

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CRIMINAL APPLICATION (APL) NO. 1071 OF 2018

APPLICANT : Deepak S/o. Ramdeo Jaiswal, Aged about 57 years, Occu: Director of M/s. D.J. Enterprises Ltd., Gondia, R/o. Manohar Chowk, Gondia, Tah. & Distt. Gondia.

//VERSUS//

NON-APPLICANTS : 1. State of Maharashtra, through Police Station Officer, Tiroda, Tq. Tiroda, Distt. Gondia.

2. Adani Power Maharashtra Ltd., MIDC Plot No.A-1, Tiroda Growth Centre, Tiroda, Tq. Tiroda, Distt. Gondia.

Mr. R.L. Khapre, Senior Advocate a/b. Mr. Pushkar Deshpande, Advocate for the Applicant.

Mr. S.A. Ashirgade, APP for Non-applicant No.1/State.

Mr. M.R. Joharapurkar, Advocate for Non-applicant No.2.

CORAM : G. A. SANAP, J.

RESERVED ON : 18th APRIL, 2023.

PRONOUNCED ON : 7th JUNE, 2023.

JUDGMENT

In this criminal application filed under Section 482 of the Code of Criminal Procedure, 1973 (for short “Cr.PC”), the

applicant-accused has questioned the correctness of the order dated 24th October, 2018, passed by the learned Judicial Magistrate First Class, Tirora, whereby the learned Magistrate rejected the application made by the applicant-accused for his discharge in Regular Criminal Case No.11 of 2016.

02] The facts relevant for the purpose of deciding this application are as follows:

On 10th April, 2013, one Mr. Omprakash Ramkul Bhardwaj, the Project Officer of Adani Power Maharashtra Limited, Tirora, Plot No.A-1 lodged a report at Tirora Police Station against the applicant-accused. On the basis of the said report, a crime bearing No.135 of 2013 came to be registered on 11th September, 2013 against the applicant-accused for an offence punishable under Section 420 of the Indian Penal Code, 1860 (for short "IPC"). In short, it is the case of prosecution against the accused that he with dishonest intention induced the informant-company to enter into a lease agreement knowing fully well that the accused was not in possession of the property as well as had not acquired title to the property. On the basis of the recovery certificate and with fraudulent and dishonest intention, he induced the informant-company for execution of the lease agreement.

03] It is the case of prosecution that the land admeasuring 36.52 acres was possessed as a lessee by M/s. Lan Eseda Industries Limited. The said industry obtained a loan from the Industrial Finance Corporation of India. The Corporation had filed a proceeding before the Competent Court for recovery of Rs.81,41,124/- and obtained the recovery certificate. The Recovery Officer after following the procedure, conducted the auction sale of the said land namely Plot No.C-4/1 and Plot No.C-4/2, situated at Gondia Industrial Area. The accused purchased the said land in the auction sale. The Recovery Officer issued a recovery certificate in favour of the accused on 6th August, 2008. The auction sale and recovery certificate was challenged before the Debt Recovery Tribunal-II, New Delhi. The Debt Recovery Tribunal-II, New Delhi by order dated 6th October, 2008, set aside the auction sale and recovery certificate issued in favour of the accused. The Debt Recovery Appellate Tribunal, Delhi dismissed the appeal filed by the accused against the said order. The writ petition filed by the accused, challenging the order of the Debt Recovery Appellate Tribunal, was also dismissed by the Delhi High Court by order dated 4th May, 2010. The accused challenged the said order passed by the Delhi High Court in the Supreme Court by filing Special Leave Petition. The Special Leave Petition was dismissed on 27th

September, 2010. It is the case of prosecution that on 1st August, 2010, the accused represented the informant that he has become an absolute owner on the basis of the recovery certificate and as such executed a lease agreement in favour of the informant. The lease agreement was for a period of 12 months commencing from 1st August, 2010. The possession of the land was handed over to the informant.

