

(1983) 10 BOM CK 0006

In the Bombay High Court

Case No : Criminal Writ Petition No. 204 of 1983 (Bom. Appellate Side)

Narendra Pranjivan Dave

APPELLANT

Vs

Chunilal Hinduji Oswal

RESPONDENT

Date of Decision : 15-10-1983

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Contract Act, 1872 — Section 28

Criminal Procedure Code, 1973 (CrPC) — Section 177, 178, 179, 482

Penal Code, 1860 (IPC) — Section 34, 415, 420

Citation : (1983) 85 BOMLR 568

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sharad Manohar, J.—By this Writ Petition, the three accused (present three petitioners before me) invoke this Court's jurisdiction under Article 227 of the Constitution of India and Section 482 of the Criminal Procedure Code to quash the order passed by the learned Chief Judicial Magistrate, Kolhapur dated March 23, 1983 issuing process against all of them in pursuance of the complaint of the same date filed by respondent No. 1 as regards the offence committed by the accused against the complainant u/s 420 read with Section 34 of the Indian Penal Code.

2. The accused who have not in any way participated in the proceedings before the learned Magistrate urge this Court to hold that the complaint filed by the respondent No. 1 (who will be referred to as the "Complainant"), read as a whole along with the undisputable facts placed by them before this Court, would show that no offence is disclosed by the Complainant and that, in any event, the admitted factual position must give rise to the conclusion that the Criminal Court in Bombay and not the Criminal Court in Kolhapur would be having jurisdiction to entertain the Complainant's grievance against the accused, assuming that a case of any offence is made out against them.

3. Since the accused want this Court to analyse the complaint itself to show that no offence is disclosed, it is necessary to set out the substance of the complaint filed by the Complainant in the Court of Kolhapur.

4. The substance of the complaint is as follows :

(a) The Complainant is the sole proprietor of the concern M/s. Kohinoor Tarpauline Industries which is a small-scale industrial unit, at Kolhapur manufacturing tarpauline etc. In para 2 of the complaint, it is stated that accused No. 1 claims to be the proprietor of M/s. Supreme Corporation and accused No. 2 claims to be the proprietor of M/s. Citizen Finance. Accused No. 3 is their Legal Adviser. In the said para 2, it is further stated that the real business of the three accused consists of running a bogus business of cheating people all over India by giving advertisements to the effect that they would make available to needy persons huge finance on easy terms. It is further stated in the said paragraph that with this aid, accused No. 2 pretends himself to be a broker and introduces the victim to accused No. 1 after charging the visit fees and travelling expenses. It is further contended that accused Nos. 1 and 2 thereafter induce the victim to pay to the accused No. 1 the expenses for the stamp duty, registration and other legal formalities requisite for the purpose of the mortgage to be given by the victim of his properties for the purpose of securing the loan to be advanced by accused No. 1. They receive the amount for this legal expenses of stamp duty etc., at the rate of 4% of the total loan promised to be advanced by accused No. 1. After receiving the said amount of 4% of the assured loan for the so called legal expenses requisite for the execution of the documents, accused No. 3 starts his role of the Legal Adviser of the other two accused. All the three accused, thereafter, jointly go on demanding and pestering the victim, who has been made to part with 4% of the amount assured to be given as loan, with one requirement after the other. Aimlessly irrelevant requests are made one after the other and the transactions protracted to such fatiguing extent that the poor victims get tired and exhausted and ultimately give up the attempt to pursue the transactions.

(b) In para 3 of the complaint, it is stated that in the beginning of April 1981, Complainant read in Indian Express and Mumbai Samachar prominent advertisement given by accused Nos. 1 and 2 representing that requisite financial loan would be made easily available to needy persons against securities of Immovable properties and business assets. The complainant needed some additional finances for the purpose of expansion of his factory and expansion of his manufacture of his tarpauline goods in the ensuing monsoon season.

(c) In para 4, it is stated that the Complainant informed accused No. 2 his need for finance. The gist of the further statements in the said paragraph 4 are as follows :

4. Accused No. 2 gave reply to the Complainant by his letter dated 17-4-1981 and stated that for the purpose of negotiating his transaction he was in fact

visiting Kolhapur. Further, the accused in fact met the Complainant in Kolhapur on 22-4-1981. During the discussions there, accused No. 2 demanded Rs. 1500/- as his visit charges along with the travelling expenses for the visit. Accused No. 2 also visited the factory premises, the machinery and other properties of the complainant at Kolhapur. He questioned the complainant exhaustively and inspected all the documents, files and records of the complainant's business. He collected all the relevant facts and information relating to the complainant's business including the fact that the complainant had already taken loan from the State Bank of India, at Kolhapur on the mortgage of his factory premises. Accused No. 2 was satisfied that the total value of the complainant's assets was about Rs. 8,00,000/- and it was a good security for the loan of Rs. 4,00,000/-. According to the complainant, accused No. 2 had shown his complete satisfaction relating to the security for the loan of Rs. 4,00,000/-. There are a number of averments made in said para 4 to the effect that accused No. 2 conveyed his reaction of having been profoundly impressed by the financial and credit-worthy position of the complainant and he mentioned the name of accused No. 1 stating that accused No. 1 is the financier with whom accused No. 2 had collaboration and that there would be no difficulty for accused No. 2 whatsoever to obtain a loan for the complainant from accused No. 1 for a sum of Rs. 4,00,000/- and he represented that if he was paid his visit charges of Rs. 1500/- he would arrange to secure the said loan for the complainant immediately. In fact for that purpose he prevailed upon the complainant to address to accused No. 1 two letters dated April 22, 1981 asking for financial accommodation.

