IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.3042 OF 2017

1. Sheth Dayal Bhimji and Bai Cooverbai w/o.Dayal Bhimji Joint Charities, Trust
2. Dilip Dwarkadas Udeshi, Trustee of Sheth Dayal Bhimji and Bai Cooverbai w/o.Dayal Bhimji Joint Charities,
3. Dilip Laijawala, tustee of Sheth Dayal Bhimji and Bai Cooverbai w/o.Dayal Bhimji Joint Charities,
4. Jaysinh Bhagwandas Kapadia, Trustee of Sheth Dayal Bhimji and Bai Cooverbai w/o.Dayal Bhimji Joint Charities,
5. Amit Deepak Bhimani, Trustee of Sheth Dayal Bhimji and Bai Cooverbai w/o.Dayal Bhimji Joint Charities. Petitioners

versus

1. The State of Maharashtra
2. Mr. Manish Nathuram Bijutkar Respondents

WITH
CRIMINAL APPLICATION NO.485 OF 2018

Manish Nathuram Bijutkar Applicant

versus

1. Sheth Dayal Bhimji & Bai Cooverbai w/o. Dayal Bhimji Joint Charities;
2. Dilip Dwarkadas Udeshi,
3. Dilip M. Laijawala,
4. Jaysinh Bhagwandas Kapadia,
5. Amit Deepak Bhimani,
6. The State of Maharashtra Respondents

Mr.Pranav Badheka with Mr.Prashant Pawar, Advocate for petitioners.
Mr.Joydeb B.Saha, Advocate for respondent no.2.
Mr.A.R.Patil, APP, for Respondent/State.

CORAM : PRAKASH D. NAIK, J.

DATE : 14th September 2022

PC :

1. The petitioners are aggrieved by order dated 04.09.2014 passed by learned Metropolitan Magistrate, 17th Court Borivali, Mumbai issuing process under Sections 420, 120-B, 406, 465, 467, 468, 471, 193, 199 of the Indian Penal Code, order dated 03.04.2017 passed by Additional Sessions Judge, Borivali in Revision Application No. 25 of 2015, 33 of 2015 and 34 of 2015 and the impugned proceedings initiated by respondent No.2 in C.C. No. 90/SW/ 2013.

2. The brief facts of the complaint filed by respondent No.2 are as follows:

(i) The complainant was tenant of room admeasuring 180 square feet equivalent to 16.72 square meters built up area which was part of Flat No. 2 in building known as “Bai Cooverbai Dayal Bhimji Sanitorium” situated at Kamla Nehru Cross Road No.1, Kandivali (W), Mumbai.

(ii) The complainant and his family members were residing in Flat No.1 (Bed room area) in the said building since 1969 and subsequently shifted to Flat No.2 (Living room area).

(iii) The complainant’s father was working in the said building as gardner. After his death, the complainant started working as gardner in the said building. The building was owned by Charitable Trust “Seth Dayal Bhimji and Cooverbai Widow of Dayal Bhimji Joint Charities” i.e. accused No.4.

(iv) The accused No.4 appointed accused No.12 as Manager of accused No.4. Accused No.12 started residing in the said building in room No.1 (kitchen area) in the year 1983 which was partially in possession of complainant.

(v) The complainant, accused No.12 and accused No.13 were neighbours since year 1983 to 2009. In the year 2007, accused No.12 approached the complainant and informed him that accused No.4 to accused No.11 have decided to sell the building. Accused No.12 also informed that he is the Manager of the building and he has been authorized by accused No.4 to accused No.11 to negotiate with him.

(vi) The complainant informed accused No.12 that he needs accommodation in same premises but accused No.12

stated that it is not possible to get accommodation at same premises since, it is Charitable Trust and the complainant would not get any place in the same premises or at any other place and it is advisable to accept compensation and leave the premises.

(vii) The complainant informed accused No.12 that he needs to have meeting with accused Nos.1 to 11. However, the accused No.12 informed him that it is not possible to negotiate with accused Nos.1 to 3 since the complainant is tenant of accused Nos. 4 to 11. So the complainant can have meeting only with accused Nos. 4 to 11. The accused No. 12 along with complainant visited accused No.7. He repeated same story. Hence, the complainant accepted the offer of accused of Accused Nos. 4 to 11 and received compensation of Rs.5 lakhs from accused No.1 to 3.

(viii) Agreement dated 09.06.2009 was executed between accused Nos. 1 to 11 and complainant, it was agreed that the purchaser, although not legally bound to do so, has agreed to pay the lump-sum compensation of Rs. 5,00,000/- (Rupees five lacs only) to the Service Tenant. Accused Nos.1 to 3 had paid part payment of Rs. 2,00,000/- (Rupees two lacs only) to the complainant. Thereafter, the balance amount of Rs.3,00,000/- was paid to the complainant and Deed of surrender was executed on 07.08.2009 which was duly registered. The complainant delivered vacant and peaceful possession of the said premises to accused Nos. 1 to 3 in 2009.

