

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

CRIMINAL WRIT PETITION NO. 781 OF 2011

Smt. Sudha Banarasilal Sharma
Age : 59 years, Occ – Housewife,
Residing at 294, A-12, Blue Diamond
View Co-op. Hsg. Society,
Near Diamond Garden Chembur,
Mumbai 400 071.

.... Petitioner

v/s.

1) The State of Maharashtra
Through Senior Inspector of
Police, Chembur Police Station,
Chembur, Mumbai and anr.

2) K.P. Shankaran Nair
Age 83 years, Occ: Business,
Carrying business at Plot 294,
Flat No.A/11, Blue Diamond View
Co-op. Hsg. Society, Near Diamond
Garden, Chembur, Mumbai – 400 071.
Resi. At. Bungalow No.22,
Basant Garden Bungalow Co-op.
Housing Society Ltd., Near Atur Park,
V.N. Purav Marg, Chembur, Mumbai – 71.

.... Respondents

Mr. Pritam P. Runwal a/w. Mr. Anil B. Khopde for the Petitioner.
Mrs. A.A. Takalkar, APP for the State.

**CORAM: A.S. GADKARI AND
SHYAM C. CHANDAK, JJ.**

**RESERVED ON : 15th JANUARY, 2024.
PRONOUNCED ON : 28th FEBRUARY, 2024**

JUDGMENT [PER: SHYAM C. CHANDAK, J.] :-

1) Present Petition filed under Article 226 of the Constitution of India read with section 482 of the Criminal Procedure Code, is seeking to quash

C.R.No.356/2010 registered with Chembur Police Station, Mumbai and C.C.No.394/PW/12 arising out of the said crime, now pending before the learned Metropolitan Magistrate, 11th Court, Kurla, Mumbai, for the offences punishable under sections 465, 467, 471, 420 and 120-B of I.P.C.

2) Heard Mr. Pritam Runwal, learned advocate for the Petitioner and Mrs. A.A. Takalkar, learned APP for the State.

3) Record indicates that, by an Order dated 15th February 2012, Rule was issued. Mr. B.M. Ganu, learned Advocate for the Respondent No.2 had waived service at that time. However, none appeared for the Respondent No.2 when the Petition was taken up for hearing.

4) The impugned F.I.R. has been registered on the report of the Respondent No.2 wherein, in short it is narrated as under :-

4.1) That, since long the Respondent No.2 has been residing in flat No.11, in the Society stated in his address in the cause title. The Petitioner has been also residing there in flat No.12. In the year 1998, the said Society members purchase the balance F.S.I. and T.D.R. of the Society and constructed 23 flats there. As pre-decided, the additional 23 flats were to be allotted amongst the existing members of the said Society and not be sold to any outsider or non member thereof. The said 23 flats were to be allotted to the members as per the square feet area (size) of their present flat. It is alleged that, F.S.I. Committee of the following was constituted to construct the additional 23 flats : (1) Mr. Shirish Shah, (2) Smt. Sudha Sharma (Petitioner herein), (3)

Smt. Geeta Manchandani, (4) Mr. Tushar Shah and (5) K.P.S. Nair i.e., Respondent No.2. Mr. Shirish Shah was Chairman of the F.S.I. Committee even though he was not member of the Society. That, the F.S.I. Committee had the right to decide the area to be allotted to the member willing to buy flat/s in the 23 flats to be constructed and accordingly, the willing member was to pay for the construction and other expenses.

4.2) That, in view of the above, separate Letter of Intent / Undertaking was taken from the members willing to purchase a flat/s in the said 23 flats. On 4th September 1998, 16 members of the Society gave their separate Letter of Intent/Undertaking on a stamp paper of Rs.20/-. That, Respondent No.2 undertook to take/purchase flat No.42, admeasuring 952 Sq. feet, situated on the 4th Floor in the proposed 23 flats, which was in front of his flat No.11 and paid for it total Rs.13,94,000/- as decided by the F.S.I. committee. That, the said Letter of Intent/Undertaking was duly signed by the Respondent No.2, his son Suresh and daughter Sheela and it was handed over to the F.S.I. Committee. That, similar type of Letter of Intent / Undertaking was given by the Petitioner and the other willing members.

4.3) It is alleged that, the Respondent No.2 thereafter went to America for 8 months, however, during his absence, his Letter of Intent/Undertaking was altered behind his back i.e., his choice of flat No.42 in the said 23 flats to be constructed was changed to flat No.12 at the relevant places and the original 4th floor (of flat No.42) was erased/changed to read as 1st floor (for flat No.12).

Thus, by way of said alterations, the Society was shown that, flat No.12 originally owned by the Petitioner, was given to Respondent No.2 exchanging it with flat No.42 by mutual consent of both.

4.4) It is further alleged that, on 6th July, 2000 the Petitioner asked for a NOC from the Society to mortgage her flat No.12 for obtaining loan from certain Bank. On 8th July 2000, the Society gave the NOC. That, out of the said 23 flats, flat Nos.41 and 43 were allotted to the Petitioner as the same were in front of her existing flat No.12. That, the said flat Nos.41, 42 and 43 are in 'A' Wing and if flat No.42 is allotted to the Petitioner, the said entire floor (in 'A' Wing) would go to the Petitioner, therefore, the Petitioner, tampered with and changed the allotment of flat No.42 to flat No.12 in the Letter of Intent/Undertaking of the Respondent No.2, to wrongfully gain an extra area in flat No.42 (as it is bigger in size than flat No.12). Thus, the Petitioner cheated the Respondent No.2. That, the said forgery and cheating revealed to the Respondent No.2 in the year 2005. Meanwhile, the Petitioner started litigating before the Co-operative Court, therefore, and being guided late, there is delay in lodging the F.I.R.