(d) In para 5 of the complaint, it is mentioned that being induced by the said representation of accused No. 2, the complainant parted with a sum of Rs. 1500/- by paying the same to accused No. 2 against a receipt dated April 22, 1981. It is stated further that he also paid him his travelling expenses.

(e) In para 6 it is stated that after accused No. 2 left Kolhapur, he managed to send a telegram dated April 23, 1981 addressed by one of the accused to the Complainant inviting the Complainant to visit their office and to be in readiness for payment of the legal expenses. The complainant in fact visited the office of accused No. 1 who confirmed all the representations made by accused No. 2. He stated that both of them were working as a syndicate and that having regard to the representations that he received from accused No. 2, accused No. 1 would have no difficulty in granting the said loan to the complainant. He further stated that only a few formalities, such as preparation of the Mortgage Deed for the second charges, remained to be complied with. It is further stated that at that time all the business documents, files and records of the complainant were minutely inspected by accused Nos. 1 and 2 with the help of accused No. 3 as their Legal Adviser. All the three accused thereupon called upon the Complainant to pay Rs. 16,000/- for the legal charges for the purpose of preparing the legal documents, the amount being calculated at the rate of 1% of the loan amount.

(f) In para 7 of the complaint, it is stated that accused Nos. 1 and 2 even made

the complainant sign a loan proposal form as per their directions. It is further stated in the said para that thereafter the complainant sent a cheque for Rs. 16,000/- signed by the Bank of India, Mandvi Branch, in favour of the firm of accused No. 1.

5. Incidentally, it may be mentioned that there is some difficulty about the correctness of this date April 23, 1981 mentioned in the complaint. It appears that the cheque could not have been given before April 27, 1981 because, the complainant's visit to Bombay itself had not taken "place earlier. However, the fact remains that, rightly or wrongly, the date mentioned in the said para on the cheque for Rs. 16,00,0/- is April 23, 1981.

6. Para 7 further states that throughout the discussion it was being repeatedly represented to the complainant that upon the payment of Rs. 16,000/- it would be a matter of days for the mortgage document to be ready and that upon the execution of the mortgage document, a bank demand draft of Rs. 4,00,000/- would be in the hands of the complainant without any hitch and delay.

(g) Para 8 of the complaint points out the position after the receipt of the amount of Rs. 16,000/- by the accused. The substance of the para is that after receiving the amount, the accused started dragging their feet and beyond making requisitions after requisitions upon the Complainant, they would not do anything to honour their word. All sorts of flippant requisitions were made and when they were complied with they were followed with fresh requisitions not only upon the complainant but also upon the complainant's bankers.

7. I will have occasion to deal with these requisitions later on during the course of this judgement.

8. it is pointed out in the said para that ultimately the two accused just cancelled the loan transaction and flatly refused not only to pay the loan but even to return the huge amount of Rs. 17,500/- received by the accused from the complainant. A notice dated January 21, 1982, therefore, was given by the complainant through his learned advocate to the accused stating therein that the accused had systematically cheated the complainant with a common intention of all the three of them and, further, that they never had any intention to give the loan at all. but that their real intention was to make the complainant part with the said sum of Rs. 17,500/-, if not more, by making the aforesaid representations. By the said notice, the Complainant called upon the accused to reimburse him of his loss. It is further stated in said Para 8 that by his reply dated January 23, 1982 accused No. 1 has refused to comply with the notice.

(h) In Para 9, the complainant has referred to the information that he received after making inquiries as regards the modus operandi of the accused. In that para he has, more or less, repeated the allegations made against the accused in para 2 of the complaint stating that huge amounts have been received by the accused by cheating many other persons in the above mentioned manner.

9. As stated above, upon perusal of the complaint, the learned Magistrate was satisfied that the case of issuance of process was made out and by his order dated March 28, 1983 he issued process against all the three accused.

10. The present Writ Petition is filed by all the three accused on April 13, 1983 questioning the legality of the said order dated March 28, 1983. While trying to satisfy this Court that the complaint, as it stands, discloses no offence as such or, at any rate, that the learned Magistrate has no jurisdiction to entertain the complaint, the accused have also tried to produce certain documents before the Court to prove that the undisputed existence of those documents would satisfy the Court that no offence as such can be made out against the accused.

11. The first point urged by Mr. Sabnis for the petitioner/accused is that the criminal court in Kolhapur could have no jurisdiction to entertain the complaint.

