

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

CRIMINAL WRIT PETITION NO. 4400 OF 2013

MR. MAHESH SHANTILAL PAREKH
AGE-67 Yrs. Occupation- Business
Residing at: ¾, Ghanshyam Baug,
Camagally, Hansoti Lane, Ghatkopar (W),
Mumbai – 400 086.

....Petitioner/Accused

Versus

1. The State of Maharashtra
Through Marine Drive Police Station,
Mumbai.
2. Mr.Pramod Girdharilal Lath
Residing At F-1, Amalfi, 'A' Wind,
6th floor, Ruparel Marg, Malabar Hill,
Mumbai.

....Respondents

Mr. Mubin Solkar a/w Mr. Tahir Hussain i/by Ms. Tahera Qureshi for the
Petitioner.

Mr. K.V. Saste, APP for Respondent No.1/State.

Mr. Pranav Badheka a/w. Ms. Dhawani Mehta Desai a/w Mr. Rehan Bhosle &
Mr. Aadil Parsurampuriah for Respondent No. 2.

API M.G. Sangale, EOW Mumbai.

CORAM	:	SUNIL B. SHUKRE AND M.M. SATHAYE, JJ.
RESERVED ON	:	27th MARCH, 2023.
PRONOUNCED ON	:	3rd APRIL, 2023.

: JUDGMENT (PER : M. M. SATHAYE, J.):

1. Rule. Rule made returnable forthwith. Learned APP waives service
for Respondent No.1/State and learned Counsel appearing for Respondent No. 2

/complainant/informant waives service. Taken up for final disposal by consent.

2. This Petition is filed under Article 226 of the Constitution of India r/w. Section 482 of the Code of Criminal Procedure 1973, (“CrPC” for short) for quashing Crime bearing F.I.R. No. 37 of 2013 registered at Marine Drive Police Station for offences punishable u/s. 406 and 420 of Indian Penal Code, 1860 (for short “IPC”) and consequent criminal case pending on the file of Metropolitan Magistrate 47th Court Esplande Mumbai.

3. Heard learned Counsel Mr. Solkar, for the Petitioner-Accused, Mr. Saste learned APP for Respondent No. 1-State and Mr. Badheka for Respondent No. 2/Complainant.

4. Learned Counsel for the Petitioner has argued in support of his case and taken us through various documents including FIR and statements recorded during course of the investigation. Learned APP for the State has pointed out material gathered during investigation. Learned Counsel for the Respondent No. 2 vehemently opposed grant of any relief in favour of the Petitioner. He submitted that the material gathered against the Petitioner is sufficient for the Petitioner to face Trial in the facts and circumstances case.

5. We have considered rival submissions and perused the record. Perusal of FIR dated 4th December, 2012 shows that Respondent No. 2 is a businessman running a Company called “New World Resources” who is engaged

in the business of selling polymer raw material, plastic etc. It is alleged that from February, 2012 till September, 2012, the Respondent No. 2 supplied polymer raw material to the Petitioner's company Shreeji Trade Corporation from the godown at Bhiwandi. It is alleged that since the demand of raw material was continued from February, 2012 till 25th September, 2012, the Petitioner purchased raw material from time to time and it is also alleged and admitted that till May, 2012, the Petitioner has paid the consideration for the raw material purchased. It is however alleged that for the purchase of raw material from May, 2012 to September, 2012, the Petitioner issued cheques towards amount of consideration however, when the said cheques were deposited in the Bank, the payment did not realize because the Petitioner had issued stop payment instructions. It is further alleged that on inquiry with the Petitioner about due payment, the Petitioner gave evasive answers and has avoided to pay. It is alleged that total amount Rs. 6,55,42,520/- is recoverable from the Petitioner and since the Petitioner has avoided to answer and pay the said amount, the Petitioner has cheated the Respondent No. 2 and sold the raw material purchased from Respondent No. 2 in the market to third party purchasers and used the amount for himself.