(ix) In February 2012, the complainant learnt that there was an order passed by learned Charity Commissioner directing Accused Nos. 1 to 11 to take care and responsibility to accommodate tenants in the property. This fact was concealed by accused Nos. 1 to 3 which amounts to nullification of the agreement dated 09.06.2009 and Deed of surrender dated 07.08.2009. The complainant approached Charity Commissioner’s Office under Right to Information Act and obtained order dated 14.05.2009 passed by Charity Commissioner. In the said order it was stated that “purchaser has to take care and responsibility to accommodate the tenants in the property”.

(x) The other documents obtained from the Charity Commissioner Office under Right to Information Act reflects that accused No.13 Smt. Nayna Vishnu Dave is the tenant of Flat No.1 and accused No.12 is the tenant of the Flat No.2 whereas material fact is that accused No.13 was never the tenant of Flat No.1. The accused No.12 forged the documents in respect of rent receipt of Flat No.1 and incorporated the name of his wife i.e. accused No.13 by deleting name of accused No.12.

(xi) The complainant had obtained deed of surrender dated 07.08.2009 which was duly registered with the office of Sub-Registrar, Goregaon (W), Mumbai. It was executed between accused Nos. 1 to 3 and accused No.12 against Flat No.1 which reflects the name of tenant Mr. Vishnu P. Dave (accused No.12) whereas, rent receipt submitted to Charity Commissioner against Flat No. 1 shows tenant name as Smt. Nayna Dave. Accused No.12 deleted his name from rent receipt and incorporated name of his wife to create dual claim before the Charity Commissioner. It is the case of forgery, cheating, criminal breach of Trust.

(xii) Accused had acted hand in gloves with each other to cheat the present complainant. Accused had also cheated Government Authority.

(xiii) The complainant is rightful tenant of Flat No.2. Accused No.12 portrayed himself as tenant of Flat No.2 and prepared rent receipt of Flat No.2 by taking undue advantage of his position as Manager of Trust.

(ix) The complainant is bonafide tenant of accused Nos.4 to 11. Accused Nos.4 to 11 have supported the contention of complainant in respect of rightful tenancy. This fact was brought to the notice of accused Nos.1 to 3. Complaint was made to police. Cognizance was not taken. Hence, private complaint was filed.

3. Learned Advocate for the petitioner submitted as follows:-

(i) It is an abuse of process of law to prosecute the petitioners for the alleged offences.

(ii) The complainant has suppressed vital facts.

(iii) The dispute is purely of civil nature. The order issuing process reflects non application of mind. It is cryptic.

(iv) There is no evidence to show that the petitioners has acted in connivance with accused No.12.

(v) The complainant is educated person. He is party to the agreement executed between the Trust and the complainant dated 09.06.2009. He had agreed to accept the compensation of Rs.5,00,000/-. Compensation was accepted. Deed of surrender was executed between parties in 2009. The complaint is filed in 2012.

(vi) The allegations that the complainant was kept in dark about the order of Charity Commissioner is false. The documents on record would indicate that the petitioners have not acted in connivance with accused No.12.

(vii) The act of forgery has been attributed to accused No.12. The alleged alteration in rent receipt was allegedly committed by accused No.12 for the benefit of accused No.13. Accused Nos.12 and 13 are husband and wife.

(viii) The learned Magistrate has mechanically issued process. The order of the Sessions Court reflects non-application of mind. The respondent no.2 is an advocate by profession. He voluntarily accepted the compensation from Accused No.1 to accused No.3 after executing agreement and surrender agreement.

(ix) The complainant had written letters to the Trust that accused No.12 deleted the name of complainant and committed the offence of forgery. The petitioners cannot be held responsible for the offence of forgery.

(x) The demand of respondent No.2 is for compensation. He has filed suit wherein he has not claimed any relief against the petitioners and demanded compensation of Rs.

32,40,000/- from accused Nos.1 to 3.

(xi) As per the order of Charity Commissioner, the responsibility was given to accused No.1 to accused No.3 to take care of the tenant. The petitioners are not vicariously liable for the offence of forgery, cheating and criminal breach of Trust committed by other.

(xii) The petitioners have not played any role in the commission of offences. The report under Section 202 of Cr.P.C. refers to the fact that forgery was committed by accused No.12 by deleting name of respondent No.2. The deed of surrender was executed six months after the order of Charity Commissioner.