12. In this connection, Mr. Sabnis has a two-fold argument. The first part of the argument was that entire transaction had taken place in Bombay and. hence, the Kolhapur Court could have no jurisdiction to entertain the complainant. The second part of his contention is that, any event, the parties had agreed by their earlier agreement in writing that in the case of dispute the Court having jurisdiction would be the Bombay Court. Mr. Sabnis contends that in view of this stipulation in the agreement between the parties, it was not open for the complainant to invoke the jurisdiction of the Kolhapur Court to entertain this complaint.

13. To my mind, neither of these arguments can be accepted. In the first place, it is futile on the part of the accused to contend that the entire transaction had taken place in Kolhapur. A large portion of the complaint is devoted to pointing out to the Court as to how accused No. 2 personally went to Kolhapur, personally satisfied himself about the financial standing of and creditworthiness of the complainant and personally assured him in Kolhapur that the loan of Rs. 4,00,000/- would be made available by both the accused, working as a Syndicate, to the complainant. Moreover, out of the total amount of Rs. 17,500/- admittedly received by both the accused, a sum of Rs. 1500/- was admittedly received by accused No. 2 from the complainant not in Bombay but in Kolhapur. According to the complainant, this receipt of Rs. 1500/- is a part and parcel of the entire transaction of deception.

14. An attempt was made to show that the episode started in Bombay, ended in Bombay and but for the casual visit of accused No. 2 to Kolhapur, nothing had taken place in Kolhapur.

15. As regards the start of the episode, contention was that the complainant first came to Bombay to the office of the accused to ask for the loan and thereafter accused No. 2 went to Kolhapur.

16. Accused No. 2's letter dated April 17, 1981 addressed from Bombay to the complainant in Kolhapur belies this plea. That letter is in reply to complainant's

letter. This means that the initial enquiry of the loan was made by the complainant by a letter from Kolhapur, not by personally visiting Bombay.

17. The contention that accused No. 2's visit to Kolhapur was just a casual visit is equally meaningless. The fact that accused No. 2 paid Rs. 1500/- by way of commission in Kolhapur is admitted. There is no denial even of the fact he was paid his travelling expenses. Till accused No. 2 visited the complainant in Kolhapur, both were total strangers to each other. It is, therefore, a futile contention that accused No. 2's visit to Kolhapur was a casual visit.

18. The contention that the episode ended in Bombay is of doubtful tenability. As per the complainant's case, the loan was to be paid in Kolhapur for expansion of his factory in Kolhapur. The huge loss directly resulting from the alleged deception is suffered in Kolhapur.

19. Strenuous attempts were made by Mr. Sabnis to satisfy me that the major part of the transaction had taken place in Bombay and that the complainant had made false and misleading statements in the complaint to show that the transaction had taken place in Kolhapur. He took me through the entire documentary evidence in this behalf.

20. However, he could not place his finger upon anything which would show that any deliberate attempt being made by the complainant to show that any particular part of the transaction had taken place in Kolhapur when it had in fact taken place in Bombay. But even apart from that aspect of the matter, point remains that an important and significant segment of this episode had shaped itself in Kolhapur. If that is the position, it cannot be said that Kolhapur Court had no jurisdiction to entertain the complaint on the ground that the transaction had taken place wholly in Bombay.

21. Mr. Sabnis invited my attention to the Loan Form dated April 22, 1981 filed by the Complainant in Bombay. He further invited my attention to the complainant's letter showing that the amount of Rs. 16,000/- was paid by the complainant to the accused by a cheque on a bank in Bombay. He further pointed, out the receipt of the said sum of Rs. 16,000/- executed by the accused in Bombay. Lastly he referred to the registered Notice given by the complainant to the accused through his learned advocate. In para 2 of the said Notice, it is stated as follows:

As my client was in need of financial aid, he personally approached to Shri B.K. Modi the proprietor of Citizen Finance, Bombay in the month of April, 1981.

22. By relying upon this portion of the said Notice and the above mentioned document, Mr. Sabnis tried to contend that on the complainant's own showing the entire transaction had taken place in Bombay only and, hence, the Kolhapur Court would have no jurisdiction to entertain the complaint.

23. To my mind, the contention is misleading. It proceeds upon convenient overlooking of the remaining statement of facts which are not only averred but

are practically admitted. It is true that a Joan proposal form was signed and the cheque was given by the complainant to the accused in Bombay and the cheque was drawn on a Bank in Bombay. It is even true that the receipt for the cheque was executed by the complainant in Bombay. But the point is that the preceding and relevant representation which was made by the accused was not in Bombay only; for making that representation, accused No. 2 is alleged to have travelled all the way to Kolhapur. In fact the representation started from Kolhapur, not from Bombay. Whether it was a fraudulent representation or not is a different thing. But if the complainant proves that it was a fraudulent representation which started in Kolhapur by virtue of which he was made to part with Rs. 1500/- in Kolhapur, then it cannot be said that no part of the transaction took place in Kolhapur. In fact the complainant can legitimately contend that it was only because a firm representation was made by accused No. 2 in Kolhapur that the complainant was induced to make a journey to Bombay only to be entrapped by the accused.

