



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.2739 OF 2023**

Swastik Developers and Ors.

... Petitioners

versus

The State of Maharashtra and Anr.

... Respondents

Mr. Niranjan Mundargi i/by Grishma Lad, Ms. Keral Mehta, Ms. Aishwarya Bapat, Ms. Shruti Mishra, for Petitioners.

Mrs. Geeta Mulekar, APP for State.

Mr. Aabad Ponda, Sr. Advocate with Mr. Rahul Moghe i/by Ms. Kalyani Rathod, for Respondent No.2.

CORAM: N.J.JAMADAR, J.

RESERVED ON : 6 FEBRUARY 2024

PRONOUNCED ON : 9 MAY 2024

ORDER :

1. Rule. Rule made returnable forthwith. With the consent of the learned Counsel for the parties, heard finally.

2. This Petition under Article 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (the Code) calls in question the legality, propriety and correctness of an order dated 22 February 2023, passed by the learned Metropolitan Magistrate, 28th Court, at Esplanade, Mumbai, in Complaint No.2800110 of 2022 of issue of process against the Petitioners-accused for the offences punishable under Sections 409 and 420 read with Section 34 of the Indian Penal Code.

3. Shorn of unnecessary details, the background facts leading to this

Petition can be summarized as under :

3.1 Khanna Rayon Industries Pvt. Ltd. - Respondent No.2 – complainant is a private limited company. The complainant owned parcels of land situated at Ghatkopar bearing Survey No.187 Hissa No.1 (part), 2 (part), 189, Hissa No.2 (part), 3 (part), 3A (part), 190, Hissa No.1 (part) and 2 (part), totally admeasuring 9971 square yards. The complainant had entered into a development agreement with M/s. Siddhivinayak Construction Company for development of five wings over the subject properties. M/s. Siddhivinayak Construction Company completed development of four wings and a portion of the 5th wing. Thus, under a subsequent Development Agreement dated 24 October 2011 and Deed of Addenda dated 13 October 2015, development rights were granted to M/s. Swastik Developers – Petitioner – accused No.1, a partnership firm in respect of the incomplete portion of the 5th wing (designated E-1 by the MCGM).

3.2 The genesis of the alleged offences is in the due performance of the terms of the development agreement and Deed of Addenda. At the heart of the dispute is the allotment of, and entitlement to, parking spaces in the basement (E-1), which was allegedly delivered to the Petitioners for development.

3.3 The complainant asserts, under the development agreement 2011 and the Deed of addenda, it was agreed by and between the parties that out of 18 car parking spaces in the basement of E-1 Wing, five car parking spaces admeasuring 1700

sq. ft. would be provided to the complainant. It is alleged, the accused dishonestly and fraudulently converted the basement of wing E-1 into a two wheeler parking without prior intimation to the complainant. Resultantly, the complainant was deprived of the five car parking spaces agreed to be delivered under the Development Agreement 2011 and the Deed of Addenda.

3.4 The complainant alleged, the accused was under an obligation to handover the possession of the basement to the complainant, in the event it was not possible to provide parking spaces. However, the accused fraudulently converted the basement area, to which the complainant was lawfully entitled to, into two wheeler parking spaces, and, thereby obtained the occupation certificate, and, thus, committed cheating and criminal breach of trust.

3.5 The complainant lodged a report with the jurisdictional police under Section 154(1) of the Code. The police declined to register the FIR as the dispute was of civil nature. A report lodged with the Deputy Commissioner of Police under Section 154(2) of the Code, also did not yield desired result. Thereafter, the complainant filed a complaint before the learned Magistrate seeking a direction for investigation under Section 156(3) of the Code. By an order dated 22 February 2022, the learned Metropolitan Magistrate declined to direct the police to carry out investigating under Section 156(3) of the Code. Instead, the complainant was directed to examine himself under Section 200 of the Code. Post examination of the

complainant under Section 200 of the Code and consideration of the material on record, the learned Metropolitan Magistrate found that a prima facie case of cheating and criminal breach of trust was made out. Hence, process was issued under Section 409 and 420 read with Section 34 of IPC.

3.6 Being aggrieved, the Petitioners/accused have approached this Court.

4. The Petitioners aver, the learned Metropolitan Magistrate committed manifest error in holding that a prima facie case for the offences punishable under Sections 409, 420 read with 34 of the Indian Penal Code, was made out, as the dispute is primarily of civil nature arising out of a contractual obligation. There is no element of criminality of whatsoever nature. Neither the ingredients of cheating, nor criminal breach of trust, were prima facie made out. The obligation of the accused to provide five parking spaces in the basement to the complainant was expressly contingent upon such provision being feasible. There are reports which indicate that it was not possible to extend the basement under Wing E-1 to provide for the parking spaces without following necessary IS code and fire fighting requirements. Therefore, the inability of the accused to allot parking spaces to the complainant, can by no stretch of imagination, be given a cloak of criminal offences. Thus, the instant prosecution constitutes a gross abuse of the process of law.