(xii) Learned advocate for the petitioner has relied upon the following decisions “-

(a) Chunduru Siva Ram Krishna and Anr. Vs. Peddi Ravindra Babu and Anr.[1];

(b) Keki Hormusji Gharda And Ors. Vs. Mehervan Rustom Irani and Anr.[2];

(c) R. Kalyani Vs. Janak C. Mehta and Ors.[3];

(d) G. Sagar Suri And Anr. Vs. State of U.P. and Ors.[4];

1 (2009) 11 SCC 203
2 (2009) 6 SCC 475
3 (200) 1 SCC 516
4 (2000) 2 SCC 636

(e) GHCL Employees Stock Option Trust Vs. India Infoline Limited[5];

(f) Sunil Bharti Mittal Vs. Central Bureau of Investigation[6];

4. Learned advocate for respondent No.2 submitted as follows:-

(i) On the basis of averments in the complaint, the documents annexed to the complaint, verification statement and report under Section 202 of Cr.P.C., the learned Magistrate has issued process. The order of issuing process need not be elaborate. The Sessions Court had rejected Revision Applications by assigning reasons. *Prima facie* offences are made out against petitioners.

(ii) There is sufficient evidence to show involvement of the petitioners in the commission of offences. They have acted in connivance with other accused.

(iii) The defence of the accused cannot be considered at this stage, it would be matter of evidence.

(iv) The order passed by Charity Commissioner is to the knowledge of petitioners, who are the members of Trust.

5 (2013) 4 SCC 505
6 (2015) 4 SCC 609

While agreement was executed in 2009 between the purchaser of the premises and the Trust as well as complainant, there is no reference to order passed by Charity Commissioner. In the event, it was brought to the knowledge of the petitioners that the Charity Commissioner has directed the purchaser to take care of service tenant/respondent No.2, he would not have signed the agreement and executed surrender deed. He would not have accepted compensation amount.

(v) Respondent No.2 was misled and convinced that he has no right in the property being tenant and hence he should accept the compensation and vacate the premise.

(vi) The offence is serious in nature. The report under Section 202 of Cr.P.C. supports the case of the complainant. The accused were involved in commission of offence of forgery. The accused No.12 has forged rent receipt and inserted name of his wife to claim dual benefit and to deprive respondent No.2 of his right. The accused needs to be prosecuted for the offences. The forgery of documents is committed by accused No.12. The petitioners cannot feign ignorance about forgery of claim of accused No.12. The documents on record supports the allegations in the complaint. Reliance is placed on affidavit in reply filed by respondent No.2 opposing reliefs sought in the petition.

(vii) The advocate for respondent No.2 has relied upon the decision of the Supreme Court in the case of **Narayan Malhari Thorat Vs. Vinayak Deorao Bhagat and Anr**. delivered in Criminal Appeal No. 1487 of 2018. The respondent No.2 has filed compilation of various decisions during previous hearings.

5. The petitioner No.1 is the public Trust. Petitioner Nos.2 to 5 are Trustees of said Trust. The petitioners are impleaded as accused Nos. 4, 5, 9, 7 and 11 in C. C. No. 90/ SW/2013. The complaint is filed by respondent No.2. It is not in dispute that the father of respondent No.2 was working as gardner in the building. After his demise, the respondent No.2 continued to act as gardner in the said building. The respondent No.2 had occupied portion of the flat premises situated in the same building. The Trust decided to sell the property. The application was preferred before the Charity Commissioner under Section 36(1)(a) of the Bombay Pubic Trust Act, 1950. Office of Joint Charity Commissioner, Mumbai allowed the said application dated

14.05.2009. In the said order it was observed that the Trust owns property bearing survey No. 85, admeasuring 7151 sq. yards at Kandivali (w) CTS No. 379-C is part of it. There is a sanatorium over CTS No. 379-C admeasuring 802 sq. meters. It is the ground plus two storied building. The Trusties resolved in their meeting dated 22.12.2006 to sell the property. Offers were invited from interested parties by issuing public notices in news papers. According to the applicants therein, there is no income from the property. The Trust cannot maintain the property. It cannot be used to further objects of the Trust. The decision to sell the property was taken in the meeting dated 10.12.2007. The valuer has submitted a report of valuation of the said property at Rs.1,40,56,200/-. The opinion is supported by detailed reasons. The Trusties have taken care to see that they get best offer, advertisements were given in the newspapers inviting offers. Pursuant to that four offers were received. Copies of the offer were placed on record. The Trustees in their meeting considered the offers and unanimously accepted the highest offer of Rs. 1,51,00,000/- given by Amar Enterprises. The copy of minutes of the meeting was placed on record. The offerer issued Rs.1,55,00,000/-. The affidavit is filed by Trustee stating that consideration amount would be utilized for furtherance of objects of the Trust. Trusties are negotiating the purchase of the property in Vasai Taluka and Virar for sanatorium. It was also recorded that the purchaser has to take care and responsibility to accommodate tenants in the property. The offer is reasonable and fair. Sale is in the interest of the Trust.

