

VRJ

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

**WRIT PETITION NO.2681 OF 2022**

Rakesh Rabindra Samanta Authorized  
Signatory of M/s. Samraj Gold Export  
Pvt. Ltd.

... Petitioner

**V/s.**

Neesha Jewels Ltd. (UK) & Ors.

... Respondents

Mr. Aseem Naphade i/by Mr. M.M. Chaudhari for the  
petitioner.

Ms. G.P. Mulekar, APP for the respondent No.4/State.

**CORAM : AMIT BORKAR, J.**

**DATED : DECEMBER 14, 2022**

**PC.:**

**1.** The petition is directed against the order dated 9<sup>th</sup> May, 2022 passed by the learned Sessions Judge in Criminal Revision Application No.84 of 2021 confirming order dated 19<sup>th</sup> December, 2020 passed by 28<sup>th</sup> Court, Metropolitan Magistrate, Esplanade, Mumbai in CC No.157/SW/2017 dismissing the complaint of the petitioner on the ground of lack of ingredients constituting offences alleged against the petitioner.

**2.** The petitioner is original complainant who had filed complaint under sections 406 and 420 of the Indian Penal Code alleging that in furtherance of the orders placed by accused Nos.2

and 3 on behalf of the accused No.1, the complainant delivered goods to the accused by raising invoice in the amount of US\$77,700. It is stated that the accused persons made false representation while placing the order and promise to make payment on delivery but it refused to make payment. Accused raised false issues that the goods supplied were stolen and the insurance company shall make payment. It is, therefore, contended that the accused persons deliberately made false promise with dishonest intention to play fraud on the complainant.

**3.** The learned Magistrate by order dated 19<sup>th</sup> December, 2020 refused to issue process and dismissed the complaint against which the petitioner filed revision which has also been dismissed by the learned Sessions Court. Aggrieved thereby the petitioner has filed present petition.

**4.** The learned advocate for the petitioner submitted that the averments in the complaint are sufficient to constitute offences alleged against the petitioner. Necessary averments to constitute offences are present. He invited my attention to paragraph 5, 6 and 7 to urge that the averments contained therein are sufficient to constitute offences against the accused persons. In support of his submissions he relied on the judgment in the case of **Rajesh Bajaj Vs. State NCT of Delhi And Others** reported in (1999) 3 SCC 259 and **Kamal Shivaji Pokarnekar Vs. State of Maharashtra & Others** reported in (2019) 14 SCC 350.

**5.** Having heard the learned advocate for the petitioner, in my opinion, the Courts below were justified in refusing to issue

process against the petitioner.

**6.** Having carefully scrutinized the averments of the complaint, in my opinion, the complaint made by the petitioner in substance was delivery of goods to the accused persons. The accused persons refused to make payment in spite of promise. Merely by stating that the accused persons made false representation while placing the order is not sufficient to constitute offences under sections 406 and 420 of the Indian Penal Code. To constitute offences under section 406 of the Indian Penal Code, following ingredients need to be fulfilled: first, entrusting a person with property or with any dominion over property; second, that the person entrusted (a) dishonestly misappropriating or converting that property to his own use; or (b) dishonestly using or disposing of that property or willfully suffering any other person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged, ii) of any legal contract made, touching the discharge of such trust.

**7.** The Apex Court in the case of **S.W. Palanitkar & Others Vs. State of Bihar And Another** reported in (2002) 1 SCC 241 held that to constitute offences under section 405 and 406, the material on record needs to show that any property entrusted with any of the accused or that the accused had dominion over any property of the complainant which the accused converted to their own use.

**8.** In relation to offences under section 420 of the Indian Penal Code, 1860, it has been held that the fraudulent or dishonest

intention should exist at the time of making of inducement. Mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating.

**9.** In so far as, the judgment in the case of **Kamal Shivaji Pokarnekar** (supra) is concerned, in the facts of the said case, father of the complainant expired on 17th January, 1994 and the respondents were accused of forgery and preparing false documents on the basis of which the development agreement dated 11th December, 2002 came into existence. In the facts of the said case, the High Court held that the dispute involved was of civil nature and continuation of proceeding would amount to abuse of process of Court. It needs to be noted that in paragraph 5 of the said judgment, the Apex Court observed that if the allegations said out in the complaint do not constitute the offences of which cognizance has been taken by the learned Magistrate, it is open to the High Court to quash the same. The Apex Court recorded a finding that on reading of the complaint and consideration of allegations therein, the ingredients of the offences were disclosed.

**10.** In the facts of the present case on reading of the complaint and on consideration of allegations therein, the ingredients of offences alleged against the respondent/accused are not disclosed, therefore, the said judgment is of no help to the petitioner.

**11.** In the facts of **Rajesh Bajaj** (supra) the Apex Court held that the complaint need not state the ingredients of the offence in verbatim if the factual foundation for the offence has been laid in

the complaint. The Court should not assail to quash the criminal proceedings during investigation stage. There could not be any dispute about the law laid down by the Apex Court. In the facts of the present case, as observed earlier the complainant in substance has stated that on a promise made by the accused to repay the amount of goods were delivered to the accused and the accused in turn refuse to pay the amount and, therefore, according to the complainant, ingredients of offence under sections 406 and 420 are made out. Therefore, in my opinion, in absence of basic facts to constitute offences alleged against the petitioner are absent.

**12.** For the above reasons, the orders passed by the Courts below cannot be termed as perverse. There is no miscarriage of justice.

**13.** The writ petition is, therefore, dismissed. No costs.

**(AMIT BORKAR, J.)**