5) During the pendency of the Petition, the police completed the investigation and submitted the charge-sheet but only against the Petitioner and not against the others named in the F.I.R. Hence, necessary amendment has been carried out.

6) Learned counsel for the Petitioner submitted that, the Petitioner has

filed a case bearing No.CC/I/194 of 2002 before the Co-operative Court, at Mumbai, against cancellation of allotment of the same flat No.42 by the Society. Initially, only Society was the opponent in the said case. By an Order dated 3rd August 2002, the Co-operative Court directed the Petitioner to deposit certain amount for the said flat. The said Order was appealed against by the Petitioner and the Society *i.e.* A.O.Nos.249/2002 and 266/2002 respectively. Said Appeals were decided by the Maharashtra State Co-operative Appellate Court, Mumbai by its common Order dated 24th March 2003, whereby the Petitioner was directed to deposit certain amount and the Society was directed not to allot the flat No.42 to any member other than the Petitioner.

6.1) However, the Order dated 24th March 2003 was set-aside by a common Order dated 22nd June 2004, passed by learned Single Judge of this Court, in Writ Petition No.789 of 2004 and Writ Petition No.3261 of 2003 filed by the Respondent No.2 and the Petitioner, and it was directed that, A.O.Nos.249/2002 and 266/2002 be heard afresh by impleading the Respondent No.2 as party therein and in the case No.CC/I/194 of 2002. Thereafter, the Maharashtra State Co-operative Appellate Court, Mumbai heard the said Appeals and decided the same by its common Order dated 22nd September 2004, wherein the Appellate Court held that, the Petitioner *prima facie* proved that flat nos.41, 42 and 43 were allotted to her. This finding came in favour of the Petitioner because there was mutual agreement/understanding between the Petitioner and the Respondent No.2 to allot flat no.42 to the

Petitioner. However, the Respondent No.2 lodged a false report, against the Petitioner and others, that too after a lapse of 10 years with mischievous intent despite the fact that there was no forgery, cheating, etc. in respect of the Letter of Intent of the Respondent No.2. Hence, the impugned F.I.R. be quashed.

7) In contrast, learned APP has submitted that, there is *prima facie* case against the Petitioner of having committed the alleged offence of cheating, forgery, etc., as alleged in the F.I.R., hence the Petition may be dismissed.

8) The record indicates that, after registration of the impugned F.I.R., the Investigation Officer recorded the statement of witnesses and referred the disputed document/s i.e. Letter of Intent/Undertaking given by Respondent No.2 for examination by the Handwriting Expert. The Handwriting Expert's Report claims that, there is tampering with the Letter of Intent of the Respondent No.2 by substituting the original flat no.42 with flat no.12 and the 4th floor with 1st floor on the page 1 thereof. Thus, according to the police, there is *prima facie* case against the Petitioner of having committed the offence of forgery, cheating etc., as alleged. Therefore, police filed the charge-sheet against her. There is nothing on record to take an exception to that.

9) The Petitioner herself has initiated the case No.CC/I/194 of 2002. The Order dated 22nd September 2004, passed by the Maharashtra State Co-operative Appellate Court, Mumbai, is an interim Order meaning thereby it is not passed after hearing the merits of the case finally. Therefore, it is for the Petitioner to prove before the Co-operative Court that, the flat No.42 was in fact

allotted to her since beginning. At the same time, she has been prosecuted for the alleged forgery related to Letter of Intent/Undertaking given by the Respondent No.2, which was claiming contrary before the alleged forgery with it. As such, whether flat No.42 was allotted to the Petitioner or not is a question of fact to be decided by the Co-operative Court. Similarly, whether the Petitioner committed the forgery and cheating in respect of the Letter of Intent of the Respondent No.2, is also a question of fact to be adjudicated by the Court of the Metropolitan Magistrate.

10) Therefore, and considering the rival submission, the cases i.e. No.CC/I/194 of 2002 filed by the Petitioner and C.C.No.394/PW/12 filed against her are expected to be decided in the light the same pleadings, contentions, facts circumstances and the evidence that may be presented by the parties. The Handwriting Expert's opinion may be relevant in both the matters.

11) In the backdrop, to accept the contention of the Petitioner in this Petition that, the impugned F.I.R. is false and to exonerate her from prosecution in C.C.No.394/PW/12 or otherwise, this Court will have to undertake a mini trial. For that purpose, this Court will be required to draw certain inferences based on the oral submissions and the documents on record. It is trite law that, recourse to such a mini trail is not available to this Court while exercising the inherent powers in a Petition under Article 226 of the Constitution of India and/or in an Application under Section 482 of Cr.PC. Secondly, when the relevant issue is already pending for adjudication on merits before the Co-

operative Court, this Court cannot be in unison with the submissions made on behalf of the Petitioner as it would amount to recording a finding having binding effect in the case No.CC/I/194 of 2002 as well as in C.C.No.394/PW/12, without hearing the merits thereof. In other words, when the questions of facts are required to be decided by a Civil and Criminal Court, then it is not proper to decide those questions exercising powers under Article 226 of the Constitution of India.

12) In view thereof, the Petition is liable to be dismissed and is accordingly dismissed.

(SHYAM C. CHANDAK, J.)

(A.S. GADKARI, J.)

**PREETI
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JAYANI**

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