04] It is stated that the accused concealed from the informant the orders passed till the execution of lease deed with regard to setting aside of the auction sale. It is further stated that the accused was never put in possession of the land. He represented that he had taken the possession of the land and as such was competent to hand over the possession of the land to the informant. The informant on initiation of proceeding by the Recovery Officer after dismissal of the Special Leave Petition, came to know about the real state of affairs. The Recovery Officer in the said proceeding appointed a Court Receiver for taking possession of the property and for fresh sale of the said property. A direction was issued by the Recovery Officer on receipt of the report from the Court Receiver, to deliver the possession of the property to the Court Receiver. It is stated that the accused concealed the material

facts from the informant. The intention to deceive the informant was writ large. The informant was cheated. The informant suffered huge damage.

05] On the basis of this report, a crime as above came to be registered. After investigation, the charge-sheet was filed against the accused in the Court of Judicial Magistrate First Class, Tirora for the offence punishable under Section 420 of the IPC. The accused made an application under Section 239 of the Cr.PC for his discharge. It is contended that the informant was apprised about the real state of affairs. After issuance of recovery certificate in his favour, he had constructed a Godown on the property under the reasonable belief and presumption that the formal possession receipt was not necessary and warranted under law. He had apprised the informant about the nature of his title. The informant is a company manned by experts was supposed to make an enquiry about the title of the accused. On the basis of the recovery certificate, the company entered into a transaction with the accused. There was no intention on his part to deceive the informant, when the lease deed was executed. The subsequent events, which led to the cancellation of the recovery certificate, were not under the control of the accused. The informant has

enjoyed the property and received the benefits. The subsequent two lease deeds executed one after the other, indicate that there was no intention on the part of the accused to cheat. According to the accused, the dispute is of civil nature. The informant has given the colour of criminality to the said dispute just to pressurize the accused. The prosecution lodged against him is without substance. There is no evidence to *prima facie* indicate that he has committed any offence. There is no evidence to presume that he has committed any offence and therefore, he is entitled to be discharged.

06] The prosecution filed reply and opposed the application. According to the prosecution, there is sufficient material on record to presume that the accused has committed the offence. The accused at the very inception of transaction had an intention to cheat the informant. The accused concealed all the facts known to him from the informant. On the basis of recovery certificate without obtaining the possession by lawful means, he represented the informant that he became the full owner of the property. The informant believed the said representation.

07] The learned Judicial Magistrate First Class, Tirora, on consideration of the material placed on record, found the said

material sufficient to presume the commission of offence by the accused. The learned Magistrate opined that therefore, the charge is required to be framed against the accused. Learned Magistrate dismissed the application. Being aggrieved by this order, the accused has come before this Court.

08] I have heard Mr. R.L. Khapre, learned Senior Advocate for the accused, Mr. S.A. Ashirgade, learned Additional Public Prosecutor for the State and Mr. M.R. Joharapurkar, learned advocate for the informant. Perused the record and proceedings.

09] Learned Senior Advocate for the accused submitted that the facts and evidence, if considered at its face value, would show that the offence of cheating punishable under Section 420 of the IPC has not been made out against the accused. Learned Senior Advocate submitted that the informant-company being manned by experts could not even contend that without making thorough enquiry as regards the title of the accused, the transaction was entered into with the accused. Learned Senior Advocate submitted that the accused had apprised the informant about the real state of affairs and therefore, the question of having entertained a dishonest intention at the very inception of transaction by the accused cannot be believed and accepted. Learned Senior Advocate submitted that

the *prima facie* consideration of the material on record would show that the dispute between the accused and the informant is of civil nature. Learned Senior Advocate pointed out that in order to seek redressal of dispute, the informant-company has filed a civil suit against the accused for damages. Learned Senior Advocate submitted that simultaneously this criminal proceeding has been initiated just to harass and pressurize the accused to succumb to the proposals of the informant. Learned Senior Advocate pointed out that the civil dispute is tried to be given the colour of criminal offence. In the submission of learned Senior Advocate, the offence has not at all been made out on the basis of the facts and evidence. Learned Senior Advocate further submitted that since the civil suit has reached the stage of final adjudication, it would be necessary to keep this proceeding in abeyance till the decision of the civil suit. Learned Senior Advocate submitted that the material on record is not sufficient to *prima facie* establish the commission of offence of cheating by the accused and as such not sufficient to frame the charge against the accused. Learned Senior Advocate submitted that this criminal prosecution is the abuse of the process of law and therefore, the accused is required to be discharged. Learned Senior Advocate took me through the order passed by the learned Magistrate First Class, Tirora and submitted that all these facts

have not been properly appreciated and considered by the learned Magistrate.