5. An affidavit in reply is filed on behalf of the Respondent No.2. The allegations in the complaint of dishonest and fraudulent conversion of the basement

into two wheeler parking spaces have been reiterated. It would be contextually relevant to note that the complainant instituted a suit being Commercial Suit No.316 of 2020 seeking, inter alia, performance of the obligation by the accused under the development agreement and Deed of Addenda. A decree for specific performance of the contract to allot five parking spaces was sought, and, in the alternative, the accused-Defendants be directed to pay to the complainant a sum of Rs.2 Crores along with interest @ 24% p.a.. In the said suit, on 24 February 2020, consent terms were entered into between the complainant and accused.

6. Consent Minutes of Order, inter alia, reads as under :

“1.To resolve the issue of feasibility of extension of the basement under Wing “E” (now re-numbered as Wing E-1); the parties hereto agree, confirm and undertake that M/s. Vora and Associates – R.C.C. Structural and Engineers of Wing A to E-1 and recommended by the Plaintiff shall within a period of four weeks from the date hereto submits its Report as per IS Code and Rules, regulations and specification of RCC and fire at the time fo Deed of Addenda dated 13 October 2015 and as of today; in triplicate in a sealed envelope to this Hon’ble Court as to whether basement under Wing “E” (now re-numbered as Wing E-1) could have been / can be structurally further extended as per the plans which were last sanctioned on 1st September 2015 prior to the Deed of Addenda dated 13th October 2015.

2. The feasibility report of M/s. Vora & Associates – R.C.C. Structural Engineers shall be final, binding and conclusive on the parties and neither of the parties shall be entitled to challenge the same.”

7. It may be apposite to note that M/s. Vora and Associates, Consultants, submitted a report as under :

“For reasons best known basement beyond building line of wing E was not constructed though plans furnished and no provision to construct in future is provided.

Now it is proposed to provide the Basement connecting to the existing building forming a part of the existing building with excess and continuity to the existing building.

The said proposed extension has to comply / cater to the present IS Code and the present Fire fighting requirements and Regulations.

Looking at all the technical aspects we are of the opinion that it is not recommended to provide the said proposed basement connecting to the existing building constructed in 1995 and forming a part of the existing building complying to the present Codes and Fire Fighting requirements.”

8. At this juncture, reference to Clause 5 of the Deed of Addenda would be necessary. It reads as under :

“5. It is agreed and recorded by and between the Owner and the Developers hereto that Owner are entitled to the car parking spaces in the basement 1 and 2 in the building known as “Gold Crest” and in basement No.1 under Wing E-1 (to be constructed subject to the feasibility report by the Consultants) on pro-rata basis in small, big, stack on each basement level as set out in the Schedule annexed hereto and marked as “ANNEXURE-E” and the Developers are entitled to the car parking spaces in the basement Nos.1 and 2 in the building known as “Gold Crest” and in basement No.1 under Wing E-1 (to be constructed subject to the feasibility report by the consultants) on pro rata basis in single parking under Wing E-1 as set out in Schedule annexed hereto and marked as “ANNEXURE-F”. It is agreed and recorded by and between the Owner and the Developers that the owner and the Developer shall be entitled to grant concession for parking to their respective purchasers.”

9. Annexure E to the Deed of Addenda, inter alia, includes parking spaces

reserved for purchasers of Wings from Khanna Rayon in basement No.1 (E-1). A bare perusal of Clause 5 of the Deed of Addenda, extracted above, would indicate that the parties were fully cognizant of the fact that the car parking spaces to be provided in basement No.1 under E-1, were dependent upon its feasibility. The said fact is underscored by adding a qualification at two places in clause 5 to the effect that “parking spaces to be constructed subject to the feasibility report by the consultants”. In the consent minutes, the parties had agreed that the feasibility report of M/s. Vora and Associates shall be final, binding and conclusive on the parties, and neither of the parties shall be entitled to challenge the same. The report submitted by Vora and Associates, Structural Engineers, pursuant to the consent minutes is required to be appreciated in the aforesaid backdrop.

10. M/s. Vora and Associates opined that looking at all the technical aspects, it was not feasible to provide the proposed basement connecting to the existing building constructed in 1995 and forming part of the existing building, due to the present IS Code and fire fighting requirements. At this stage, in view of the clear opinion of Vora and Associates, which the parties agreed to be bound by, that the provision for extension of basement and parking spaces was not technically feasible, the question that comes to the fore is, if the provision for parking spaces is not feasible, how are the rights of the parties to be governed ?

