

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO.791 OF 2020

Faisal Mohammad Hussain	]	
Agarbattiwala,	]	
Aged 40 years.	]	
	]	
2.Aaliya Faisal Agarbattiwala,	]	
Aged 34 years	]	
both residing at 24 Bhojwani	]	
Mansion, 1st/2nd Floor, Flat no.4,	]	
and 5, Maratha Mandir Marg,	]	
Mumbai Central, Mumbai-400 008.	]	
		 Petitioners.

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Vs.

The State of Maharashtra	]	
(at the instance of Nehru Nagar	]	
Police station, Mumbai-C.R.No.	]	
20/2019)	]	
	]	
2. Manoj Dattatraya Mistry,	]	
Aged 52 years, Indian Inhabitant,	]	
residing at Flat No.801, F-Wing,	]	
Baba Vihar, Mother Dairy road,	]	
Nehru Nagar, Kurla (East),	]	
Mumbai-400 024.	]	
		...Respondents.

...

Mr.Kushal More a/w Mr Pranav Avhad a/w Ms Darshna Naval
for the petitioners.
Mr.K.V.Saste, APP for the State.

Mr. Chaitanya Pendse with Akshay Pai with Bhomesh Bellam
with Siddhi Bhosale with Atharva Sane for respondent no.2.

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**CORAM: Nitin W. Sambre
& R.N.Laddha, JJ.**

DATE : 19 July, 2023.

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Order (Per Nitin W. Sambre,J.) :

Challenge in the petition is to the initiation of prosecution against the petitioner vide crime no.20 of 2019, for the offence punishable u/Ss 406, 420, 506 r/w 34 of the Indian Penal Code, in which the trial is informed to have advanced as already 4 witnesses have been examined.

2. Learned Counsel appearing on behalf the petitioners would urge that perusal of the FIR and other material on record depicts hand-loan transaction between the petitioners and the respondent no.2. In such eventuality ingredients of the offence u/s 406, 420, 506 r/w 34 of Indian Penal Code cannot be inferred. So as to substantiate his claim he would

urge that part payment as against the debt of Rs.1,10,00,000/- is already made. It is further submitted that the Petitioner is already facing civil proceedings so also, proceedings for dishonour of two cheques under the Negotiable Instruments Act, which were given to the complainant/respondent no.2 in the form of security. Further submissions are that there is no *mens rea* on the part of the petitioner *qua* cheating and criminal breach of trust. So as to substantiate his contention he has relied on the following judgments.

i) **G. Sagar Suri & Anr. Vs. State of U.P. & Ors.**¹

ii) **Mahesh Shantilal Parekh Vs. State of Maharashtra & Anr.**²

4. While countering aforesaid submissions, learned APP and learned Counsel for respondent no.2 would urge that on perusal of the FIR, it would depict that the accused persons issued two cheques to the petitioners, towards security of hand-loan by the respondent no.2. On depositing the said

¹ (2000)2 SCC 636.

² Cri.WP 4400 of 2013.

cheques by the respondent no.2 for encashment, one of the cheque was dishonoured for the reason that the signature was not matching with that of petitioner no.2 and another cheque was dishonoured for the reason there being '*stop payment*' instructions. As such, according to them, there is dishonest intention, an element of cheating and criminal breach of trust, as can be inferred from the act and the intention of the petitioners.

5. We have appreciated the submissions.

6. The fact that a hand-loan of Rs.1,10,00,000/- was given by the respondent no.2 to the petitioners is not disputed. As can be seen from the contents of the FIR two cheques were issued by the petitioners. Against above transaction, petitioner no.1's brother namely Sohail Mohammed Agarbattiwala towards security issued a cheque whereas another cheque was

issued by petitioner no.2 from her account.

7. As far as cheque issued by the petitioner no.2 is concerned, it has been specifically mentioned in the cheque return memo that the signature of respondent on the said cheque is not matching with that of the specimen signature given in the bank. Apart from above, another cheque, for an amount of Rs.55 lakhs, issued by brother-in-law of petitioner no.2 who stood as 'Guarantor', was also dishonoured in view of '*stop payment*' instructions by the petitioner.

8. In the aforesaid background, even if the petitioners are facing prosecution u/s 138 of the Negotiable Instruments Act, from the conduct of the petitioners for not honouring the two cheques and the reasons for such a dishonour, prima facie, satisfies the very ingredients of the offence u/s 406 and 420 of the Indian Penal Code, as dishonest intention of the

petitioners can be very much inferred as both the cheques issued by the petitioner towards security stood dis-honoured.

9. That being so, merely because civil proceedings are pending against the petitioners, that by itself will not take away the rigour of the criminal conduct of the accused, as perusal of the FIR prima facie depicts disclosure of a cognizable offence and the necessary ingredients of the offence alleged can be inferred.

10. Apart from that, as informed by the learned APP, the trial has advanced and after framing of charge, four witnesses have been examined.

11. In the aforesaid background, if we appreciate the submission of the petitioners by drawing support from the judgment of the Apex Court in the matter of *G. Sagar Suri &*

Anr. and Mahesh Shantilal Parekh (supra), what can be noticed is the transaction and a set of facts in both these matters are different from the case in hand.

12. In the matter of **G.Sagar Suri** (supra) it was admitted position that the said appellant was an employee of the company and he was not responsible for the alleged payments. Similarly, in the matter of **Mahesh Parekh** (supra) there was transaction under the Sale of Goods Act and the court was of the view that the proceedings u/s 138 of the Negotiable Instruments Act would be a proper remedy.

13. In the case in hand, the factual matrix of the case is intentionally dishonouring cheques by the petitioners thereby cheating the respondent no.2 and criminal breach of trust. Sufficiently, there is material on record which proves that there is *mens rea* on the part of the petitioners to cheat the respondent no.2. That being so, no case is made out for

allowing the petition. In the consequence, the **petition is dismissed.**

[R.N.Laddha, J.]

[Nitin W. Sambre, J.]