10] Learned advocate for the informant submitted that after registration of the FIR, the investigation conducted by the police revealed the complicity of the accused in the commission of crime. Learned advocate submitted that the accused conveniently concealed the facts within his knowledge with regard to setting aside of the auction sale and recovery certificate by the Debt Recovery Tribunal, New Delhi and the confirmation of the said order by the Delhi High Court. Learned advocate submitted that when the first lease deed was executed by the accused, the Special Leave Petition was pending in the Apex Court, where the order passed by the Delhi High Court was challenged. Learned advocate pointed out that this fact was also not made known to the informant. Learned advocate, therefore, submitted that the accused concealed the material fact from the informant with an intention to deceive and cheat the informant. Learned advocate submitted that this intention of the accused to cheat the informant at the very beginning of transaction can be gathered from the facts, circumstances and material brought on record. Learned advocate submitted that the facts stated in the FIR would *prima facie*

establish the basic ingredients of the offence of cheating punishable under Section 420 of the IPC. Learned advocate submitted that the dispute between the parties cannot be termed as a civil dispute simply because of the recourse taken by the informant to the remedy under the civil law. Learned advocate submitted that the facts and the evidence clearly satisfy the ingredients of offence of cheating. Learned advocate further submitted that at the stage of framing of charge or while deciding the discharge application, the Court has to sift the material for limited purpose of finding out whether the same is sufficient to presume the commission of offence by the accused. In the submission of the learned advocate, the material on record is sufficient to satisfy this fundamental requirement of law. Learned advocate further submitted that initiation of civil proceeding in Civil Court cannot be a bar for initiation and continuation of the criminal prosecution, if the facts and evidence clearly indicate the commission of an offence.

11] Learned Additional Public Prosecutor for the State adopted the submissions advanced by the learned advocate for the informant. Besides, learned Additional Public Prosecutor submitted that the material on record is sufficient to frame the charge against the accused for the offence punishable under

Section 420 of the IPC. Learned Additional Public Prosecutor submitted that the scope of enquiry at the stage of hearing the discharge application is very limited. Learned Additional Public Prosecutor submitted that the right to initiate a civil proceeding and right to launch prosecution for commission of an offence are two distinct and separate aspects. Learned Additional Public Prosecutor submitted that in the facts and circumstances, in case of commission of criminal offence by the accused, the informant can take recourse to the remedy provided under the civil law. It is submitted that the recourse taken to this remedy under civil law cannot bar the informant from reporting the criminal offence to the police and further prosecution on the basis of the *prima facie* evidence of the commission of the offence.

12] In order to appreciate the rival submissions, at the outset, it would be necessary to set out the certain undisputed facts, which in my view would be relevant for deciding the dispute in this application. The informant purchased the property in an auction sale. On 6th August, 2008, the recovery certificate was issued to him by the Recovery Officer, as per the order of the Debt Recovery Tribunal. The auction sale and issuance of recovery certificate to the accused was challenged before the Debt Recovery Tribunal-II,

New Delhi. On 6th October, 2008, the Debt Recovery Tribunal-II, New Delhi set aside the auction sale and the recovery certificate issued to the accused. The accused challenged the said order in appeal before the Debt Recovery Appellate Tribunal, New Delhi. On 9th June, 2009, the appeal came to be dismissed. The accused challenged the said order by filing writ petition in the Delhi High Court. The Delhi High Court on 4th May, 2010 dismissed the writ petition. The accused approached the Hon'ble Apex Court by filing Special Leave Petition. The Special Leave Petition came to be dismissed on 27th September, 2010.

