485 of 2014 filed before the
Court of learned J.M.F.C., Pune for offence under Sections 3, 5, 6,
10, 11 and 13 of the Maharashtra Ownership of Flats (Regulation

Digitally signed
by SUNNY
ANKUSHRAO
THOTE
Date:
2022.11.24
13:52:01 +0530

SUNNY
ANKUSHRAO
THOTE

of Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short 'MOFA' 1963) r/w Sections 406 and 420 of Indian Penal Code (for short "IPC"). The respondent Nos. 1 and 2 in the said application were impleaded as accused Nos. 1 and 2 in the said complaint. The petitioners in Criminal Writ Petition No.140 of 2019 are original accused and the respondents are complainant.

2. The brief allegations in the complaint were that the accused are promoter and developer. They proposed to promote and develop scheme by name "Shobha Karneson" consisting of buildings with penthouses/flats/units etc. on the land bearing S.No.19, Hissa No.1/1A/1A/A and S.No.19, Hissa No.1/1A/1A/1 and S.No.16 at village Kondwa Budruk, Pune. The accused offered to sell a penthouse,apartment/unit on 8th Floor in Block No.2/unit admeasuring about 2631.184 Sq.Ft. carpet area, 263.268 Sq.Ft. of private terrace and 660.365 Sq.Ft. Of proportionate share in common area and amenities with two car parking spaces No.2085 and 2085-A. The accused had agreed that the possession will be handed over on completion of penthouse to the complainants with all the amenities and facilities. The complainants agreed to purchase penthouse with all the benefits and rights. The accused executed agreement for sale of immovable property dated

22nd March, 2013. The copy of the agreement was not provided to complainants until the execution of agreement. At the time of execution the complainants realized that the agreement is one sided and raised the issue with the accused. The complainants trusted the accused. The complainants had parted huge amount and had no choice to sign the agreement. The complainants paid part consideration of Rs.2,00,000/- vide cheque dated 21st January, 2013. Thereafter, from time to time the complainants paid entire agreed consideration. The total consideration was Rs.1,57,04,640/-. The accused failed to provide necessary documents. It was represented that the scheme is approved by various banks for availing loan facility. The accused had informed the complainants that the project was approved by HSBC Bank. Despite receiving the entire consideration, the accused avoided to handover the actual and physical possession of the penthouse to complainants. The accused issued possession letter dated 5th July, 2013 on 23rd October, 2013 to complainants. The accused assured that some minor repairs are to be carried out to the penthouse and they will soon hand over the physical possession to the complainants. The actual possession was not handed over to the complainants. On inspection of premises it was noted that there were defects in the penthouse and other facilities and amenities.

The accused did not rectify the defects. Basic amenities were not provided. The complainants wrote letter dated 22nd November, 2013 addressing their grievances. The accused gave false reply and threatened the complainants of terminating the agreement of sale dated 22nd March, 2013. Counter reply was given by the complainants. The accused has no right of possession to the penthouse. The complainants forwarded mail dated 14th December, 2013 to the accused to provide basic facilities and amenities. The accused failed to complete the said scheme. The private complaint was filed by the complainants.

3. The learned J.M.F.C vide order dated 31st July, 2015 issued process against the accused under Section 3, 5, 6, 10, 11 and 13 of the MOFA, 1963 r/w Sections 406 and 420 of IPC.

4. The accused challenged the order of process before the Court of learned Additional Sessions Judge, Pune by preferring Criminal Revision Application No.429 of 2015. The learned Additional Sessions Judge, Pune vide order dated 27th January, 2016 set aside the order issuing process dated 31st July, 2015 and remanded the case back to the learned Magistrate to pass fresh order following the provisions of Section 202 of Cr.P.C.

5. The learned J.M.F.C. vide order dated 4th May, 2017 directed Kondhwa Police Station to conduct inquiry under Section 202 of Cr.P.C. The Kondhwa Police Station conducted inquiry and submitted report dated 7th October, 2017 before the Court of learned J.M.F.C. Pune with an conclusion that the complainants have filed a suit before the Civil Court and the dispute is apparently of civil nature.

6. Vide order dated 22nd January, 2018, the learned Magistrate considered the material on record and the report under Section 202 of Cr.P.C. and issued process against the accused under Section 3, 5, 6, 10, 11 and 13 of the MOFA, 1963 and Sections 406 and 420 r/w Section 34 of IPC.