24. The reference to and reliance upon the statements in the Notice extracted above stems from convenient reading of the notice, not from its careful reading, because in the just next para of the notice it is stated in so many words that accused No. 2 visited the complainant's factory at Kolhapur on April 22, 1981. It is further stated there as follows :

He assured my client that he will definitely disburse the loan to my client from Supreme Corporation, Bombay. Mr. Modi requested my client to pay Rs. 1500/- as his commission for sanctioning the said loan. As per Shri Modi's request, my client has paid an amount of Rs. 1500/- on 22-4-1981 at Kolhapur as his commission for the purpose of getting sanctioned the loan from the proprietor of Supreme Corporation, Bombay.

25. In view of these statements in the notice, reliance upon the earlier statement becomes meaningless.

26. In support of his contention that the Court in Kolhapur had no jurisdiction to entertain the complaint, Mr. Sabnis relied upon the judgment of the Supreme Court in Mobarik Ali Ahmed Vs. The State of Bombay, . He particularly relied upon the following part of the head-note of the said Report, which correctly summarises the ratio of the case. The head-note is as follows : head note (h) at p. 858]

The appellant though at Karachi was making representations to the complainant through letters, telegrams and telephone talks, sometimes directly to the complainant and sometimes through a commission agent that he had already stock of rice, that he had reserved shipping space and that on receipt of money he would be in a position to ship the rice forthwith. These representations were made to the complainant at Bombay, notwithstanding that the appellant was making the representations from Karachi. It was a result of these representations that the complainant part with his money to the tune of about Rs. 5.5 lakhs on

three different dates. It was found that the representations were made without being supported by the requisite facts and that this was so to the knowledge of - the appellant and that the representations were so made with an initial dishonest intention.

Held (1) that all the ingredients necessary for finding the offence of cheating u/s 420 read with Section 415 occurred at Bombay. In that sense the entire offence was committed at Bombay and not merely the consequence viz., delivery of money which was one of the ingredients of the offence, (para 23).

27. I have extracted the above mentioned portion of the head-note advisedly because, to my mind, the very reading of the said head-note would show that the law declared in the same was in relation to a totally different context. As mentioned above, in the instant case, the averments made in the complaint, some of which are even admitted by the accused, leave no room for doubt that a part of the transaction has positively taken place in Kolhapur. The facts of the case before the Supreme Court were entirely different. Moreover, the Court was not considering in that case whether the Court at Karachi also would be having jurisdiction or not. It is possible that even in that case, some part of the transaction had taken place in Karachi. If that was so, even the Karachi Court would be having jurisdiction. But that did not mean that the Bombay Court had no jurisdiction in that case. This is all that is decided by that authority. Nothing in the case decided by the Supreme Court gives justification for the view that in the case such as the present case, the jurisdiction of the Court such as the Kolhapur Court is to be ignored. Even a casual reading of the provisions of Sections 177 to 179 of the Criminal Procedure Code would clarify this position.

28. The next part of Mr. Sabnis's "jurisdictions" objection is based upon the assumption that the transaction has taken place in two places: in Bombay as well as in Kolhapur. Mr. Sabnis contends that if this is an admitted position then both the Courts would be having jurisdiction and contended that the parties by their earlier agreement had stipulated that only the Bombay Court would be having jurisdiction and if this is the position, the Kolhapur Court's jurisdiction must be deemed to have been necessarily barred.

29. In support of his contention, Mr. Sabnis relied upon the clause in the loan proposal signed by the complainant on April 27, 1981. Said clause runs as follows:

Any dispute or difference is to be settled subject to Bombay jurisdiction only.

Relying upon this stipulation, Mr. Sabnis contends that the Kolhapur Courts would have no jurisdiction to entertain the complaint.

30. To my mind, this contention is quite misconceived. The stipulation mentioned above contemplates a civil dispute. As is well-known, in spite of the provisions of Section 28 of the Contract Act, when two Courts are likely to have jurisdiction to entertain a dispute relating to the enforcement of any contract. It is open for the

parties to select one of the two or more Courts which should have exclusive jurisdiction to adjudicate upon the dispute relating to the matter. But from the very nature of things, the dispute contemplated by said Section 28 of the Contract Act is a civil dispute because it must be a dispute for enforcement of the contract. The present proceeding is not for enforcement of the contract. An offence committed by any of the parties to the contract and the criminal proceedings pursuant thereupon are not the kinds of dispute contemplated or exempted by said Section 28.

31. This is the position on first principle. My attention was not invited to any authority taking a contrary view.

32. This brings me to the real question that is required to be decided in this petition namely, as to whether the respondent's complaint discloses any offence or not. On this question, the contention of Mr. Sabnis was four-fold. He contended that:

(a) the complaint, read as a whole together with the documents relied upon by the complainant himself, would disclose no offence on the part of any of the accused at all.

(b) Alternatively, the averments made in the complaint read in the light of the documents relied upon by the complainant in the trial Court and also in the light of the documents sought to be produced by the petitioner/accused before this Court would show that resort to criminal courts was misconceived.

(c) The dispute was of a purely civil character and there was no justification for invoking the jurisdiction of criminal Courts.

(d) In any event, accused No. 3 who is a practising Advocate had been acting in his capacity as the Legal Adviser of the other two accused and, hence, he could not be imputed the act or intention of criminality for having given any particular advice to the accused or for having done anything as per the instructions of the accused.