13] The lease agreement was executed by the accused in favour of the informant on 1st August, 2010. On the date of execution of lease agreement by the accused, the Special Leave Petition was pending before the Supreme Court. It is to be noted that on the date of execution of lease deed, the order passed by the Debt Recovery Tribunal-II setting aside the auction sale and recovery certificate was confirmed and maintained by the Delhi High Court by order dated 4th May, 2010. It is to be noted that the informant was not a party to the said proceeding. Similarly, the informant was not privy to the said proceeding in any manner. If both the parties had knowledge of the above facts, then they were

expected to make a reference in the lease deed of the order passed by the Delhi High Court. It is to be noted that, if the accused had brought the said fact to the notice of the informant, the informant would have two options. The first option with the informant was to make a mention of this fact in the lease agreement and make the lease agreement conditional subject to the outcome of the Special Leave Petition, pending before the Hon'ble Supreme Court. The second option with the informant was to back out from the transaction and not to take the risk. If the accused had made the informant aware of the actual factual position, then the accused would have insisted for inserting a clause in the lease deed, to save and safeguard his interest.

14] It is to be noted that in the facts and circumstances, the accused had no right to execute a lease deed in favour of the informant in respect of the property. The auction sale and recovery certificate issued to the accused was already set aside. The possession of the property after recovery certificate was not handed over to the accused. It is to be noted that by deeming legal fiction on the basis of recovery certificate, the auction purchaser would not get a symbolic possession of the property. There is specific provision under law that after auction sale, recovery certificate has

to be issued. The amount has to be deposited by the auction purchaser. After satisfying all the requirements, the Recovery Officer is required to handover the actual possession of the property to the purchaser.

15] In this case, indubitably the actual possession of the property was not handed over to the accused. The material on record clearly indicates that on the basis of the recovery certificate, the accused represented the informant that he had taken the possession of the property. Perusal of the lease deed would show that there is a clause with regard to the handing over of the actual possession to the informant by the accused. It is, therefore, apparent on the face of the record that on the date of the lease deed, the right in the property was not vested in the accused. He was not entitled to deal with and dispose of the property in any manner. The disposal of the property in this manner by the accused was contrary to the law.

16] As far as the informant is concerned, it is contended that the informant was deceived with dishonest and fraudulent intention to enter into a transaction and take the possession of the property. It is true that the informant-company is manned by experts. It was, therefore, expected on their part to make an

enquiry as to the clear title of the property. However, a person having purchased the property in an auction sale and armed with a recovery certificate was expected to know the real state of affairs. After auction sale and recovery certificate, one can be made to believe that the said person has acquired the right in the property.

17] In this case, the accused is not justified in raising the defence on the above line at this stage. Such defence in support of his prayer seeking discharge would have been considered at this stage, if he had entered into a transaction with the informant after taking actual possession of the property on the basis of the recovery certificate. It is seen that this case is not as simple as sought to be made out. In this case, the auction sale and the recovery certificate was set aside by the Debt Recovery Tribunal. The said order was confirmed by the Delhi High Court. While deciding the role of the informant in this situation, in the facts and circumstances, it has to be presumed that, if the informant had been made aware of setting aside of auction sale and recovery certificate, the informant would not have entered into any agreement or transaction in respect of the said property with the accused. A person of ordinary prudence in the fact situation would not have taken such a risk. In my view, all the abovestated facts cannot be glossed over, while appreciating

the submissions advanced by the learned advocate for the parties.

