

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL WRIT PETITION NO.5344 OF 2017**

1. Nalini Parisa Halingale and

2. Bahubali Parisa Halingale

.. Petitioners

v/s.

Sachin Jawahar Hulle And Ors.

.. Respondents

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Mr. Wasim Samlewale, i/b. Tejpal S. Ingale, for the Petitioners.

Ms. Rui Danawale, i/b. Umesh Mankaprue, for Respondent Nos. 1 and 2.

Mr. M.G. Patil, APP, for State.

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CORAM: R.G. AVACHAT, J.

DATE : 24 JANUARY 2023.

P.C:-

Heard.

2. The challenge in this writ petition is to the order dated 7 November 2017, passed by Additional Sessions Judge in Criminal Revision Application No.157 of 2016, setting aside the order of issuance of process passed by Court of Judicial Magistrate, First Class, Miraj, on 21 September 2016 in Regular Criminal Case No. 236 of 2016 against the Respondents herein.

3. The Petitioners herein are the original complainants in R.C. C. No.236 of 2016. It is their case that agricultural land, bearing Gat No.2625, situated at Village Malgaon, Tal. Miraj, Dist. Sangli, belonged to them. They agreed to sell it to Respondent No.1 for Rs.6,20,000/-. Respondent No.2 was a commission/estate agent. The transaction was entered into through him. An agreement for sale was executed on 27 October 2009. On the same day, another document in the nature of “हमीपत्र” (Document of Assurance) was executed. The Petitioners were paid a sum of Rs.1,20,000/- as earnest money. Respondent No.1 issued the cheque towards balance consideration amount. The cheque was presented for encashment. It was, however, bounced for the reason “signature deferred”. The Petitioners, therefore, initiated proceedings under Section 138 of the N.I. Act. A bank official was examined as a witness in the said case. In the evidence of the bank official, it was realised that it was a bank account in the name of Respondent No.2. Respondent No.1 issued the cheque on the account maintained by Respondent No.2. As such, it was an offence of cheating committed by both the Respondents in connivance with each other.

4. Learned Advocate for the Petitioners, relying on the aforesaid factual matrix, submitted that the trial court had rightly issued process against both the Respondents, the revisional court ought not have set aside the order of issuance of process. According to him,

when the revisional court found the trial court to have not appreciated documents on record in right perspective, it could have remanded the matter directing the trial court to go through all the documents relied on and pass order afresh. According to learned Advocate, when the averments in the complaint prima facie made out an offence, the revisional court ought not to have interfered with the order passed by the learned Magistrate.

Learned Advocate relied on the judgment of Apex Court in *Fiona Shrikhande vs. State of Maharashtra & Another*¹ to submit Magistrate has to arrive at prima facie satisfaction as to whether there are grounds for proceeding, by reading complaint as a whole, without advertng to defence of accused, if any, and without going into merits of the case – Magistrate has to examine prima facie truth and inherent probabilities apparent on allegations made in complaint so as to be satisfied that prima facie ingredients of alleged offence made out from complaint for issuance of process – Once Magistrate by exercising his discretion forms opinion regarding existence of ground for proceeding, higher court should not substitute its own discretion for that of Magistrate.

Learned Advocate, ultimately, urged for allowing the writ petition.

1(2013) 14 SCC 44.

5. Learned Advocate for the Respondents, on the other hand, submits that it was Respondent No.1, who was at the receiving end. He paid a sum of Rs.2,00,000/- as earnest money. The Petitioners did not perform their part of the agreement. The civil suit has, therefore, to be filed for specific performance of contract. It was, in fact, a civil dispute. A blank cheque was issued as a security. Remaining amount of consideration was to be paid in cash. This Court was taken through the terms of agreement for sale. Learned Advocate, ultimately, urged for dismissal of the petition.

6. Considered the submissions advanced. Perused the complaint and the citation relied on. There can be no dispute over the proposition that if averments in the complaint make out a prima facie case, process has to be issued.

It has specifically been averred in the complaint that it was Respondent No.1/accused no.1, who agreed to purchase the land belonging to the Petitioners herein. Agreement for sale was placed on record of the trial court. Another document executed simultaneously with the agreement for sale, was also placed on record. In the recitals of the document executed as a guarantee/security to pay the balance consideration amount, a cheque drawn on ICICI bank, Branch Sangli, was issued. The said document was executed by Respondent No.1/accused no.1. The said impliedly suggest him to have issued the

cheque, necessarily of his banker. It was, however, transpired during recording of evidence of a bank official in a proceeding initiated under 138 N.I. Act that the cheque was drawn on an account of Respondent No.2 (accused no.2), who is an attesting witness to the assurance deed (“हमीपत्र”). These facts, prima facie, make out a case for issuance of process under Section 420 r/w. 34 of the Indian Penal Code. The trial court has rightly issued the process. The revisional court ought not to have, in the facts and circumstances of the case, interfered with the order of issuance of process. This writ petition, therefore, deserves to be allowed.

7. The petition is, therefore, allowed. The impugned order is hereby set aside, restoring the order of issuance of process.

(R.G. AVACHAT, J.)