6. Accepting the allegations made by Respondent No. 2 in the FIR at their face value, since the Respondent No. 2 has admitted in the FIR itself that in the ongoing transaction of sale and supply of raw material from February, 2012 to September, 2012, the Petitioner had already paid part of amount towards sale

of raw material till May 2012, the basic ingredient of offence of cheating u/s. 420 which is fraudulent or dishonest inducement (which is required to be in existence since inception) is clearly lacking. Also there are no allegations of fraudulent/dishonest inducement or deceit employed to deliver property. The said allegations taken at their face value, also do not constitute offence u/s. 406 because there is no entrustment of property with the Petitioner having dominion over the same and dishonestly misappropriating or converting the same to his own use or dishonestly using or disposing of said property. We say so, for the simple reason that even according to FIR, it is clear case of sale of raw material and not entrustment of raw material by Respondent No. 2 with the Petitioner.

7. Perusal of the statements of third party purchasers recorded during investigation, show that they have purchased raw material from the Petitioner. Assuming that the Petitioner has received monetary benefits by selling the raw material to third party purchaser, without paying its initial purchase costs to the Respondent-Complainant, still it does not mean that there was intention to cheat from the inception, which is basic ingredient of offence u/s. 420 of IPC, because admittedly as per FIR Petitioner has paid till May 2012. Other material collected during investigation, such as statements of godown keeper and evidence showing Petitioner receiving goods under certain disputed invoices (Nos. 25 to 27) can, at the most, mean that Petitioner has received goods even under the disputed invoices also. However, it is not the case of the Respondent/Complainant that he had entrusted the raw material/goods with the

Petitioner for some other purpose; the case of the Respondent/Complainant all along is of continuous sale transaction, which has taken place from February 2012 to September 2012, during which the Petitioner has made payment till May 2012.

8. From the averments in the FIR it is clear that the dispute is of civil nature arising out of non payment of part-consideration of sale of goods for which legal remedy is under civil law and even a remedy under Negotiable Instruments Act, 1881 is available, which the Respondent No. 2 may proceed with. We do not express any opinion about the merits of the said case about recovery of unpaid sale consideration and cheque bouncing case against Petitioner. They are separate causes and Respondent No. 2 is entitled to pursue them. But that *per se* would not mean that Petitioner can be prosecuted for offences punishable u/s 420 and 406 of IPC. In view of the lack of basic ingredients of both the offences with which Petitioner is charged, as stated earlier, in our considered view, it will be an abuse of process of law, if the Petitioner is permitted to be prosecuted further. With the averments in the FIR and quality of material gathered during investigation, the Petitioner cannot be made to face trial. We are fortified in taking such a view in the light of latest pronouncement of law by Apex Court in the matter of **Vijaykumar Ghai Vs. State of West Bengal reported in (2022) 7 SCC 124** rightly relied upon by the Petitioner. Useful reference can be made to para 35 and 40 of the said case.

9. So far as the Order of the learned single Judge of this Court dt. 17.01.19 passed in Perjury Petition No. 1 of 2018 taken out by Respondent No. 2 in Summons for Judgment No. 54 of 2016 in Comm. Suit No. 138 of 2015, relied upon by the Respondent No.2 is concerned, the said Order directs inquiry into offences in relation to section 191 to 193 of IPC referred to in section 195(1)(b) of CrPC. That is a totally separate matter and present offences u/s. 406 and 420 of IPC were not under consideration in that proceeding. In that view of the matter, the said order does not advance the case of the Respondent No. 2.

10. So far as reliance placed by the Respondent No. 2 on the case law of **Rajesh Bajaj Vs State NCT of Delhi & Ors reported in (1999) 3 SCC 259** is concerned, careful perusal thereof shows that in that case, there was clear allegation by complainant that accused induced him to believe that he would honour payments on receipt of invoices but complainant later realised that intentions of accused were not clear. Useful reference can be made to para 11 of the said judgment. In the case at hand, there is no such allegation of inducement. In fact in this case it is admitted in FIR that Petitioner has made payment till May 2012. Therefore said case is clearly distinguishable and therefore does not advance the case of Respondent No. 2.

11. In the net result, the Petition succeeds and the Petition is allowed in terms of prayer clause (a) which reads as below :

“(a) To quash and set aside the said FIR registered by Marine Drive Police Station at FIR No. 37 of 2013 for offences punishable u/s 406 and 420 of IPC on 13th March, 2013 and charge-sheet and Trial Court proceeding in FIR No. 37 of 2013 pending on the file at Metropolitan Magistrate 47th Court Esplanade Mumbai.”

12. Rule is made absolute in above terms. No order as to costs.

(M. M. SATHAYE, J.)

(SUNIL B. SHUKRE, J.)