IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.130 OF 2020

Shivprasad S/o Bankatlal Lohiya,
Age-70 years, Occu:Retired,
R/o-Springdal Apartment, Flat No.3,
Bhakti Nagar, CIDCO, N-1,
Aurangabad.

...APPLICANT

VERSUS

1) The State of Maharashtra,
(Through Pundaliknagar Police
Station, Aurangabad,

2) Subhash S/o Sambhaji Mundhe,
Age-37 years, Occu:Pvt. Service,
R/o-C-3, H.No.52, Town Center,
Aurangabad.

...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.1136 OF 2021

Pradeep S/o Shivprasad Lohiya,
Age-45 years, Occu:Advocate,
R/o-Springdale Apartment, Flat No.3,
Bhakti Nagar, CIDCO, N-1,
Aurangabad.

...APPLICANT

VERSUS

1) The State of Maharashtra,
(Through Pundaliknagar Police
Station, Aurangabad,

2) Subhash S/o Sambhaji Mundhe,
Age-37 years, Occu:Pvt. Service,
R/o-C-3, H.No.52, Town Center,
Aurangabad.

**...RESPONDENTS**

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Mr. Sohail Subhedar Advocate h/f. Mr. N.S. Ghanekar Advocate for Applicant in both Applications.
Mr. S.A. Gaikwad, A.P.P. for Respondent No.1 in both Applications.
Mr. S.B. Munde Advocate for Respondent No.2 in both Applications.

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**CORAM: SMT. VIBHA KANKANWADI AND R.W. JOSHI, JJ.**

**DATE : 6th JANUARY, 2025**

**ORDER [PER SMT. VIBHA KANKANWADI, J.] :**

1. The applicants are the father and son, who prayed for quashment of the proceedings in R.C.C. No.412 of 2020 pending before the learned Judicial Magistrate First Class, Aurangabad for the offence punishable under Sections 406, 420, 504, 506 read with Section 34 of the Indian Penal Code arising out of the First Information Report (for short "the FIR") vide Crime No. 327 of 2018 registered with Pundliknagar Police Station, Aurangabad, lodged at the behest of respondent No.2.

2. Heard learned Advocate Mr. Subhedar holding for learned Advocate Mr. Ghanekar, learned APP Mr. Gaikwad for respondent No.1 and learned Advocate Mr. Munde for respondent No.2. In order to cut short, it can be stated that the learned Advocates for the respective parties have argued in support of their contentions.

3. Perusal of the FIR would show that respondent No.2 had entered into oral agreement on 16th June 2016 in respect of sell of flat situated at Kumbhephal with applicant for Rs.12,00,000/-. At that time three Advocates were witnesses. Applicant Pradeep is also an Advocate by profession. Informant says that he gave an amount of Rs.5,00,000/- in cash to applicant Pradeep. The flat which was agreed to be sold, was in a constructed apartment in Plot No.8, Gut No.40 of Mahendrakumar Soni. Copies of documents in the name of Mahendrakumar Soni in respect of the plot were given to him. Thereafter informant went to the spot, whereupon he found that the apartment was constructed. He, therefore, met Mahendrakumar Soni and made inquiry in respect of the flat. At that time informant came to know that applicant Pradeep has booked the flat in the said apartment, however, there is outstanding amount of Rs.7,00,000/-. Therefore, the informant demanded the amount of Rs.5,00,000/- back from the

applicant Pradeep. In repayment of the same, applicant Pradeep issued the cheque on 5th March 2017 drawn on I.D.B.I. Bank for Rs.3,50,000/-. The said cheque got dishonoured. Thereafter the informant was demanding the amount from the applicant Pradeep continuously. Applicant Pradeep then promised that he would pay the amount in his house on 24th February 2018. Informant along with his cousin brother, went to the house of the applicant Pradeep. The door was opened by the applicant Shivprasad – father and asked the informant as to what was the work. Informant told that applicant Pradeep had called him for taking the amount of Rs.5,00,000/-. According to the informant, then applicant Shivprasad started abusing the informant and his brother and gave threats to kill and drove the informant and his brother out of the house. Informant says that the applicant Pradeep had promised to sell the flat and accepted the amount of Rs.5,00,000/- but still he was not registering the flat in the name of informant nor returning the amount and therefore, he has cheated the informant.

