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

CRIMINAL WRIT PETITION Nos. 2679/2022 & 127/2021.

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CRIMINAL WRIT PETITION NO.2679/2022.

1.Chintan Arvind Shah,
Age 36, Occupation -
Business,

2.Vinit Arvind Shah,
Age 38, Occupation -
Business,

Address – Both residing at
49/50, 5th Floor, Prem Court
Near Jaslok Hospital,
Peddar Road, Mumbai – 400026. … Petitioners.

-Versus-

1.The State of Maharashtra,
Through Sr. Inspector of Police,
Economic Offences Wing, Thane.

2.Hemant Sahebrao Salunkhe,
Type B, Wing Room No.304,
Abhidarshan Homes, Manda,
Titwala, Kalyan West,
District Thane. … Respondents.

WITH

CRIMINAL WRIT PETITION NO.127/2021.

1.Chintan Arvind Shah,
Age 41, Occupation -

Business,

2.Vinit Arvind Shah,
Age 43, Occupation -
Business,

Address – Both residing at
49/50, 5th Floor, Prem Court
Near Jaslok Hospital,
Peddar Road, Mumbai – 400026. … Petitioners.

-Versus-

1.The State of Maharashtra,
Through Sr. Inspector of Police,
Economic Offences Wing, Thane.

2.Rajni Ganesh Bhise,
Oshodhara Complex, Godrej Hills,
Kalyan West, District Thane.

3.The General Manager,
HDFC Bank, Bank House,
Dr.Annie Besant Road, Shiv
Sagar Estate, Worli,
Mumbai 400018.

4.HDFC Bank,
Jamnagar Branch,
SN 1, Gr.Flr, Kuber Park
Colony, Opp. Jogger's Park
Jamnagar, Gujarat 361008.

5.The Manager,
HDFC Bank, Sukh Sagar Complex
SN 5 to 9, Gr. Floor, Near
Fortune Landmark, Usmanpura,
Ahmedabad 380013. … Respondents.

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Shri Hemant Ingle & Shri Pratik Ingle, Advocates for Petitioners.
Shri J.P. Yagnik, A.P.P. for Respondent State in Writ Petition No.2679/2022.

Ms M.H. Mhatre, A.P.P. for Respondent State in Writ Petition No.127/2021.
Shri Devesh Sawant, Advocate i/by Shri Vivek Patil Associates, for Respondent No.2 in both petitions.

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CORAM : NITIN W. SAMBRE AND SHARMILA U. DESHMUKH, JJ.

DATE : JUNE 08, 2023.

ORAL JUDGMENT : (PER NITIN W. SAMBRE, J)

Heard learned Counsel for the parties.

2. In both these petitions petitioners are same and since the prayer in both these petitions are based on similar genesis of offence, with consent of the parties the same are tagged and heard finally.

3. In both these petitions the petitioners are seeking quashing of the first information report.

4. In Criminal Writ Petition No.127/2021, prayer is for quashing of Crime No.220/2018 punishable under Sections 420, 406 read with Section 34 of the Indian Penal Code, Section 3,13[i] of the Maharashtra Ownership Flats (Regulation of the Promotion of the Construction, Sale, Management and Transfer) Act, 1963 (MOFA) and Section 3 of the Maharashtra Protection of Interest of Depositors (In Financial

Establishments) Act, 1999 (MPID). Petitioners consequent to above have also sought quashing of MPID Case No.105/2020, which is pending adjudication on the file of Special Judge. The challenge is also to the impugned notice dated 28.05.2020 and look out circular.

5. Similarly in Criminal Writ Petition No.2679/2022, the prayer of petitioners is for quashing of Crime No.111/2019 punishable under Sections 420, 406 read with Section 34 of the Indian Penal Code, Section 3,13[1] of the Maharashtra Ownership Flats (Regulation of the Promotion of the Construction, Sale, Management and Transfer) Act, 1963 (MOFA) and Section 3 of the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999 (MPID). Petitioners have also sought for quashing of the lookout circular.

6. Both petitioners are real brothers. They became partners in M/s. Harmya Developers, (earstwhile 'Valram Corporation'). The said firm was in the business of construction and development of properties. Accused no.1 Harish Bhanushali, a partner with 50% stake and another partner M/s.Heet Infra Project decided to develop a land at Mouza Titwala, as referred to in the first information report, bearing land Survey Nos.145/7A.01, 7A.02, 146/1 and 147/2/2. Accordingly all accused persons in the aforesaid offence, including petitioners, accepted

the amount towards booking with promise to deliver the develop property. Since the partners of the aforesaid firm who have accepted booking amount and part consideration have failed to honour their commitment, a criminal complaint came to be lodged.

