IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.288 OF 2005

M/s. Neel Sagar Co-op. Hsg. Soc. & Ors ...Petitioners
Versus
Baban Raghunath Mandlik & Anr ...Respondents

Mr. Mandar Limaye, Advocate for Petitioners.
Smt. M.H. Mhatre, APP for State/Respondents.

CORAM : SARANG V. KOTWAL, J.
DATE : 19th OCTOBER 2023

ORAL JUDGMENT :

1. This Writ Petition is pending since 2005. This Court (Coram: A.S. Gadkari, J.) on 15th February 2021 had observed that the Advocate who had earlier filed his Vakilpatra for the Respondent No.1 had stopped practicing in the High Court and, therefore, this Court had issued notice to the Respondent No.1. The office note shows that the notice issued pursuant to the order dated 15th February 2021 was served on the Respondent No.1 on 13th March 2021. The police report to that effect is in the records of this case. The Respondent No.1 has not made any arrangement to represent himself in this Petition. This matter was thereafter

called out for final hearing on 24th August 2023, 7th September 2023 and 21st September 2023. On these three occasions, none appeared for the Petitioners and none appeared for the Respondent No.1. On 5th October 2023, learned Counsel for the Petitioners appeared before the Court and sought an adjournment and, therefore, the matter was adjourned. The matter was called out on 17th October 2023. At that time nobody appeared for either of the parties. Thus, it can be seen that the matter was called out repeatedly and nobody had appeared for the Respondent No.1. The matter can not be kept pending indefinitely. Therefore, today I have heard learned Counsel for the Petitioners and I am deciding this Writ Petition.

2. The Petitioner No.1 is a Co-operative Housing Society. The Petitioner No.2 was the Secretary, the Petitioner No.3 was the Chairman, the Petitioner No.4 was the Treasurer and the Petitioner No.5 was the Committee Member of the said society at the relevant time which is the subject matter of this Petition. The Respondent No.1 filed a Criminal complaint against the Petitioners in the Court of Chief Judicial Magistrate, Thane vide Criminal Case

No.218/2003. The complaint was filed with a prayer for issuance of process under Sections 420, 406 r/w 34 of I.P.C. The learned Chief Judicial Magistrate, Thane vide his order dated 2nd September 2003, dismissed the complaint. The Respondent No.1 had challenged that order in Criminal Revision Application No.191/2003 before the 4th Additional Sessions Judge, Thane. The Revision Application was allowed. The Chief Judicial Magistrate's order was set aside and the learned Additional Sessions Judge directed the Chief Judicial Magistrate to issue process against the Petitioners under Section 406 r/w 34 of I.P.C. vide his order dated 5th November 2004. This particular order is under challenge in this Writ Petition.

3. The allegations in the complaint are that the society was to get 10% amount from Maharashtra Co-operative Housing Finance Society Ltd. A meeting was called on 11th August 2002 for distribution of that amount after issuing notice for the meeting on 28th July 2002. According to the Respondent No.1, he had replied to the notice of that meeting and in particular, for the subject matter at serial No.7 in respect of return of the said amount. The

complainant had given his view that the said amount should be returned to all the members with interest. The meeting took place on 11th August 2002. It is mentioned in the complaint that the majority in the said meeting had decided to return the said amount to the respective members of the society. It was further decided that the members who were in arrears of outgoings of the society should give in writing, to adjust their arrears from the said amount and the remaining balance amount after adjustment, be returned to the members of the society. The Respondent No.1 did not give in writing to the society for adjusting that amount in the arrears. It is his case that he was not in arrears at all. The Respondent No.1 sent a letter dated 7th April 2003 to the society and demanded his amount with interest. The society sent a reply dated 8th May 2003 claiming that the Respondent No.1 was in arrears of large amount and, therefore, the said amount of 10% was not paid to him. Thus, according to the Respondent No.1, the Accused misused the Respondent No.1's money and committed the offence of cheating and criminal breach of trust. According to him, the Accused had wrongfully gained from the complainant's money and they used the same for their own benefit. On this basis, the complaint was filed.

4. The learned Chief Judicial Magistrate observed that the dispute between the parties appeared to be of civil nature, which could be resolved in the Civil Court. According to him, the offence was not made out and, therefore, the complaint was dismissed.

5. The learned Additional Sessions Judge took a contrary view and observed that the amount which was returned to the society belonged to the members of the society including the Respondent No.1. The society was entrusted with that amount which was due and payable to the Respondent No.1. The learned Additional Sessions Judge referred to resolution No.7 which mentioned that only if the member consented, this amount could be adjusted towards the outstanding dues. Since the Respondent No.1 had not consented to such course of action, the society could not have retained the amount. This amounted to the offence of criminal breach of trust. On this reasoning, the Additional Sessions Judge, Thane directed the Chief Judicial Magistrate to issue

process against the Petitioners under Section 406 r/w 34 of I.P.C. in R.C.S. No.218/2003.

6. Learned Counsel for the Petitioners submitted that the Chief Judicial Magistrate's order was based on sound reasoning. The Additional Sessions Judge erred in setting aside that order. He further submitted that from the complaint itself it is clear that, it was purely a civil dispute if at all and there was no criminality attached to it. There are no allegations against any individual Petitioner. The Respondent No.1 had remedy to approach the authorities under the Maharashtra Co-operative Societies Act. He was in arrears of heavy amount and, therefore, the society was left with no option but to adjust that amount with the outstanding dues. He submitted that the alleged non-compliance of the resolution passed in the meeting can only be a subject matter under the Maharashtra Co-operative Societies Act. It can not be an offence under I.P.C. He further submitted that even the society could not have misappropriated the amount, as it was not used for anybody's personal gain. The Respondent No.1 himself is a member of the society and, therefore, it can not be said that the

society had misappropriated his amount.

7. I have considered these submissions and in my opinion, the submissions made by the learned Counsel for the Petitioners, deserve to be accepted. Criminal breach of trust is defined under Section 405 of I.P.C. which reads thus:

> "**405. Criminal breach of trust.**— Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

8. The main ingredient is about dishonestly misappropriating that property in violation of any direction of law or of legal contract.

9. The main ingredient of offence is about the misappropriation of the amount. None of the Accused had

individually taken that amount for themselves. If there is any dispute about the amount of arrears which was due and payable to the society, it could have been resolved by taking recourse to the provisions of the Maharashtra Co-operative Societies Act and not under I.P.C. There are no specific allegations against the individual Petitioners. From the complaint it can not be said that the society misappropriated the money belonging to the Respondent No.1 and committed criminal breach of trust. If there was violation of any resolution passed by the society, again the remedy would have been under the provisions of the Maharashtra Co-operative Societies Act. Hence, no offence is made out in the complaint and, therefore, the learned Chief Judicial Magistrate, Thane had rightly dismissed the complaint. The learned Additional Sessions Judge has not taken these legal issues into consideration. In this view of the matter, the Petition deserves to be allowed.

10. Hence, the following order:

<u>O R D E R</u>

i) The Petition is allowed.

ii) The order dated 5th November 2004 passed by the 4th Additional Sessions Judge, Thane in Criminal Revision Application No.191/2003, is set aside.

iii) The order passed by the Chief Judicial Magistrate, Thane on 2nd September 2003 in Criminal Case No.218/2003, is restored and the complaint filed by the Respondent No.1 against the Petitioners, stands dismissed.

(SARANG V. KOTWAL, J.)