6. The agreement was executed on 09.06.2009 between respondent No.2, members of the Trust and purchaser of the property M/s Amar Enterprises. It is not in dispute that the agreement was signed by respondent No.2. The Respondent No.2 was referred to as service tenant. In the agreement, it was mentioned that the service tenant was permitted by Trust to use and occupy for residential purpose room admeasuring 180 square feet built-up area in the flat No.2’A’ Wing of the building of the said Trust. The respondent No.2 was residing with his mother, wife and son for the past about fifteen years gratuitously without payment of any rent, compensation, license fee etc. It was further stated that the Trust decided to sell the said property to the purchaser and has consequently terminated the employment of the service tenant and paid him his full

service dues in full and final settlement of his claim. Purchaser, although not legally bound to do so, has agreed to pay the lump-sum compensation of Rs.5,00,000/- to the service tenant. The service tenant has agreed to remove himself, his family members and belonging from the said premises and quit premises. Thereafter, deed of surrender was executed between respondent No.2 and purchaser M/s Amar Enterprises on 07.08.2009. Respondent No.2 agreed to accept the compensation amount of Rs.5,00,000/-. Receipt on record shows that the amount has been accepted by him after the period about three years. The complainant made the grievance on the basis of the order passed by the Charity Commissioner. On 03.06.2012, respondent No.2 addressed letter to the Trusties stating that he was tenant of Flat No.2. He had addressed letter to valuer and asking him as to how the name of Smt. Nayna Dave as tenant in respect to flat No.1 and Mr. Vishnubhai Dave against flat No.2. He was informed that information was provided by the Trust of office bearers. By letter dated 11.06.2012, respondent No.2 was informed by Trust that they are surprised to read the contents of valuation report. They do not know Smt. Nayna Dave. The question of her being tenant does not arise. The Trust had denied the claim of Smt. Nayna Dave. It was also stated that Trust had appointed Mr. Vishnu Dave as caretaker of the Sanatorium and to properly look after it. He was provided accommodation next to Trust office in the building. Over the years Vishnu Dave (accused No.12) had also started using the trust office for his personal use. The father of Respondent No.2 has served the Trust honestly for long years. He was also provided accommodation in the room next to the Trust office i.e. Flat No.2 and after his demise the Trust has recognised respondent No.2 as rightful tenant of flat No.2. The Trust had never created any tenancy in favour of Smt. Nayna Dave. If any such representations were made to the valuer or to any other person by Vishnu Dave, the same were false. This letter would indicate that the Trust has supported claim of respondent No.2 and recognized him as tenant. It is also pertinent to note that the a grievance was made by respondent No.2 almost three years after the execution of the agreement and surrender deed and acceptance of amount of compensation. Memorandum of understanding was executed on 26.07.2007 between Trustees. The respondent No.2 forwarded letter to the Trust on 28.08.2012 stating that the accused No.12 has taken undue advantage of his position and shown his wife's name as tenant of flat No.2. The Trust is requested to correct the mistake. Thus, from the documents it is apparent that there was no complicity of the petitioners being Trust and its members with co-accused to deceive the complainant. After the order of the Charity Commissioner was passed under Section 36 (1)(a) of the Bombay Pubic Trust Act, the letter addressed by Trust to respondent No.2 as tenant. The complainant himself has addressed letter to the Trust that accused No.12 has committed forgery by inserting name of his wife in the rent receipt. There is no material on record to show that the petitioners were acting in connivance with accused No.12. It is pertinent to note that respondent No.2 is the educated person. He accepted the amount of Rs.5,00,000/-. He is signatory to the agreement dated 09.06.2009. He executed surrender deed.

7. The decision relied upon by both sides are decided in the context of the factual aspects of the matter. It is settled law that in the case of abuse of process of law, the Court can exercise powers under Section 482 of Cr.P.C. or under Article 227 of the Constitution of India to quash and set aside proceedings.

8. The impugned proceedings in the present case deserves to be quashed and set aside.

ORDER

(i) The order issuing process dated 4th September 2014 passed by Metropolitan Magistrate, 17th Court, Borivali, Mumbai in C.C. No.90/SW/2013 and common order dated 3rd April 2017 passed by Sessions Judge, Dindoshi, Mumbai in Criminal Revision Application Nos.25 of 2015, 33 of 2015 and 34 of 2015 qua petitioners and proceedings in CC No.90/SW/2013, are quashed and set aside;

(ii) Criminal Application No.485 of 2018 is disposed off;

(iii) Writ Petition is allowed in above terms and stands disposed off.

(PRAKASH D. NAIK, J.)