7. The order issuing process dated 22nd January, 2018 was challenged by the accused before the Sessions Court, Pune by preferring Criminal Revision Application No. 89 of 2018. The learned Sessions Judge vide order dated 29th October, 2018 modified order dated 22nd January, 2018 passed by the learned J.M.F.C., Pune and issued process against the accused for an offence punishable under Section 420 of IPC and Sections 11 and 13 of the MOFA, 1963. The order of process for offences punishable under Section 406 of IPC and Sections 3, 5, 6, 10 of MOFA, 1963 was set

aside.

8. The order dated 29th October, 2018 has been challenged by the Original complainants to the extent of setting aside, the process under the aforesaid Sections by preferring Criminal Application No.1489 of 2018.

9. Whereas, the accused have preferred Criminal Writ Petition No.140 of 2019 challenging the order issuing process passed by the learned Magistrate and the order dated 29th October, 2018 passed by learned Additional Sessions Judge to the extent of issuing process against the accused for offence punishable under Section 420 of IPC and Sections 11 and 13 of MOFA, 1963.

10. Dr. Uday Warunjikar appearing for the applicants in Criminal Application No.1489 of 2018 and Respondent Nos. 1 and 2 in Criminal Writ Petition No.140 of 2019 (complainants) submitted as under:-

i. The learned Sessions Judge has committed an error while passing order dated 29th October, 2018 setting aside the process against the accused for offence under Section 406 of IPC and Sections 3, 5, 6, 10 of MOFA, 1963.

ii. The order dated 29th October, 2018 passed by Learned Sessions Judge to the extent as stated hereinabove

is contrary to material on record. *Prima facie* case was made out for offence under Section 406 of IPC and Sections 3, 5, 6, 10 of MOFA, 1963.

iii. The learned Sessions Judge failed to appreciate that the learned Magistrate had issued the process on the basis of the documents on record. The Court was *prima facie* satisfied and issued the process against the accused under provisions referred to in order dated 22nd January, 2018. There was no reason to set aside the order process for some provisions. The learned Sessions Judge has travelled beyond the scope of the revisional jurisdiction.

iv. The material on record shows that the accused had committed criminal breach of trust. The accused is holding consideration amount and failed to deliver the possession of the premises to the complainants. The accused has failed to provide the amenities as promised. All the offences under the MOFA, 1963 as well as under the provisions of IPC were made out in the complaint and there was no reason to modify the order dated 22nd January, 2018, passed by the Court of learned J.M.F.C. Pune.

v. The complaint was filed in detail and spells out the offences of which cognizance was taken by learned

Magistrate.

vi. The Sessions Court has considered the defence of the accused while exercising revisional jurisdiction.

vii. There was no reason to set aside the process under Section 406 of IPC. The complaint makes out the offences against the accused.

viii. The necessary ingredients for the offence under Sections 3, 5, 6, 10, 11 and 13 of the MOFA, 1963 were made out against the accused.

ix. The obligation to deliver the possession of the unit was and statutory obligation under MOFA, 1963 and the possession of the unit is unlawfully retained by the promoter.

x. The modified order of learned Sessions Judge setting aside the process for the aforesaid provisions is bad in law and deserves to be set aside by giving opportunity to the complainants to prove the offences during trial.

11. Learned Advocate Mr. Harshad Nimbalkar appearing for Respondent Nos. 1 and 2 in Criminal Application No. 1489 of 2018 and petitioners in Criminal Writ Petition No.140 of 2019 (Accused) submitted as under:-

i. There was no material to issue process under Sections 3, 5, 6, 10, 11 and 13 of MOFA, 1963 and Sections 406 and 420 r/w Section 34 of IPC.

ii. The learned Additional Sessions Judge has partly allowed the revision application by setting aside the process under Section 406 of IPC and Sections 3, 5, 6, 10 of MOFA, 1963. The learned Sessions Judge has rightly set aside the process for the said provisions. However, the learned Sessions Judge has committed an error in confirming the process under Section 420 of IPC and Sections 11 and 13 of MOFA, 1963.

iii. The complainants have filed Special Civil Suit No.638 of 2014 against the accused before the civil Court praying for the possession of the penthouse and to execute necessary documents for formation of society and conveying land of in favour of society. The said suit is pending.

