IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APL) NO.64 OF 2021

Mr. Vibhor s/o Anand Saklani,
age 42 years, occupation : service,
r/o Flat No.C-147, Plot No.17,
Siddharth Kunj Apartment,
Sector 7, Dwarka, South, New Delhi. ... Petitioner

- Versus -

1) State of Maharashtra,
Police Station Officer,
Police Station, Ambazari,
Nagpur City, Nagpur.

2) Shirish s/o Narayan Borkar,
age 50 years, occupation :
Journalist, r/o Yogiraj-A/02/09,
Hindusthan Colony, Amravati Road,
Nagpur.

3) Commissioner of Police,
Nagpur City, Nagpur.

4) State of Maharashtra, through
its Secretary, Department of Home,
Mantralaya, Mumbai-32. ... Respondents

Shri R.R. Vyas, Advocate for applicant.

Shri A.S. Fulzele, Additional Public Prosecutor for respondent nos.1, 3 and 4.

Shri S.M. Puranik, Advocate for respondent no.2.

CORAM : SUNIL B. SHUKRE AND
G.A. SANAP, JJ.
DATED : JULY 14, 2022

ORAL JUDGMENT (PER SUNIL B. SHUKRE, J.) :

Heard Shri Vyas, learned Counsel for the applicant, Shri Fulzele, learned Additional Public Prosecutor for the respondent nos.1, 3 and 4, and Shri Puranik, learned Counsel for the respondent no.2/complainant.

2) Rule. The rule is made returnable forthwith. Heard finally by consent of the learned Counsel for the parties.

3) The allegations made against the applicant are that in the year 2015, he had agreed to sell his flat to the complainant for consideration of Rs.55 lakhs and as a part of the deal, the complainant paid the applicant an amount of Rs.2 lakhs as earnest money and that was done on the demand of the applicant, but later on the applicant failed to keep his promise and on one pretext or the other, avoided to complete the sale transaction and even refused to refund the amount of Rs.2 lakhs to the complainant. On the basis of

these allegations, an offence punishable under Section 406 of Indian Penal Code came to be registered against the applicant.

4) According to Shri Vyas, learned Counsel for the applicant, no offence of criminal breach of trust punishable under Section 406 of Indian Penal Code is made out even after taking the allegations made against the applicant as correct. He further submits that there was no dishonest intention on the part of the applicant and the sale transaction could not be completed because of failure of the complainant to obtain loan amount. He also submits that Section 41(1) of the Code of Criminal Procedure has not been complied with by the respondent no.1 in the present case.

5) Shri Fulzele, learned Additional Public Prosecutor for the respondent nos.1, 3 and 4, and Shri Puranik, learned Counsel for the respondent no.2, both submit that bare perusal of the allegations would be sufficient to disclose dishonest intention of the applicant since beginning of the transaction and, therefore, not only an offence of criminal breach of trust punishable under Section 406 of Indian Penal Code, but also an offence of cheating punishable under Section 420 of Indian Penal Code is prima facie made out against the applicant. They also submit that it is wrong to say that sale

transaction was not completed due to failure of the complainant to secure loan.

6) It is true that the complainant had filed his complaint in July 2017 and on its basis, no crime was registered then and crime was registered only in the year 2019. But, it is also true that the complainant had acted with due diligence and, therefore, this would not be a case of belated filing of complaint against the applicant.

7) When allegations against the applicant are considered in entirety and taken to be correct without adding anything thereto or subtracting anything therefrom, we find that they do disclose prima facie commission of an offence of cheating against the applicant. Of course, we agree with the submission of the learned Counsel for the applicant that they do not make out even in a prima facie way the offence of criminal breach of trust punishable under Section 406 of Indian Penal Code, but the investigation is still going on and, therefore, possibility cannot be ruled out if at the end of investigation, the offence of cheating punishable under Section 420 of Indian Penal Code is added in the crime registered against the applicant.

8) In order to prima facie constitute offence of cheating, presence of dishonest intention since beginning of the transaction is necessary. On going through all the allegations made against the applicant, we find that they point towards the state of mind of the applicant at the beginning of his transaction with the complainant. The applicant had agreed to sell his flat for a consideration of Rs.55 lakhs and as an earnest money deposit, he had also demanded an amount of Rs.2 lakhs from the complainant, which was indeed paid to him by the complainant. After having accepted the earnest money deposit, it became duty of the applicant to do everything, which was necessary for execution of the sale deed, but complaint shows that the applicant avoided to do that and kept on giving some or the other excuse. Then, there is no mention in the complaint anywhere that sale transaction could not be completed because the complainant could not obtain loan from the Bank for financing purchase of flat by him from the applicant. It appears that the contention of the applicant that sale transaction could not be completed because of failure of the complainant to obtain loan is only an excuse being put forward by the applicant by way of his defence. As of now, the law requires us to go by the allegations as they are and consider them at their face value. As stated earlier, the

allegations do not show any admission on the part of the complainant that he was unable to obtain the Bank loan. So, what has happened in the present case is acceptance of money by the applicant from the complainant on the promise that he would sell his flat to him for a consideration of Rs.55 lakhs. The promise given by the applicant was not kept by him and the fact that the applicant gave out excuses from time to time reasonably indicates that the intention of the applicant since the day he entered into an agreement of sale with the complainant was not honest. It was dishonest intention on the part of the applicant, thereby prima facie making out an offence of cheating against him.

9) Shri Vyas, learned Counsel for the applicant, further submits that in this case the Investigating Officer has not followed the procedure prescribed in Section 41(1) of the Code of Criminal Procedure, which was applicable in view of the fact that the offence was not punishable for imprisonment of seven years or more. The question whether this procedure was followed by the Investigating Officer or not is a question of fact and it would have to be proved by the applicant like any other fact. The applicant has not placed on record any material to substantiate his argument except for pointing

out circumstance of the applicant having been kept in Police Custody Remand for three days. Section 41(1)(b)(ii) of the Code of Criminal Procedure provides that arrest can be made by the Police Officer on the grounds mentioned in Clauses (a) to (e) subject to the condition that the reasons for making such arrest are recorded by the Police Officer. So, it is not the case that Police Officer cannot make arrest even in offences, which are punishable with imprisonment for a period, which is less than seven years, but if he decides to make arrest, he is required to record his reasons on the lines suggested in Clauses (a) to (e). The learned Additional Public Prosecutor submits that he is unable to make any statement regarding recording of reasons by the Police Officer or not as he does not have with him case diary. Therefore, it is not possible to say at this stage that Section 41(1) of the Code of Criminal Procedure was or was not followed and that would mean that the applicant would have to take recourse to appropriate remedy for proving this fact.

10) Even otherwise, if the procedure prescribed under Section 41(1) of the Code of Criminal Procedure is not followed by the Investigating Officer, its consequence would certainly not be quashing of crime itself. Its consequence would be direction to erring

Police Officer, who can be taken to task departmentally and also under appropriate law. The applicant is at liberty to prosecute his remedy, which may be available to him in law against the erring Police Officer.

11) Once it is found that the complaint made by the person like complainant discloses commission of cognizable offence - that offence is one, which is punishable under Section 420 of Indian Penal Code, it would not be possible for this Court to make any interference in the matter. In the present case, even though the crime has been registered only for an offence punishable under Section 406 of Indian Penal Code, the crime cannot be quashed as there is a possibility of addition of further crime by the Investigating Officer, if he is allowed to make further investigation in the matter.

12) For the reasons stated above, we are not inclined to make any interference with the impugned crime. The application is, therefore, dismissed with liberty to the applicant as indicated above. No costs.

JUDGE JUDGE

khj