18] It is to be noted that after FIR, the investigation was conducted. The investigation revealed the complicity of the accused in the commission of crime. The main evidence relied upon is in the form of documents. It is true that the informant-company has filed a civil suit for recovery of damages against the accused. In the discharge application, it has been stated that there is no iota of material to make out the offence of cheating by the accused and as such to frame the charge against him. Learned Senior Advocate for the accused took me through the record and tried to convince me that there is no material or the available material on record is not sufficient to frame the charge against the accused. It is to be noted that the only question needs to be addressed in the teeth of the above undisputed facts and material, is to ascertain the intention of the accused, when he entered into a lease agreement with the informant. The facts, circumstances and material on record *prima facie* indicate that the accused at the very inception of the transaction knew the real state of affairs. Therefore, the material on record is sufficient to infer the intention of the accused to deceive the informant at the very inception of the transaction. There is material on record to support this inference at

this stage. The material is sufficient to presume the commission of an offence by the accused. In the teeth of this settled position in the law as to the scope of enquiry at the stage of framing of charge or at the stage of deciding the application for discharge needs to be considered.

19] In this context, a useful reference can be made to the decisions of the Hon'ble Apex Court in the cases of *Tarun Jit Tejpal Vs. State of Goa and Another* [(2020) 17 SCC 556] ; *Niranjan Singh Karam Singh Punjabi, Advocate Vs. Jitendra Bhimraj Bijjaya and Others* [(1990) 4 SCC 76] and *Sajjan Kumar Vs. Central Bureau of Investigation* [(2010) 9 SCC 368], wherein it has been held that appreciation of evidence at the time of framing of the charge or while considering discharge application, is not permissible. The Court is not permitted to analyse all the material touching the *pros* and *cons*, reliability and acceptability of the evidence. In the case of *Tarun Jit Tejpal* (supra), it is held that at the time of consideration of the application for discharge, the Court cannot act as a mouth piece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is held that at the stage of consideration of application

for discharge, the Court has to proceed with an assumption that the materials brought on record by prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offences. At this stage, the Court is not expected to go deep into the matter and hold that materials would not warrant a conviction. It is held that what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting accused has been made out. It is further held that the law does not permit a mini trial at the stage of deciding the discharge application or at the time of framing of charge.

20] In this case, on sifting and analysing the material on record, I am of the view that it is sufficient to presume the commission of the offence by the accused. If the material is appreciated contrary to the settled position of law, then it would amount to conducting a mini trial at the stage of framing of charge or while deciding the discharge application. The case on hand does not fall within the permissible parameters of law to discharge the accused.

21] In the above background, it would be necessary to consider the decisions relied upon by the learned advocates for the parties. Mr. R.L. Khapre, learned Senior Advocate for the accused, relying upon the decisions in the cases of *B. Suresh Yadav Vs. Sharifa Bee and Anr. [AIR 2008 SC 210]* and *Laxman Vithoba Jadhav and Others Vs. State of Maharashtra and Others [2016 (1) Bom.C.R. (Cri.) 167]*, submitted that one parallel proceeding is pending before the Civil Court and Civil Court is yet to adjudicate on the issue. The complainant should not be allowed to use the criminal justice system. In the case of *B. Suresh Yadav* (supra), the civil suit was pending regarding the same subject matter. The plea taken by the contesting party was found inconsistent. The Hon'ble Supreme Court, therefore, held that in such a case, such a proceeding cannot be turned into a criminal case.

22] Learned advocate for the informant in order to meet this submission has placed heavy reliance on the decision in the case of *M.S. Sheriff, P.C. Damodaran Nair Vs. State of Madras, M. Govindan, Damodaran [AIR 1954 SC 397]*. In this case, in respect of the same subject-matter, there was a civil as well as a criminal proceeding. The facts giving rise to the proceedings were identical. The question before Five Judge Bench of the Hon'ble Apex Court

was as to whether the civil matter or the criminal matter deserves precedence in such a situation. The Hon'ble Apex Court has held that as between the civil and criminal proceedings, the criminal matter should be given precedence. It is further observed that a civil suit often drags on for years and therefore, it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. It is further observed that another reason for such a course of action is that it is undesirable to let things slide till memories have grown too dim to trust. It is to be noted that in the backdrop of this principle of law laid down by the Hon'ble Apex Court and distinguishing facts of this case, the decisions relied upon by the learned Senior Advocate for the accused are not applicable in this case. It is to be noted that on the basis of same set of facts, the criminal offence as well as the right to take recourse to the remedy by filing a civil suit may accrue to the party. The law does not provide that simply because of the availability of the remedy under civil law the criminal offence made out on the basis of the same facts, would get vanished.