iv. The accused No.1 is the reputed company involved in business of development and land constructions of residential buildings and selling it under ownership schemes. The learned Magistrate had committed an error in issuing process for various offences. The learned Magistrate has

ignored the report submitted by the Police under Section 202 of Cr.P.C. wherein it was opined that the dispute is of civil nature.

v. The complainants have suppressed vital facts from the Court of learned J.M.F.C. while filing the criminal complaint. There was no intention to cheat the complainants. The complainants did not accept the possession of penthouse though offered as per the possession letter dated 5th July, 2013. This fact is suppressed by the complainants.

vi. The dispute is purely of a civil nature continuing criminal proceedings would be abuse of process of law. The allegations in the complaint are vague.

vii. As per provisions of the MOFA, 1963, every promoter shall take necessary steps to complete his title and convey the same to co-operative society. The accused were taking steps to convey the land to “Shobha Karneson” Co-operative Housing Society by exchanging several drafts of conveyance deed and following of with society on regular basis to approve and execute the conveyance deed etc. The society members are delaying the consent for conveyance

deed and rendering the accused unable to execute and register a conveyance deed within the stipulated time. The subject matter of execution and registration of conveyance deed for the land on which “Shobha Karneson” building is constructed is between the petitioners and “Shobha Karneson” Co-operative Housing Society and the accused and society have taken steps for conveying land to society. Draft of conveyance has been exchanged and process is in progress and in accordance with law. Thus the accused would not fall within ambit of willful defaulter pursuant to which no criminal liability can be fastened against the accused for offence under Section 11 of MOFA, 1963.

viii. Section 13 of MOFA, 1963 is sub divided into six sub-clauses. Clauses 1 to 6 would be committed only if the promoter commits some other offences under the provisions of the Act. The order issuing process under Section 13 of MOFA, 1963 reflects non application of mind.

ix. The complainants in their verification statement has admitted that letter of possession was given on 23rd October, 2014. The accused were willing to handover possession of penthouse upon receipt of balance dues. The complainants

are not taking possession on some pretext or avoid the balance dues. The accused are willing to handover of possession of penthouse.

x. To constitute offence under Section 420 of IPC there has to intention to cheat right from inception. Such intention is absent in the present case. There is no wrongful gain to the accused and wrongful loss to the complainants.

xi. The matter relates to contractual obligations and it is of civil nature.

12. The applicants in Criminal Application No. 1489 of 2018 and respondents in Criminal Writ Petition No.140 of 2019 filed a private complaint before the Court of learned J.M.F.C. alleging offences under Sections 3, 5, 6, 10, 11 and 13 of MOFA, 1963 and Sections 406 and 420 of IPC. The grievance of the complainants have been referred in the earlier paragraphs. In short the complainants have alleged that the accused are promoters and the complainants have parted consideration for purchasing penthouse. The promises were not fulfilled. Provisions of MOFA, 1963 were not complied. The defects in the penthouse were not rectified, inspite of being brought to the notice of the accused. The considerations towards the penthouse was handed over to the accused and it is

being utilized by the accused. Process was issued vide order dated 31st July, 2015 for offences under Sections 3, 5, 6, 10, 11 and 13 of MOFA, 1963 and Sections 406 and 420 of IPC. The accused preferred Criminal Revision Application No.429 of 2015. Vide order dated 27th January, 2017 the order issuing process dated 31st July, 2015 was set aside and the case was remanded to the trial Court to pass fresh order by following provisions of Section 202 of Cr.PC. After the case was remanded back to the trial Court, the learned Magistrate directed the concerned police station to make inquiry under Section 202 of Cr.PC. The police submitted a report dated 7th October, 2017 under Section 202 of Cr.PC. and by referring to the civil proceedings initiated by complainants and the other factual aspects, opined that dispute is of civil nature. The learned Magistrate vide order dated 22nd January, 2018 observed that the complainants had given consideration to the accused. Delivery of the flats was not given to the complainants. Initiation of civil proceedings is entirely different from the criminal proceedings. There is no bar to file civil as well as criminal proceedings. There is breach of provisions of MOFA, 1963. *Prima facie* offences are made out under Sections 3, 5, 6, 10, 11 and 13 of MOFA, 1963. The accused committed breach of trust and withheld the consideration amount given by the complainants and