33. As regards the first contention (a) namely, that the complaint discloses no offence at all against any of the accused, I cannot find any justification for such a plea at all. It is mainly with a view to repel this contention that I have set out above the contents of the complaint in some details. The complainant's plea is simple. He has pointed out to the Court that accused No. 2 came all the way to Kolhapur, satisfied himself fully about the financial condition and creditworthiness of the complainant and represented to him in so many words that he himself was working in Syndicate with accused No. 1 and that there would be absolutely no difficulty to both the accused working as a Syndicate to advance the loan of Rs. 4,00,000/- to the complainant. He even asked for the commission of Rs. 1500/-. In the first instance, it is a little bewildering that accused No. 2 who had himself advertised the loan facility, meaning thereby, when accused No. 2 himself was to give loan to others and

who himself came for the purpose of seeing whether the complainant's financial condition qualified him for the loan should have received "Commission" for that purpose. What is stated by the complainant as regards the understanding given by him to the complainant is that the loan was to be given by accused No. 1 and the role of accused No. 2 was to make that loan available to the complainant from accused- No. 1. This is the only basis upon which a sum of Rs. 1500/- could be claimed by accused No. 2 as a commission. But the point is that the commission would be normally payable by some one for something done as agent of some one else. But apart from the question of justification for this "Commission", the very receipt of this amount in Kolhapur tells its own tale. It is to be noted that the complainant had not invited accused No. 2 to Kolhapur; accused No. 2 of his own accord had written to the complainant that he was coming to Kolhapur to discuss the matter. This entire factual position gives quite some credence to the case of the complainant that accused No. 2 was fully satisfied about the creditworthiness of the complainant and that he conveyed his impression to that effect to the complainant. If this is the position, there is nothing incredible about the complainant's plea that accused No. 2 in fact represented to the complainant that in view of his sound financial condition, the sanction of the loan was a mere formality.

34. But the more important aspect of the matter is that the fact that the accused received a further sum of Rs. 16,000/- from the complainant specifically for the purpose of preparation of the mortgage document is an admitted fact. Strenuous efforts were made by Mr. Sabnis to satisfy me that the reason why the accused could not give loan to the complainant was that he had not made good his case of creditworthiness. For this purpose, Mr. Sabnis produced certain documents before me to show that the complainant was heavily indebted to the Bank. It is possible to hold that even that contention, is quite untenable. But the point to be noted here is that all these wisdoms appear to have dawned upon the accused only after they have safely pocketed Rs. 17,500/- from the complainant. I asked Mr. Sabnis repeatedly as to for what purpose the accused have received the amount of Rs. 16,000/- from the complainant. All the documents produced before the Court go to show that the amount was to be paid strictly for the purpose of legal expenses that would be incurred by the accused for the purpose of the execution of the mortgage, that is to say, for the purpose of preparation of the loan and mortgage documents. This means that it is only if the accused were to accept the mortgage of the relevant properties of the complainant that any question of incurring of any expenses would have arisen. If the accused were not satisfied about the solvency and creditworthy condition of the complainant, the simplest thing for the accused was to decide not to dream of giving any loan to the complainant. In that case, no question of preparation of any documents would arise and, hence, no question of incurring any expenditure for preparation of documents would arise. In this connection, it is to be noted that the amount of Rs. 16,000/- is received by the accused as exact equivalent of 4% of the loan assured. Representation by the accused to the complainant was that for the

purpose of securing the loan by mortgage document, the expenses that were incurred amounted to approximately 4% of the loan. Even the letter taken by the accused from the complainant dated April 27, 1981 clearly mentions that the amount of Rs. 16,000/- is paid "towards the cost of legal expenses such as legal fees for preparing mortgage documents, stamp and registration charges."

35. What is further stated in the said letter is equally important. It states as follows:

This amount is not paid as a deposit but only for the above mentioned legal expenses.

36. There is, therefore, hardly any doubt left about the position that the amount of Rs. 16,000/- was not received by the accused for the purpose of finding out and ascertaining the solvency and credit-worthiness of the complainant, but it was received only for the purpose of meeting the expenses required for preparation of the mortgage documents. I called upon Mr. Sabnis repeatedly to point out as to for what purpose this amount of Rs. 1500/- received by accused No. 2 and the amount of Rs. 16,000/- was received by accused No. 1, if the decision to give the loan was not already taken and conveyed to the complainant. Mr. Sabnis contended that the amount of Rs. 16,000/- was paid for the purpose of ascertaining the solvency of the accused. In the first place, the above mentioned letter dated April 27. 1981 rules out any such plea. But that apart, my attention is not invited to any evidence which could support such a plea. As regards receipt of Rs. 17,500/- he did not have any explanation whatsoever. The inference, therefore, is that a sum of Rs. 17,500/- was received by the accused upon the representation that they were satisfied about the complainant's credit-worthiness and that since the mortgage documents had to be prepared before the loan was to be advanced, the complainant was prevailed upon to pay the expenses so that the bank draft for the loan would be immediately given by the accused to the complainant. The case made out by the complainant read with the admitted conduct of the accused makes the complainant's plea so consistent and rational that it is impossible to dismiss the same at a threshold, either as false or unacceptable.