23] Learned Senior Advocate for the accused in support of his submission that the basic ingredients of Section 420 of the IPC and particularly the ingredients of wrongful loss, have not been satisfied in this case and therefore, the accused is entitled to be discharged and further that the dispute between the parties is a plain and simple breach of contract and therefore, cannot be permitted to be taken to the criminal Court, has relied upon the decisions in the cases of *Vijay Kumar Ghai and Others Vs. State of West Bengal and Others [(2022) 7 SCC 124]* ; *Merino Leathers Pvt. Ltd. and Another Vs. Wentzel and Schmit Gmbh and Another [2004(1) Mh.L.J. 66]* and *Dalip Kaur and Ors. Vs. Jagnar Singh and Anr. [AIR 2009 SC 3191]*.

24] Learned advocate for the informant in order to meet this submission has relied upon the decisions in the cases of *M. Krishnan Vs. Vijay Singh and Another [AIR 2001 SC 3014]* ; *Tamil Nadu Mercantile Bank Ltd. Vs. State through Deputy Superintendent of Police and Anr. [AIR 2014 SC (Supp) 555]* and *Vijayander Kumar and Ors. Vs. State of Rajasthan and Anr. [AIR 2014 SC (Supp) 1319]*.

25] I have perused the decisions relied upon by the learned advocates for the parties. The legal position culled out from the

decisions needs to be stated. It is held that wrongful loss and wrongful gain are essential elements to attract the offence under Section 420 of the IPC alongwith the cogent evidence to show that at the very inception of the transaction, the intention of the accused was dishonest and fraudulent. The civil dispute arising out breach of contract cannot be given a colour of criminal offence. The fraudulent intention at the time of making promise or representation is necessary to constitute an offence. It is further held that in all cases of cheating and fraud, in the whole transaction, there is generally some element of civil nature. It is held that the criminal prosecution cannot be quashed only because the other side has filed a civil suit with respect to the same transaction. It is held that the criminal proceedings can continue on same set of facts even if the facts discloses the civil dispute as well. The availability of civil remedy cannot be a ground to quash a criminal proceeding.

26] In my view, in this case for the reasons recorded hereinabove, the decisions relied upon by the learned Senior Advocate for the accused would not be applicable. I have already considered the undisputed facts and the material on record. The material on record would *prima facie* show that at the very

inception of the transaction, the intention of the accused was dishonest and fraudulent. He knew the real state of affairs. He was made aware by the judicial pronouncements that he was not entitled to claim the right in the said property. There is no material at this stage to conclude that he had made the informant aware of all these facts before executing the lease deed. The intention of the party has to be ascertained on the basis of the facts and circumstances obtained on the record. The Court for the purpose of ascertaining the intention of the party has to take the material in entirety into consideration and form an opinion. The Court within permitted limits on the basis of the *prima facie* material and undisputed facts can draw inference as to the intention of the accused.

27] In this case, the accused transferred the interest in the property in favour of the informant knowing fully well that he had no right in the property. On the date of the transaction, he knew that the very auction sale and the recovery certificate on the basis of which he claimed the right in the property, was set aside. The order of Debt Recovery Tribunal setting aside the auction sale and the recovery certificate was confirmed by the Delhi High Court. The accused was, therefore, not entitled to dispose of the property.

In the fact situation, he would not have transferred the property to anybody including the informant. In my view, if the matter is considered in the backdrop and conspectus of the facts and evidence on record, it would show that the learned Magistrate was right in rejecting the application.

28] I, therefore, conclude that there is no substance in the application. It cannot be said that the criminal prosecution launched against the accused, is misuse of the process of the law. The application being devoid of merits deserves to be dismissed.

29] It is made clear that the observations made in this judgment are for the purpose of deciding this application and therefore, the trial Court, while deciding the matter on merits, shall not get influenced by the same in any manner.

30] Accordingly, the application is **dismissed**.

(G. A. SANAP, J.)