IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.942 OF 2023

SHANKARRAO S/O RAJARAM GAUD
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

WITH
CRIMINAL WRIT PETITION NO. 278 OF 2023

HITENDRA VINAYAKRAO UPADHYAY
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS
...
Advocate for Petitioner in WP/942/2023 & for Respondent Nos. 2 to 4: Mr. A. H. Kasliwal
Advocate for Petitioner in WP/278/2023 & for Respondent No. 2 in WP/942/2023: Mr. S. S. Jadhavar
APP for Respondents: Mrs. G. L. Deshpande
...

CORAM : R.M. JOSHI, J

DATE : AUGUST 29, 2023

PER COURT :

1. With consent, heard finally at the stage of admission.

2. These Petitions takes exception to the order dated 15.09.2022 passed by learned Additional Sessions Judge, Parbhani in Criminal Revision Application No. 13/2020 whereby order dated 13.01.2020 passed in R.C.C. No. 500/2017 by learned JMFC is set aside and process was issued against Accused No. 2 – Shankar only.

3. For the sake of convenience, parties are referred to as complainant and accused.

4. The facts, in nutshell which have led to the filing of these Petitions, can be narrated as under:

Complainant is a partner of liquor shop at village Zari, Dist. Parbhani. License thereof was standing in the name of his father. Complainant and other partners decided to transfer liquor shop premises with the right in liquor license. Accused contacted him and showed their willingness to purchase the liquor premises along with goodwill and liquor license. As per the contention of complainant, accused were appointed as Managers by executing Naukarnama on 01.04.2013 for the period of 1 years and asked to look after day to day affairs and conduct of the business. Thereafter, it was decided to transfer the liquor license in favour of accused herein for consideration of Rs. 25 lacs towards goodwill. He claims that it was orally agreed that this amount would be paid prior to transfer of liquor license. It is contended that pursuant to the said agreement, complainant and other partners filed an application before Collector, Parbhani on 08.01.2014 for transfer of liquor license in the name of accused. Though, the said application was filed by them, it was decided to complete formalities after the amount agreed is paid. It is alleged that by keeping the complainant and other partners in dark, accused in collusion with the Officers of Excise Department got the liquor license transferred in the name of accused. On the basis of these allegations, complaint came to be filed under Section 156(3) of Cr.P.C.

5. Learned Magistrate did not pass order of investigation into the crime under Section 156(3) of Cr.P.C but issued process against the accused persons by order dated 20.03.2018. The said order was challenged by filing Criminal Revision Application by the accused being no. 118/2018. The said application was allowed by order dated 23.11.2018 and the order passed by learned Magistrate was set aside for non-compliance of provisions of Section 202(1) of Cr.P.C. The matter came to be remanded back to the Magistrate for decision as per law. Thereafter, learned Magistrate called report from police under Section 202 of Cr.P.C. After the said report, learned Magistrate passed order

dated 13.01.2020 dismissing the complaint. The said order was taken exception in Criminal Revision Application No. 13/2020. The Revisional Court passed impugned order dated 15.09.2022 and partly allowed the application. The process was issued against accused herein. No process was issued against Accused Nos. 1 and 3 in R.C.C. No. 500/2017.

6. The complainant is aggrieved by non-issuance of process against accused nos. 1 and 3 whereas accused no. 2 being aggrieved is issuance of process have filed these Petitions.

7. Learned Counsel for Complainant submits that there is ample evidence against accused Nos. 1 and 3 in order to issue process against them. It is submitted that though the application is filed by the complainant and other partners for transfer of liquor license, however, it was never agreed that the amount of transfer fee would be paid by the accused persons. It is submitted that the accused no. 3 though challan has deposited the said amount of transfer fee and hence, his involvement in the crime is evident. It is submitted that the material on record in the form of

affidavit of accused no. 2 clearly indicates that it was agreed between the parties that the sum of Rs. 25 lacs would be payable to the complainant by way of goodwill for the transfer of license. He also drew attention of the Court to the agreement executed in this regard on 22.08.2015 pursuant to which 5 cheques were issued of Rs. 5 lacs each. It is submitted that subsequently cheques were dishonoured. According to him, all these facts clearly indicates that all accused person in furtherance of their common intention have cheated the complainant and, therefore, the process ought to have issued against all accused.