37. Mr. Sabnis thereafter tried to rely upon certain documents produced by the complainant in the trial Court as well as some other documents produced by the accused themselves in this Court on affidavit to satisfy me that as a matter "of fact the complainant's financial standing was badly inadequate for the purpose of qualifying himself for the loan. I must state here that, prima facie, I was not at all satisfied about the correctness of this submission. But in the interest of Mr. Sabnis's client, I do not propose to discuss that question minutely because if my prima facie view about the untenability of the contention is finally confirmed by myself upon the minute examination, I would have to give reasons for refuting the contention and in that event some of my observations in that connection were quite likely to harm the accused in the trial. As it is, Mr. Sabnis has invited me to give this judgment on the question as to whether any legally acceptable

case of an offence is made out by the complainant or not and my above mentioned discussion leaves, no room for doubt that, according to me, such a case is made out by the complainant. If I discuss the effect of the further evidence led by the accused and if I ultimately record the finding that the plea of the accused is misleading my observations in that behalf are likely to prejudice the accused in the trial. I see no reason to prejudice the case of the accused in this manner any more than is absolutely necessary and unavoidable. But that apart, to my mind, the above mentioned argument of Mr. Sabnis namely, that the financial standing of the complainant was unequal "for the loan facility is. above all. irrelevant. The complaint is not that in spite of the very good financial condition of the complainant the accused are not giving the loan. The grievance is that the accused represented to the complainant that they were satisfied about his financial condition, promised to give him that loan if he paid to them Rs. 17,500/-, received that amount, pocketed it and, thereafter, have started finding out excuses and subterfuges for the purpose of not giving the loan and for the purpose of pocketing the amount. I can understand if right at the beginning the accused had satisfied themselves that the complainant did not qualify himself for the loan and had returned back at least the cheque for Rs. 16,000/- and had washed off their hands of the entire transaction. The position in the instant case is that the amount of Rs. 16,000/- was taken, at least prima facie, for the purpose of expenses pertaining to the mortgage documents and for no other purpose and, still, the accused have chosen to stick fast to the said amount of Rs. 16,000/-.

38. Mr. Sabnis invited my attention to the following stipulation contained in the proposal for the loan :

This transaction is to be completed within a period of 15 days from the date of receipt by me/us of the copies of the documents prepared by your Legal Advisers pursuant to my/our Application for Loan {Proposal for Mortgage} providing all legal requirements as instructed therein together with sureties as settled previously.

In default, I/We shall pay you Rs. 8000/- (Rupee; Eight Thousand only) in addition to the legal expenses so incurred by you in respect of this transaction and in that event transaction will be treated as cancelled. I/We shall previously obtain your written permission/consent in the event of time of completion to be extended under any circumstances, if required. In such case I/We shall do hereby bind myself/ourselves to pay you the Additional Return for such extra period of delay so caused."

39. Relying upon this stipulation, Mr. Sabnis contended that since the complainant could not complete the transaction within the stipulated time, the accused were perfectly" justified in forfeiting the amount of Rs. 16,000/-.

40. I wish that in their own interest the accused had not invited me to give reply to this plea. My answer to this plea is bound to affect the case of the accused in

the trial Court; but that is something which the accused have chosen to take risk about.

41. I fail to see how the above mentioned stipulation in the proposal form justifies the accused from forfeiting the huge amount of Rs. 17,500/-. In the first place, the main facts placed by the complainant before the Court, which is in no way refuted by the accused go to show that whatever documents the accused had asked for had been supplied by the complainant to the accused promptly and expeditiously. Absolutely no fault can be found on the part of the complainant in that behalf. As a matter of fact, it is the accused themselves who have manifestly resorted to meaningless and unheard of requisitions not only upon the complainant but also upon the bankers of the complainant. But even after those requisitions are complied with, the accused decide not to advance the loan. My attention was not invited to anything which would show that the accused had failed to execute the documents sent by the complainant. Admittedly, no mortgage document was sent by the accused to the complainant. It is only if the accused had failed to execute those documents sent by the complainant that, possibly, the above mentioned forfeiture clause would have sprung into operation. In the instant case, monies for preparation of the documents were already received by the accused. The accused had given clear impression to the complainant that they were satisfied about the financial condition of the complainant to qualify himself for the loan. It was only upon that representation that the complainant was made to part with the monies. If this much evidence is placed before the Court and it is accepted by the Court, then it will be difficult for the Court to hold that the accused are as blameless and innocent as they would want this Court to believe. I see no reason why the complainant should be given no opportunity to prove his above mentioned case before the trial Court by leading appropriate evidence in that behalf. My attention was not invited to anything by virtue of which it could be held that in no event it would be possible for the complainant to satisfy the trial Court before the veracity and acceptability of his case.

42. In this view of the matter, to my mind, the first two contentions of Mr. Sabnis cannot be accepted.

43. Mr. Sabnis's next contention (c) is that if the complainant has any grievance against the accused, he can have it redressed in a Civil Court because the acts complained of may at the most amount to a civil wrong, but the resort to criminal court is illegal.