4. Perusal of the contents of the charge-sheet would show that there is only supporting statement of the cousin brother of the informant in respect of alleged incident that had taken place on 24th February 2018. There are statements of Advocate Ravi

Kendre, Advocate Avinash Bangar and Advocate Raju Kasture, who were allegedly present when the oral agreement was entered into. All of them have not taken the name of applicant Shivprasad. Therefore, there is no question of the involvement of applicant Shivprasad in the transaction of sell of flat and therefore, there is no question of cheating. In respect of the said incident dated 24th February 2018, there was no immediate lodging of the report by the informant. Whatever FIR has been lodged now, was on 27th November 2018. That means it is after the period of about nine months. On the contrary, it appears that applicant Shivprasad has lodged the FIR vide Crime No.37 of 2018 on 24th July 2018 for the offence punishable under Sections 452, 323, 504, 506 read with Section 34 of the Indian Penal Code, against the present informant and his cousin brother as well as two unknown persons, in respect of incident dated 24th February 2018. Though it is also belated, it is certainly prior to the present FIR. Therefore, certainly case is made out for exercise of powers under Section 482 of the Code of Criminal Procedure, to be exercised in favour of applicant Shivprasad.

5. Now, as regards the case against applicant Pradeep is concerned, even if we taken the contents of the FIR as it is, it is to be noted that there was oral agreement to sell in respect of

which amount of Rs.5,00,000/- is stated to be given as earnest amount. Now it appears from the contents that when informant came to know that amount of Rs.7,00,000/- was outstanding i.e. to be paid by applicant Pradeep to Mahendrakumar Soni, he demanded his earnest money back. This can only happen upon implied cancellation of the agreement. Informant had not lodged any suit for specific performance of the contract. He accepted the cheque as part payment towards the repayment of Rs.5,00,000/-. The said cheque was drawn on I.D.B.I. Bank dated 5th March 2017, for Rs.3,50,000/-. The informant has not stated as to what action he had taken after he received the information that the cheque has been dishonoured. The normal course for such a person would be to send statutory notice under Section 138 of the Negotiable Instruments Act and ultimately to lodge complaint for the said offence. No such steps appears to have been taken by the informant. He then cannot say that the applicant Pradeep is not executing the sale deed in his favour. When he himself had decided to cancel the agreement and accepted the part repayment of the earnest amount, he cannot insist upon the registration of the document. It appears that the remedy for him was to get the recovery of the amount. But he appears to have gone to the house of the applicant Shivprasad with some ulterior motive. Even on that day the action under Section 138 of the Negotiable Instruments Act was barred. Further, when he had accepted the cheque as part repayment of the earnest amount, dishonour of the said cheque *per se* will not amount to cheating or keeping that amount with applicant Pradeep would not amount to criminal breach of trust. There was no question of the domain of the said property. Unnecessarily the civil transaction is tried to be projected as having element of criminal nature and therefore, even in favour of applicant Pradeep inherent powers are required to be used.

6. It would be unjust to ask both the applicants to face the trial with such evidence on record. Hence, we pass following order:-

**O R D E R**

(I) Both the Applications i.e. Criminal Application No.130 of 2020 and Criminal Application No.1136 of 2021 stand allowed.

(II) The proceedings in R.C.C. No.412 of 2020 pending before the learned Judicial Magistrate First

Class, Aurangabad for the offence punishable under Sections 406, 420, 504, 506 read with Section 34 of the Indian Penal Code arising out of the First Information Report vide Crime No. 327 of 2018 registered with Pundliknagar Police Station, Aurangabad, stands quashed and set aside as against applicant – Shivprasad S/o Bankatlal Lohiya and applicant – Pradeep S/o Shivprasad Lohiya.

**[R.W. JOSHI]**
**JUDGE**

**[SMT. VIBHA KANKANWADI]**
**JUDGE**

asb/JAN25