11. In the context of the instant proceedings, the pivotal question would be

whether the failure to make a provision and use of the existing basement E-1 for two wheeler parking involves an element of criminality ? The learned Magistrate was of the view that the offences punishable under Sections 409 and 420 of the Indian Penal Code, were prima facie made out. I am afraid, in the facts of the case, such an inference is not sustainable, even if the allegations in the complaint are taken at par.

12. Evidently, the liability to provide the parking spaces was contingent upon its feasibility. There is an opinion of the competent architect that extension of the basement and consequential provision for additional parking spaces was not feasible. At best, it appears to be a case of failure on the part of the Petitioners to perform the contract, which was to the knowledge of the parties contingent upon the feasibility of the things to be performed.

13. The offence of cheating involves deceit coupled with an injury. The intention of the person accused of having committed cheating ought to be dishonest since the inception of the transaction. A mere failure to perform a promise, in itself, does not amount to cheating. The accused must have deceived the victim and, thereby fraudulently or dishonestly induced that person to deliver any property or to consent that any person shall retain any property or intentionally induced the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived and such act or omission causes or is likely to cause damage or harm to that person. Fraudulent or dishonest inducement is the linchpin of the offence of cheating.

14. In the case of Vijay Kumar Ghai and Ors. V/s. State of West Bengal and Ors.¹, the Supreme Court elucidated the ingredients of the offence of cheating as under :

“31. Section 415 of Indian Penal Code define cheating which reads as under:

415. Cheating. --Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

The essential ingredients of the offence of cheating are :

1. Deception of any person.

2. (a) Fraudulently or dishonestly inducing that person-

(i) to deliver any property to any person: or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

32. A fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.

33. Section 420 Indian Penal Code defines cheating and dishonestly inducing delivery of property which reads as under :

420. Cheating and dishonestly inducing delivery of property.-- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and

1 (2022) 7 SCC 124

which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

34. Section 420 Indian Penal Code is a serious form of cheating that includes inducement (to lead or move someone to happen) in terms of delivery of property as well as valuable securities. This Section is also applicable to matters where the destruction of the property is caused by the way of cheating or inducement. Punishment for cheating is provided under this Section which may extend to 7 years and also makes the person liable to fine.

35. To establish the offence of Cheating in inducing the delivery of property, the following ingredients need to be proved :

- (i). The representation made by the person was false.
- (ii). The Accused had prior knowledge that the representation he made was false.
- (iii). The Accused made false representation with dishonest intention in order to deceive the person to whom it was made.
- (iv). The act where the Accused induced the person to deliver the property or to perform or to abstain from any act which the person would have not done or had otherwise committed.

36. As observed and held by this Court in the case of **Prof. R.K. Vijayasathya and Anr. v. Sudha Seetharam and Anr.**², the ingredients to constitute an offence Under Section 420 are as follows :

- i) a person must commit the offence of cheating Under Section 415; and
- ii) the person cheated must be dishonestly induced to;
 - a) deliver property to any person; or
 - b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. Thus, cheating is an essential ingredient for an act to constitute an offence Under Section 420 Indian Penal Code.”

2 (2019) 16 SCC 739

15. A reference can also be made to a recent pronouncement in the case of

Mariam Fasihuddin and Anr. V/s. State by Abdugodi Police Station and Anr.³

wherein the Supreme Court again postulated the ingredients of the offence of cheating punishable under Section 420, as under :

“22. Section 420 IPC provides that whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy, the whole or any part of valuable security, or anything, which is signed or sealed, and which is capable of being converted into a valuable security, shall be liable to be punished for a term which may extend to seven years and shall also be liable to fine. Further, Section 415 IPC distinctly defines the term 'cheating'. The provision elucidates that an act marked by fraudulent or dishonest intentions will be categorised as 'cheating' if it is intended to induce the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, causing damage or harm to that person.

23. It is thus paramount that in order to attract the provisions of Section 420 IPC, the prosecution has to not only prove that the accused has cheated someone but also that by doing so, he has dishonestly induced the person who is cheated to deliver property. There are, thus, three components of this offence, i.e., (i) the deception of any person, (ii) fraudulently or dishonestly inducing that person to deliver any property to any person, and (iii) mens rea or dishonest intention of the accused at the time of making the inducement. There is no gainsaid that for the offence of cheating, fraudulent and dishonest intention must exist from the inception when the promise or representation was made.

24. It is well known that every deceitful act is not unlawful, just as not every unlawful act is deceitful. Some acts may be termed both as

3 2024 SCC Online SC 58

unlawful as well as deceitful, and such acts alone will fall within the purview of Section 420 IPC. It must also be understood that a statement of fact is deemed 'deceitful' when it is false, and is knowingly or recklessly made with the intent that it shall be acted upon by another person, resulting in damage or loss.² 'Cheating' therefore, generally involves a preceding deceitful act that dishonestly induces a person to deliver any property or any part of a valuable security, prompting the induced person to undertake the said act, which they would not have done but for the inducement.