44. Now I find no basis or justification for such a plea at all. In the context of the main facts, which are not at all in dispute, not only a civil liability on the part of the accused emerges but as a result of these facts the accused are unmistakably exposed to the charge of criminality. This is not a simple case of the accused taking monies from the complainant and not being able to deliver the goods. According to the complainant, the accused had made a representation to the complainant that they were satisfied about his credit-worthiness and that if he

parted with Rs. 17,500/-, they would give him a loan for Rs. 400000/- upon execution of a mortgage document; that on this representation they received the monies and after pocketing those monies, subsequently, just started making unjustifiable requisitions upon the complainant and ultimately refused to perform their part of the agreement fraudulently in addition to sticking fast to the huge amount. Whether the Complainant has proved his plea or not is a different question. But I cannot go upon the assumption that the complainant has not proved his case. Far less, I can prevent him from proving the case and the only way in which the complainant can prove his case is by leading evidence in the trial Court in that behalf.

45. The contention that the liability is only a civil liability and not a criminal liability is, in the light of the facts of the instant case, wholly misconceived. There are no doubt cases where the liability is purely a civil liability and no criminality is involved. Likewise, there are cases where the liability may be purely a criminal liability and no civil obligation may be involved. But leaving aside these two categories of cases, there exists a category of case where the liability of the person may be both civil as well as criminal. A person who has recovered monies from another illegally by force or by extortion or even by cheating may be no doubt liable in a civil court to repay or recompense the victim. But on that account, he will not be immune from criminal liability. There are cases in which the liability is purely a civil liability. But the main facts of the instant case which are not in dispute do not leave any scope for the contention that the instant case is one of them. I have referred to above to the cases where the monies are received for the delivery of goods and the recipient of the monies is unable to deliver the goods. In such a case if it is found that he had the intention to deliver but was unable to deliver it later on, in conceivable cases, it would be held that he did not entertain criminal intention right from the beginning. But even in such a case if it is found that the promisor had entertained no intention at any time to deliver the goods but had pocketed the monies only upon the representation that he had the intention to deliver the goods, the Court will have to hold in suitable cases that he has committed not only a civil wrong but also a criminal offence. Everything will depend upon the manner in which the evidence is led by the parties. The real intention of the recipient of the monies will be projected in the evidence only.

46. In support of his above mentioned contention Mr. Sabnis relied upon the judgment of the Supreme Court in Hari Prasad Chamaria Vs. Bishun Kumar Surekha and Others, . He particularly relied upon the following observations in para 4 of the said judgment (at p. 302) :

For the purpose of the present appeal we would assume that the various allegations of fact which have been made in the complaint by the appellant are correct. Even after making that allowance, we find that the complaint does not disclose the commission of any offence on the part of the respondents u/s 420, Indian Penal Code. There is nothing in the complaint to show that the

respondents had dishonest or fraudulent intention at the time the appellant parted with Rs. 35,000/-. There is also nothing to indicate that the respondents induced the appellant to pay them Rs. 35,000/- by deceiving him. It is further not the case of the appellant that a representation was made by the respondents to him at or before the time he paid the money to them and that at the time the representation was made, the respondents knew the same to be false. The fact that the respondents subsequently did not abide by their commitment that they would show the appellant to be the proprietor of Drang Transport Corporation and would also render accounts to him in the month of December might create civil liability for them, but this fact" would not be sufficient to fasten criminal liability on the respondents for the offence of cheating.

47. I fail to see what relevance this authority could have to the facts of the present case. The complaint in the instant case is not of the character which is referred to by the Supreme Court in the above mentioned portion of the judgment. I have set out the averments in the complaint quite in extenso and those averments leave no room for doubt that if those averments are proved the fact that the accused made the complainant part with a valuable sum of Rs. 17,500/- with criminal intention to cheat him would become inescapable. I do not mean to say that the intention imputed to the accused in the complaint should be held by the trial Court to be proved. All that I mean to say is that if that is the complainants averment in the complaint, it cannot be said that he has not averred the facts which give rise to inference of criminality. The nature of complaint with which the Supreme Court was dealing was entirely different from the nature of complaint with which I am dealing.

48. The above mentioned Supreme Court's authority has, therefore, no application to the facts of the present case.

49. This brings me to the last question relating to the liability of accused No. 3. Mr. Sabnis contended that accused No. 3 is afterall the advocate of accused Nos. 1 and 2. If accused No. 3 entered into a correspondence with the complainant upon the instruction of the first two accused and if he gave advise to the two accused to protect their interest in the transaction, accused No. 3 could not be exposed to a criminal liability. In this connection, he has particularly invited my attention to the averments in para 6 of the complaint after stating the conduct of accused Nos. 1 and 2. The complainant averred in Para 6 as follows :

At that time accused Nos. 1 and 2 had minutely inspected all my business documents, files and records" with the help of accused No. 3 who was represented to me as their legal advisor. All the accused thereupon asked me to pay Rs. 16,000/- to accused No. 1's said firm being the legal charges for preparing the legal documents including the necessary stamp papers, registration charges in respect thereof at the rate of 4%i of the loan amount.