7. In Criminal Writ Petition No.127/2021, the complaint came to be lodged against petitioners and other persons on 07.06.2018 by respondent no.2 to the said petition. Whereas in Criminal Writ Petition No.2679/2022, the complaint was lodged by respondent no.2, which led to registration of respective offences, as referred above.

8. According to Shri Ingle, learned Counsel for petitioners, the partnership firm was into the business of construction, development of immoveable property. The said partnership, according to him was formed on 04.03.2008, and revised on 24.09.2010 when there was change in the name as Harmya Developers. It is further claimed that the said partnership decided to develop a project at Titwala. Accordingly not only the booking amount, but also consideration from various parties like respondents/complainants were accepted. It is claimed that a MOU on 06.08.2013 came to be entered into in between petitioners and Mr. Bhanushali i.e. other partner and since the said MOU was not honoured, a Retirement Deed dated 01.10.2013 came to be entered into. It is

claimed that w.e.f. 01.10.2013 petitioners stood retired from the aforesaid partnership firm.

9. According to him, the inter-se dispute between accused persons was resolved and confirmation agreement dated 13.09.2014 came to be executed. The learned Counsel for petitioners would invite our attention to the terms of the Confirmation Agreement dated 13.09.2014, whereby entire liability, assets was handed over to the accused no.1 Harish Bhabushali, and petitioners were absolved of their entire liability including criminal liability. According to the learned Counsel, it was also agreed that the accused no.1 having taken over the entire firm he shall alone be liable and responsible for and on behalf of the said firm in every manner including that of criminal liability. Petitioners in compliance with the terms of said MOU claimed to have paid an amount of Rs.2,73,72,207/- with accrued interest w.e.f. 12.06.2014. It is claimed that the said amount was deposited with Diwan Housing Finance Limited towards satisfaction of debt of partnership firm. It is urged that inspite of the terms of aforesaid MOU, the accused has failed to honour his commitment as to discharge all the dues i.e. tax, payments to various financial institutions, statutory tax liabilities. It is further claimed that the accused no.1 started misrepresenting the public about failure of Applicant to deliver the developed property, has issued threats

to petitioners of involving them in false offence and has tried to extract money, which led to lodging of police complaint dated 19.08.2016.

10. In this background, the contention of learned Counsel for petitioners in both matters are that petitioners are absolved of their entire liability including financial by virtue of the Confirmation Agreement dated 13.09.2014. So as to substantiate said contention, our attention is invited to various orders passed by this Court in Arbitration Petition No.97/2017 on 01.02.2017 and 03.02.2017, so as to urge that the criminal liability cannot be fastened on petitioners. It is also claimed that in Commercial Arbitration Application No.208/2018 and Arbitration Petition No.97/2017, this Court has already taken into account the terms of the Confirmation Agreement dated 13.09.2014, and in view thereof the criminal liability cannot be fastened on petitioners.

11. So as to substantiate the aforesaid contentions, the learned Counsel for petitioners would invite our attention to the recitals in the various agreements viz. Partnership Deed dated 04.03.2008, Revised Partnership Deed dated 24.09.2010, MOU dated 06.08.2013, Retirement Deed dated 01.10.2013 and Confirmation Agreement dated 13.09.2014.

12. It is the contention of learned Counsel for petitioners that

petitioners who are real brothers since have stood retired from the aforesaid firm from 01.10.2013 and in view of the terms of Confirmation Agreement dated 13.09.2014, the entire liability of the firm is taken over from the said date by accused no.1 Harish Bhanushali and petitioners cannot be held liable for the offence alleged against them.

13. While countering the aforesaid submissions, the learned Counsel for respondents/complainants, so also the learned A.P.Ps Shri Yagnik and Ms Mhatre, appearing for State in respective writ petitions would oppose the prayer. According to them, even if the Deed of Retirement and Confirmation Deed are executed and appears to have been acted upon, as can be inferred from the orders referred above passed in the Arbitration Proceedings, petitioners cannot be said to have been absolved of their criminal liability. It is claimed that both these documents speaks of absolvement of petitioners of financial and civil liabilities.

14. In addition to above, the contention of learned A.P.Ps. are that, the intention of petitioners to dupe flat buyers since inception of the project can be inferred from the mode and manner in which the petitioners not only accepted their money from the firm, but, has also taken recourse to mode of retirement, so as to get themselves absolved

of criminal liability.

15. It is claimed that the retirement of petitioners from the partnership firm or as per the terms of Confirmation Deed dated 13.09.2014, cannot absolve them of their criminal liability.