8. Learned Counsel for the Accused defended the refusal of the issuance of process against accused nos. 1 and 3. It is his submission that there is no evidence to indicate that these accused persons have committed any offence as alleged. For the purpose of challenging the order of issuance of process against accused nos. 2, it is submitted that any agreement for sale of the license issued by the authority under the provisions of Maharashtra Prohibition Act would be barred in view of Section 58 thereof. It is thus, clear that since the

object of the alleged crime is barred by the provisions of law in view of Section 23 of Contract Act, such contract does not become enforceable. Apart from this, he submitted that learned JMFC while acquitting Respondents for the offence punishable under Section 138 of Negotiable Instruments Act has held that the cheques were not issued against discharge of legally enforceable debt. He also drew attention of the Court to the evidence recorded therein which indicate that some other agreement was also entered into between the parties in the year 2013, which is suppressed by complainant. In order to support his submission that mere breach of contract will not amount to cheating, reliance is placed on the judgment of Hon'ble Apex Court in case of *Sarabjit Kaur Vs. State of Punjab and Anr, 2023 SCC OnLine SC 210*.

9. Perusal of the complaint indicates that the Respondent has specifically alleged that for the purpose of transfer of license an amount of Rs. 25 lacs was agreed to have been paid towards goodwill. The said contention of Respondent gets support from the agreement dated 26th August, 2015 between the Petitioner

and Respondents wherein it is reaffirmed that a sum of Rs. 25 lacs was to be paid on the date of transfer of license in favour of the Petitioner. Thus, at this stage, there is evidence on record to indicate that at the time of delivery of the application for transfer, under the signature of Respondent, there was deception played on him with assurance to pay a sum of Rs.25 lacs. It is immaterial as to whether said agreement would be enforceable in law or not, as validity of said agreement is not in issue before trial Court. In order to satisfy essential ingredients to constitute cheating under Section 415 of Indian Penal Code, there must be intentional deception to deliver any property and which act is likely to cause damage to such person. Suffice it to say that *prima facie* material placed on record indicates that there was oral agreement between the parties and on the basis of assurance of payment of Rs. 25 lacs on the date of transfer of the license signed form for transfer of license is handed over. Thereafter, transfer of liquor license is obtained without payment of assured amount. It is immaterial whether the Prohibition Act bars sale of license or not.

10. The distinction will have to be drawn in respect of any agreement to sale the license and deception played on assurance to pay certain amounts. At this stage, therefore, the learned Revisional Court was fully justified in issuing process against the accused no. 2. No inference is called for therein.

11. As far as challenge to the refusal of the learned Revisional Court of issuance of process against accused nos. 2 and 3 is concerned, perusal of the record indicate that the liquor license has been transferred not in favour of them but in favour of co-accused. The only contention raised by the learned Counsel for the complainant for seeking issuance of process against Respondent Nos. 2 to 4 is that Accused No. 3 has signed Challan while depositing the amount of transfer fee with the concerned authority. Perusal of the said document indicates that he never tried to impersonate him to be license holder. There is nothing brought on record to indicate that the amount towards transfer fees could not have been paid except under the signatures of the license holder. There is no denial of the fact that application for transfer of the license

is duly signed by the Petitioner himself. Thus, no case is made out for making Accused Nos. 1 and 3 to undergo rigor of criminal process for want of *prima facie* case against them. No fault can be found in the refusal of Revisional Court to issue process against them.

12. In these circumstances, there is no reason or justification to cause interference with the impugned order. Hence, both Petitions stand dismissed.

(R.M. JOSHI, J.)

Malani