50. He also invited my attention to averment in para 2 of the complaint. After stating the manner in which accused Nos. 1 and 2 induced the unwary victim to

part with the monies, the complainant had stated in said para 2 as follows :

Thereafter accused No. 3 starts his role as the legal advisor and thereby all the three accused go on demanding and pestering the victim for almost impossible requirements one after the other for a such long time that the victim gets tired and ruined and gives up everything.

51. Relying upon this averment in the complaint, Mr. Sabnis contended that on the complainant's own showing accused No. 3 is only a Legal Advisor of the other two accused. He strenuously contended that no illegality could be imputed to accused No. 3. He further contended that the question as to what advise was given by accused No. 3 to accused Nos. 1 and 2 could not be a subject matter of evidence and unless it was proved that an illegal advise was given by accused No. 3 to accused Nos. 1 and 2, no criminal intention could be imputed to the accused.

52. I have given my very considered opinion on this question and still I am of the opinion that though the case of accused No. 3 stands on a somewhat different footing than that of accused Nos. 1 or 2. there is really no necessity to interfere with the order of issuance of process passed by the learned Magistrate, at least at this stage, even as regards accused No. 3. The charge is yet to be framed. So far as accused Nos. 1 and 2 are concerned, the above mentioned discussion of the admitted facts would leave no scope for doubt that accused Nos. 1 and 2 shall have to face the charge of the offence alleged against them by the complainant. But so far as accused No. 3 is concerned, the learned Magistrate may have to apply his own mind to the question as to whether a charge against accused No. 3 also could be framed or not.

53. I have arrived at this conclusion because if it is proved in the instant case that throughout the proceedings accused Nos. 1 and 2 were being abetted by accused No. 3, the mere fact that he happened to be their Legal Advisor would not exonerate accused No. 3 of the offence. It may be that there might be some difficulty in the way of the complainant in the matter of proving the actual advise given by accused No. 3 to accused Nos. 1 and 2. But the fact that there would be difficulty in that behalf would not mean that it would be an impossible task. But that apart, it is one thing to say as to what advise accused No. 3 gave to accused Nos. 1 and 2 and it is quite another thing to place before the Court the fact that the three accused were acting in league with each other and each of them aided and abetted each other or that the entire transaction was the result of the common intention of all three of them. Everything will depend upon the nature of the charge against the three accused and the evidence led by the complainant in that behalf.

54. So far as the above mentioned averments are concerned, to my mind, those averments are not such that no criminality can be said to have been imputed to accused No. 3. There does appear to be some mischief committed by accused Nos. 1 and 2 in and after receiving the huge amount of Rs. 17,500/- which if

prompted by accused No. 3, would give rise to quite a serious inference of criminality on his part. As, for instance, it is almost incomprehensible as to why so many No-objection letters or certificates were insisted upon the complainant's bankers and as to why even after receiving the No-objection Certificate, all the accused insisted upon finding some subterfuges or the other to repudiate their liability. I do not know what defence accused No. 3 is going to take in the trial Court. For ought I know, he may come out with a defence which might be acceptable. Such a defence can be raised by him before framing of the charge and if the learned Magistrate is satisfied that it is a reasonable defence, he may have to consider as to whether a charge should be framed against accused No. 3 at all. But I find no material being placed before me at this stage to come to the conclusion that no offence on the part of accused No. 3 is disclosed.

55. At this stage, I may refer to the judgment of the Supreme Court in the case of R.P. Kapur Vs. The State of Punjab, strenuously relied upon by Miss Rekha Safari for the respondent/claimant. In the said case, the Supreme Court referred to certain categories of cases where the inherent jurisdiction of the Court to quash the criminal proceedings could be legitimately invoked. Taking me through the judgment, Miss Rekha Safari contended that the petitioner's case falls in none of the categories mentioned by the Supreme Court and, hence, I should not exercise my jurisdiction either u/s 482 of the Criminal Procedure Code or under Articles 226 and 227 of the Constitution of India.

56. Since I have already held that there exists no justification for me to interfere with the order passed by the trial Court issuing process, it is really unnecessary to rely upon the said judgment of the Supreme Court. But I must state that, by and large I am in complete agreement with Miss Rekha Safari's plea that this is not a case which falls in any of the categories mentioned by the Supreme Court to give jurisdiction to this Court to interfere with the order passed by the trial Court at the threshold of the proceedings. It may be true that the Supreme Court did not intend the enumeration of the categories to be exhaustive. But as mentioned above, irrespective of the judgment of the Supreme Court, I am satisfied that no case for interference by this Court is made out by the petitioners.

57. In this view of the matter, the Writ Petition filed by all the three accused fails. However, I make it clear that the learned Magistrate will hear the accused before framing the Charge. It will be open for him to consider the entire question quite independently, though I cannot help observing that as the record stands today and in the absence of any additional material being brought before him, it will be normally difficult for any Court to hold that no charge should be framed against accused Nos. 1 and 2. At the same time, I must also observe that the learned Magistrate will be well advised to consider the question of framing charge against accused No. 3 with more circumspection. However, the entire matter is to be decided by the learned Magistrate according to his own judgment in the light of the material placed before him.

58. Subject to the above observations, the petition fails and the Rule earlier

issued stands discharged.