

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 1028 OF 2016

Premalatha Gopalakrishna Nayak And Ors ...Petitioners

Versus

The State Of Maharashtra And Anr ...Respondents

Mr. Raja Thakare Senior Advocate a/w Mr. Bharat Manghani i/by
Mr. A. M. Chinalkar Advocate for Petitioners.

None for Respondent No.2

Mr. Y. Y. Dabake, APP for Respondent-State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 4th JANUARY, 2024

P.C.:-

1. The petitioners have invoked the jurisdiction of this Court under Article 227 of the Constitution of India and inherent powers under Section 482 of Cr.P.C. challenging the Criminal Proceedings in RCC No.177 of 2016 and order issuing process dated 10th February 2016 passed by learned JMFC, Ulhasnagar for offences under Sections 406, 420 read with 34 of the Indian Penal Code, 1860.

2. Private complaint was filed by respondent No.2 before the Court of learned JMFC, Ulhasnagar on 28th November 2014. It is alleged that, the complainant had accepted proposal to develop the land at survey No.84 as per initiation shown by accused Nos. 1 to 3 and MOU dated 7th December 2012 was executed by giving earnest amount of Rs.10 lakhs to accused. The

complainant pursued the process for getting N.A. order from Revenue Authority. There was no co-operation from the accused. The complainant collected several documents and submitted the papers for getting title clearance of survey No.84 for getting N.A. permission. The accused with ill-intention credited Rs.10 lakhs to the account of complainant without following due process of law and issued notice to the complainant. Complaint was filed for offences under Sections 420, 341, 352, 403, 511, 406, 465, 506 read with 120-B of IPC.

3. Vide order dated 16th March 2015 passed by learned JMFC, Ulhasnagar, the police inspector of Badalapur Police Station was directed to investigate the matter under Section 202 of Cr.P.C. and submit the report. Issuance of process was postponed.

4. The Badlapur Police Station conducted investigation and submitted report dated 15th June 2015 to the Court.

5. The learned Magistrate passed order dated 8th December 2015 observing that the report filed by the Police under Section 202 of Cr.P.C. is perused. It is not supporting the application of applicant/complainant. Hence, complainant was directed to examine at least two witnesses in support of his application.

6. Complainant examined two witnesses. The learned Magistrate issued process against the accused by order dated 10th February 2016 for offences under Sections 406, 420 read with 34 of IPC.

7. The Respondent No.2 filed Special Civil Suit No. 304 of 2014 alongwith application for temporary injunction before Civil Judge Senior Division, Kalyan on 17th November 2014. The petitioners filed written statement and Affidavit in reply opposing injunction. Applications were rejected by order dated 17th November 2014 and 25th November 2014. Impugned complaint was filed on 28th November 2014.

8. Learned Senior Advocate Mr. Thakare submitted that, reading entire complaint as it is, no offences are made out under Section 406 and 420 of IPC. The dispute if any is purely of civil nature. The complainant had initiated civil proceedings. On failure to get relief before Civil Court, criminal complaint was filed to harass the petitioners and to pressurize them to submit to the demands of the complainant. The report under Section 202 of Cr.P.C. does not support the complaint. The complainant has admitted that, the amount of Rs. 10 lakhs which was parted to the accused on execution of MOU was returned to the complainant. Assuming that MOU was cancelled, it does not constitute offence of criminal breach of trust or cheating. The petitioners are joint owners of piece of land admeasuring 99 Guntas at Survey No. 84 located in Joveli Village, Badlapur. Learned Magistrate has issued the process mechanically and without application of mind.

9. The respondent No.2 has filed Affidavit in reply. None appeared for Respondent No.2 on 10th November 2023 and 15th October 2023. Vide

order dated 15th December 2023, petition was adjourned till today, as a last chance. None appears for respondent No.2 Perused reply filed by Respondent No.2.

10. From the tenor of the complaint, it is apparent that MOU dated 7th December 2022 was executed between accused and the complainant. The MOU mentioned that the petitioners/owners occupy and possess and own 'R' zone bearing survey No.84 admeasuring about '1 Hectare and 2 Prati' inclusive of 'Potkharaba" land alongwith other lands situated at village Joweli, Taluka Ambernath, Dist. Thane, comprising residential and green lands. The owners intend to develop the area falling under residential zone of Kulgaon-Badlapur area, roughly admeasuring about 30R actual area determined after survey and measurement. Developers will pay Rs.10 lakhs towards earnest money and part sale consideration in respect of said land by cheque dated 7th December 2012. The owners acknowledge receipt of the same. Clause (9) of MOU stipulates that if MOU is required to be cancelled on any grounds before execution and registration of development agreement, the owners shall refund the amount of Rs.10 lakhs received by them without interest against 'R' zone of survey No.84. The petitioner No.2 sent legal notice to respondent No.2 and cancelled the MOU and returned the earnest money of Rs. 10 lakhs. The learned Magistrate directed inquiry under Section 202 of Cr.P.C. Police submitted report. Police report does not support complaint.

11. The respondent No.2 had initiated civil proceedings. Special Civil Suit No. 304 of 2014 was filed before the Court of Joint Civil Judge Senior Division, Kalyan for specific performance of contract and perpetual injunction. The respondent No.2 filed application under Section 39 Rule 1 & 2 of Civil Procedure Code to restrain the defendants/accused from creating third party interest. The learned Civil Judge rejected the said application. While rejecting the said application, it was observed that, the plaintiffs/complainant have not disputed that the defendant No.1 by notice dated 4th November 2014 has cancelled the MOU and refunded the earnest amount. The plaintiffs have not disputed that the defendant No.1 has credited the earnest amount in their bank account. From the averments in plaint Court did not find that the defendants have done any act which will point out that they have made any attempt to create third party interest in the suit property. The defendants have not given possession of land to plaintiffs. The plaintiff have not filed prima facie evidence to show that they have took into possession of suit property.

12. The complaint does not make out any offence against the petitioners. The order issuing process was passed mechanically. The order does not indicate how the offence of cheating and breach of trust is made out. The amount of Rs.10 lakhs has been returned to complainant. It is in consonance with MOU executed between parties. The complainant has failed to get relief from Civil Court. There is no element of cheating or

criminal breach of trust. The order issuing process is bad in law. It would be an abuse of process of law to continue such process. Hence, the proceedings are required to be quashed.

ORDER

- (i) Criminal Writ Petition No. 1028 of 2016 is allowed.
- (ii) The order issuing process dated 10th February 2016 passed by learned JMFC, Ulhasnagar for offence under Sections 406, 420 read with 34 of Indian Penal Code, 1860 is quashed and set aside.
- (iii) Writ Petition stands disposed off.

(PRAKASH D. NAIK, J.)