16. We have appreciated the rival submissions.

17. Petitioners in both these crimes are facing prosecution for the offence punishable under Sections 420, 406 read with Section 34 of the Indian Penal Code, provisions of MOFA and MPID Act. It is no where denied by petitioners that the firm of which they were partners, have not only accepted the booking amount, but, petitioners have enjoyed the fruits of the said firm and money received from various parties like complainants towards booking amount. The said fact is borne out of record. The Petitioners themselves have claimed that they have deposited an amount of Rs 2,73,72,207/- which was used for satisfying the debt of partnership firm.

18. Once petitioners are not denying the receipt of the booking amount, as against the promise of delivering the developed property in favour of complainants, petitioners got themselves bound by such

promise made to various complainants and similarly placed parties.

19. Merely because there exist differences inter-se between the partners of the partnership firm, that by itself will not absolve petitioners of their criminal liabilities.

20. Perusal of the recitals of the MOU dated 06.08.2013, Retirement Deed dated 01.10.2013 and Confirmation Agreement dated 13.09.2014, speaks of only absolving petitioners of civil and financial liabilities.

21. If we peruse the aforesaid orders passed in Arbitration proceedings referred to above, what could be noticed is the Court was sensitive to the execution of the aforesaid documents in favour of petitioners and the stand of accused no.1 that petitioners are absolved of all liabilities. The fact remains that co-accused has no authority in law to absolve the other accused in same offence by taking over criminal liability on himself. No such principle of law can be noticed to that effect in criminal jurisprudence.

22. Section 25 of the Indian Partnership Act 1932 (Hereinafter shall be referred to as “the Act” for the sake of brevity) provides for

liability of the partner in the act of the firm. Every partner jointly with all other partners are liable jointly and severally in all the acts of the firm carried out while such person is a partner of the firm. When personal participation of partner in the business of the firm wherein contract is executed, partner in such eventuality is liable for breach of the contract or criminal breach of trust. The relevant act for the purpose of attracting criminal liability of partner is his such status in the partnership firm on the date of the contract being entered into with third person and act of criminal breach in capacity of partner in relation to the said agreement. When a partner receives money from third person and misapplies the same then such partner is made liable even for the act of breach of trust, provided such money or property was received by the firm in the ordinary course of its business and it is misapplied by the partner while in custody of the firm. As such, principle that whenever firm is liable all the partners are jointly and severally liable including that of for liability arising out of fraud or breach of trust needs to be sensitive to. It is for partner to prove that he was not in charge of the business and in absence of any evidence, he cannot be made criminally liable for such act. Such liability of the partner for the act of firm commences from the date when such partner is admitted as partner to the partnership firm and the business. The act of partner of firm is done for and on behalf of the firm and in such eventuality a partner can be held liable even in the criminal matters. Merely because a parner discharges his financial liability (one sided) by depositing amount with the firm does not wash away his criminal liability to the third party as the third party has dealt with the firm when such person was a partner.

Section 26 provides for liability of firm for wrongful act of a partner. In case of a partner acting in ordinary course of business of firm or with the help of his partner, causes injury or loss to the third party by wrongful act or omission in such eventuality firm is liable thereof to same extent as a partner.

23. Petitioners in the capacity of partners of a firm having accepted the amount of booking with a promise to deliver the developed property within a stipulated period and not honouring such commitment sufficiently establishes the very ingredients of the offence of cheating punishable under Section 420 of the Indian Penal Code. Complainants have entrusted the money to petitioners, which they have accepted in their capacity as partners of the firm with a promise to deliver developed property, which they have failed. In such eventuality, it has to be held that petitioners in a calculated manner not only became partners, enjoyed profits from the firm and thereafter failed to honour the promise made to the parties like respondents/complainants, as such it cannot be said that petitioners cannot be held criminally liable for the failure to

perform or honour the promise.

24. The stand taken by petitioners that accused no.1 who has taken over entire liability not only failed to honour the promise of Confirmation Agreement dated 13.09.2014, but, there was misrepresentation, fraud by the said accused on petitioners, will not absolve them of criminal liability. The inter-se dispute between the partners is an issue which the partners should resolve amongst themselves, however, complainants cannot be made to suffer because of the dispute inter-se between the partners, once they having promised to deliver the developed property having accepted consideration.

25. The default on the part of petitioners in not honouring the commitment/promise appears to be a calculated move on their part since inception i.e. from the time of acceptance of booking amount. As such ingredients of offence can be said to have been satisfied.

26. Apart from above, the claim of petitioners that entire liability of firm is taken over by accused no.1 is in the form of their defence which cannot be appreciated and looked into at this stage. As such in our opinion there is no substance in both petitions, they are accordingly dismissed.

27. It is made clear that dismissal of these petitions will not come in the way of petitioners to move for discharge, in case they are chargesheeted.

28. In view of dismissal of petitions, pending interim applications, if any, also stands disposed of.

(SHARMILA U. DESHMUKH, J.) (NITIN W. SAMBRE, J.)