25. The term 'property' employed in Section 420 IPC has a well defined connotation. Every species of valuable right or interest that is subject to ownership and has an exchangeable value - is ordinarily understood as 'property'. It also describes one's exclusive right to possess, use and dispose of a thing. The IPC itself defines the term 'moveable property' as, "intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth." Whereas immoveable property is generally understood to mean land, benefits arising out of land and things attached or permanently fastened to the earth."

16. In the case of **V.Y. Jose V/s. State of Gujarat**⁴, the Supreme Court emphasised that the distinction between mere breach of contract and the offence of cheating should be borne in mind. The observations in paragraphs 18 to 20 are instructive, and, hence, extracted below :

"18. A matter which essentially involves dispute of a civil nature should not be allowed to be the subject matter of a criminal offence, the latter being not a shortcut of executing a decree which is non-existent. The Superior Courts, with a view to maintain purity in the administration of justice, should

4 2009(3) SCC 78

not allow abuse of the process of Court. It has a duty in terms of Section 483 of the code of Criminal Procedure to supervise the functioning of the trial courts.

19. An offence of cheating may consist of two classes of cases :

(1) where the complainant has been induced fraudulently or dishonestly. Such is not the case here;

(2) When by reason of such deception, the complainant has not done or omitted to do anything which he would not do or omit to do if he was not deceived or induced by the accused.

20. It is in that sense, a distinction between a mere breach of contract and the offence of cheating should be borne in mind. We, having regard to the facts and circumstances of the case, are of the opinion that no case has been made out and against the appellant so as to hold that he should face the criminal trial.”

17. Mr. Ponda, learned Senior Advocate for the Respondent No.2 would urge that in the case at hand, the criminality arises from the failure of the Petitioners to handover the basement to Khanna Rayon, once it was realized that extension of the basement was not possible. It is the dishonest retention of the basement and unauthorized conversion of the same as two wheeler parking space, which constitutes an element of criminality. Mr. Ponda would urge that the letter dated 25 February 2019 addressed by the Petitioners in response to the letter dated 18 February 2019, reveals the criminal intent on the part of the Petitioners. In the month of February 2019 itself, the Petitioners had known that RCC Consultant advised against the use of the space of the basement for car parking. The Petitioners, were thus, obligated to handover possession of the basement or compensate Khanna Rayon

for the utilization of the area of 1700 sq.ft. The Petitioners could not have utilized the said space for two wheeler parking to fulfill the condition of providing amenities as per the sanctioned plan, causing wrongful loss to Khanna Rayon.

18. As against this, Mr. Mundargi would urge that under the terms of Deed of Addenda, there was no obligation on the part of the Petitioners to either redeliver the possession of the basement E-1 or give monetary compensation to the complainant. The utilization of the basement E-1 for two wheeler parking was in accordance with the sanctioned plan. Therefore, no element of criminality can be attributed to the applicant.

19. I find substance in the submission of Mr. Mundargi. The aspect as to whether there is a provision in the Deed of Addenda regarding the redelivery of the basement and/or monetary compensation for utilizing the said space, in the event the provision for car parking space was not feasible, and, consequently, the rights and liabilities of the parties are required to be worked out by invoking civil remedy. As the obligation of the Petitioners was contingent on the feasibility of the proposal, it would be difficult to draw an inference that the intention of the Petitioners was dishonest since the inception of the transaction. Neither the element of cheating, nor that of criminal breach of trust can be said to have been made out. In the absence of a stipulation regarding the utilization of the basement in the event that additional car parking spaces could not be provided in the Deed of Addenda, the Petitioners cannot

be said to have converted the property for their own use in breach of any legal contract touching the discharge of the trust, even if it is assumed that the Petitioners were entrusted with the said portion of the basement.

20. The upshot of aforesaid consideration is that the dispute between the parties is essentially of civil nature and no element of criminality is involved therein. The learned Metropolitan Magistrate, therefore, could not have issued process against the Petitioners for the offences punishable under Sections 409 and 420 read with Section 34 of IPC. The prosecution of the Petitioners amounts to abuse of the process of the Court and has the propensity to cause miscarriage of justice. Therefore, the Petition deserves to be allowed.

18. Hence, the following order :

ORDER

- (i) The Petition stands allowed.
- (ii) The impugned order dated 22 February 2023 of issue of process for the offences punishable under Sections 409 and 420 read with Section 34 of IPC stands quashed and set aside.
- (iii) Complaint CC No. No.2800110/SW/2022 stands dismissed.
- (iv) Rule made absolute in the aforesaid terms.
- (v) No costs.

(N.J.JAMADAR, J.)