failed to deliver the possession of the premises. Hence, offence under Sections 406 and 420 are made out. The Sessions Court vide order dated 29th October, 2018 maintained the order of process under Section 420 of IPC and Sections 11 and 13 of MOFA, 1963 and set aside the process for the offences punishable under Section 406 of IPC and Sections 3, 5, 6 and 10 of MOFA, 1963. The learned Sessions Judge had observed that the complainants had booked penthouse with the accused. The complainants had paid amount towards consideration. The complainants are paying EMI to the bank against avilment of loan. There were minor defects and repairs to be done by accused in the penthouse. The accused had cheated the complainants. Over all the Sections mentioned in the order passed by learned Magistrate are not attracted.

13. Section 406 of IPC relates to criminal breach of trust. Whereas, Section 420 of IPC relates the cheating. Section 3 of the Act refers to general liabilities of promoters. Section 5 relates to the duty of promoters to maintain separate account of somes taken as advance or deposit and to be trustee therefore and disburst them for the purposes for which given. Section 6 of the Act is about responsibilities of payment of outgoings. Section 10 is about duty of promoter to take steps or formation of co-operative society or

company. Section 11 enjoins upon promoter to convey title etc. and execute documents, according to agreement. Section 13 refers to offences by promoters and consequences on conviction. Any promoter who without reasonable excuse fails to comply with or contravenes, the provisions of Sections 3, 4, 5, 10 and 11 shall on conviction be punished with imprisonment for a term which may extent to three years with fine or with both. Clauses 2 to 6 of the said provision also relates to the contraventions by the promoters.

14. Perused complaint, report under Section 202 of Cr.P.C. Impugned order dated 22nd January, 2018 and order dated 29th October, 2018. There is no material even *prima facie* to issue process under the provisions of MOFA, 1963. The learned Additional Sessions Judge vide order dated 29th October, 2018 has set aside the order of process under Section 3, 5, 6 and 10 of MOFA, 1963 and confirmed the order of process under Section 420 of IPC and Sections 11 and 13 of MOFA, 1963. Even for issuing process under Sections 11 and 13, no *prima facie* case is made out by the complainants. It cannot be said that the promoter without any reasonable excuse had contravened and failed to comply provisions of the MOFA, 1963. The complaint and the material on record also does make out any case for issuing process under Section 6 of IPC. There is no iota to establish the offence of

criminal breach of trust. Thus reading complaint as it is the offences under Sections 3, 5, 6, 10, 11 and 13 of MOFA, 1963 are not made out.

15. The complainants had parted the consideration. The possession of premises is not given to the complainants. The grievance of the complainants is that premises are defective. Civil suit is pending for certain reliefs. However, at this stage the grievance of the complainants that inspite of parting consideration the accused did not rectify the defects and handover the possession without defects cannot be brushed aside. Thus, I do not find any illegality order issuing process for offence under Section 420 of IPC. The process under the said provision is required to be confirmed. The complaint shall proceed against the accused for offence under Section 420 of IPC. Hence, I pass the following order;

ORDER

- i. Criminal Application No. 1489 of 2018 and Criminal Writ Petition No. 140 of 2019 are disposed off.
- ii. Criminal Writ Petition No. 140 of 2019 is partly allowed;
- iii. The order dated 29th October, 2018 passed by learned Additional Sessions Judge, Pune in Criminal Revision

Application No. 89 of 2018 confirming process under Sections 11 and 13 of MOFA, 1963 is quashed and set aside.

iv. The order issuing process passed by learned Joint Judicial Magistrate First Class, Cantonment Court, Pune vide order dated 22nd January, 2018 in Regular Case No. 458 of 2018 and order dated 29th October, 2018 passed by learned Additional Sessions Judge, Pune in Criminal Revision Application No.89 of 2018 to the extent of issuing process under Section 420 of IPC is maintained.

v. Order dated 29th October, 2018 passed by learned Additional Sessions Judge, Pune in Criminal Revision Application No.89 of 2018 setting aside the process for offences under Section 406 of IPC and Sections 3, 5, 6 and 10 of MOFA, 1963 is confirmed.

vi. Criminal Application No. 1489 of 2018 stands rejected.

(PRAKASH D. NAIK, J.)