

(2023) 01 BOM CK 0093

In the Bombay High Court

Case No : Criminal Writ Petition No. 1323 Of 2022

Ramesh Dadarao Bagdure And Others

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 20-01-2023

Acts Referred:

Constitution Of India, 1950 — Article 227

Indian Penal Code, 1860 — Section 34, 406, 409, 420, 467, 468

Code Of Criminal Procedure, 1973 — Section 156(3), 202, 204, 415, 482

Citation : (2023) 01 BOM CK 0093

Hon'ble Judges : Kishore C. Sant, J

Bench : Single Bench

Advocate : V. D. Hon, S. S. Manale, D. S. Jape, P. P. More

Final Decision : Allowed

Judgement

Kishore C. Sant, J

1. This Writ Petition is filed with a prayer to quash and set aside an order passed by the learned Additional Sessions Judge, Nilanga dated 17. 08.2022 in Criminal Revision No. 2/2022. By way of this impugned order, the learned Sessions Judge has rejected the criminal revision application and confirmed the order passed by the learned Judicial Magistrate First Class, Nilanga dated 22.12.2020. The learned JMFC had passed the order directing issuance of summons against present petitioners for the offences punishable under Sections 420, 406 read with 34 of the Indian Penal Code.

2. The facts are like this that the present petitioners formed a partnership firm with respondent no.2 and two other partners. The partnership deed was executed on 29.10.2002 under the name of M/s. Bhagwant Warehouse. The partnership was to carry business of a Warehousing. The firm started business from 29.10.2002. Partner no. 1 – Pandurang Attal and partner no.2 i.e. respondent no.2 were to look after the partnership business of the firm. The Warehouse was to be constructed on the land belonging to Pandurang Attal, i.e.

Gat No. 240 situated at Omerga (Hadga) Tq. Nilanga, Dist. Latur. He had no objection to use the land for the Warehouse. The land of partner no.1 i.e. present petitioner no.1 from the same Gat was also to be used by the partnership firm. Pandurang Attal expired and therefore one other partnership under name of Bhagwant Warehouse started into between petitioner no.1 and petitioner no.2 on 21.12.2013. This new firm also carries a business in the name and style of Bhagwant Warehouse. Thus, there were two different partnership firms, one in which there were five partners including the present petitioners, Pandurang Attal and respondent no.2 in the name as M/s. Bhagwant Warehouse, Omerga executed on 29.10.2002 and other in which both petitioners and late Pandurang Attal executed on 21.12.2013 were partners in the name as Bhagwant Warehouse.

3. It is case of respondent no.2 that as per the partnership deed, the land belonging to Pandurang Attal from Gat No.240, ad-measuring 1 Hec. 93 R and the land of present petitioner no.1 adjacent to the above land from the same Gat ad-measuring 81 R was decided to be used for a Warehouse over the said land. The permission was obtained for construction of Warehouse from the Deputy District Registrar (Co.op), Latur as per licence no. 14/2003 dated 12.03.2003. The proposal thereafter was submitted for finance loan to the State Bank of Hyderabad Branch at Nilanga after the recommended by NABARD. The term loan of Rs.19.80 Lacks to the firm was sanctioned by the said Bank (SBH) and the NABARD also sanctioned subsidy of Rs.592,100/- to the firm. After construction of Warehouse, the firm had started business of Warehousing. In the year 2008, the respondent no.2 started his own business at Latur and thereafter the business of the firm was managed by late Pandurang Attal and present petitioner no.2. The respondent no.2 did not take any remuneration from the said firm as it was agreed that the entire remuneration will be paid after closer of account of bank loan. In 2010, it was informed by the petitioners and Pandurang Attal to respondent no.2 that the Buldhana Urban Credit Co-operative Society, branch Nilanga (Buldhana Society for short) made a request for taking warehouse on rental basis and the same was given on rental basis, as respondent no.2 consented for the same. Since the authority for signing papers had given to the present petitioners and Pandurang Attal, the respondent no.2 did not get knowledge about the papers submitted to the Buldhana Society and the details of agreement made with the Society.

4. As the respondent no.2/Sundarlal was to get the remuneration of bank loan was repaid, he started for settling accounts and demanded share in the profit of the firm to the petitioners and Attal. However, no heed was paid and other partners avoided to provide the accounts on the pretext that the accounts were not ready. In November, 2015, the partners decided to render the accounts of the firm and thereafter the business of the firm was taken over by Attal and the present petitioners for consideration. In spite of that no accounts were submitted. However, promise is given that Sundarlal will be paid an amount around Rs.80 Lacks and to keep the warehouse. However, no amount actually

came to be paid.

5. In spite of all these things, since nothing was paid to Sundarlal, he contacted the Buldhana Society and verified the papers submitted to the society for lease agreement. He was shocked after going through the papers submitted to Buldhana Society that Bhagwant Warehouse is a new firm and the present petitioners are the only partners of the firm. It was shocking for Sundarlal that behind his back another partnership firm was registered. On asking about the said, the petitioners accepted the fact and told that they are ready to settle the accounts. They further agreed to pay the past remuneration of Sundarlal and requested to wait till 30.04.2016 for payment.

6. Since nothing happened, Sundarlal requested for the documents from NABARD and Buldhana Society. But, the Buldhana Society did not provide the documents. On perusal of the documents received from NABARD, it was found that by suppressing the facts of existing firm, the other partners made a new agreement for partnership and formed a new partnership firm without dissolving the earlier firm. It was thus given a notice that when Sundarlal had never signed the documents showing his retirement deed from the firm and when no notice was received regarding changes in the partnership firm. Since there is no intention on the part, Sundarlal to retire from the firm. It is alleged that some fabricated documents were filed to show that Sundarlal is not the partner. Though the renewal licence of firm of warehouse from 2009 was signed by all the partners, however the application sent for subsequent agreements were signed only by three partners and thus have deceived Sundarlal since 2011. This notice was sent on 22.06.2016.

7. The said notice came to be replied denying all the allegations. It was not disputed that the partnership was formed on 29.10.2002. It was asserted that both the lands exclusively owned and possessed by Pandurang Attal and Ramesh Baheti respectively and it was never intended to be transferred in the name of the firm. The lands were permitted to be used for a partnership business. It is stated that it is the complainant, who did not settle the account and therefore the remaining partners registered a new partnership firm in 2011. On the contrary, it is alleged that it Sundarlal who has not settled the account and sent a legal notice. The allegation about breach of trust, forging of the documents is clearly denied. It is asserted that they are the exclusive owners and possessors of the land and they have never executed any documents in favour of the firm transferring ownership rights, title and interest in the said land.

8. After this reply, the respondent no.2 tried to lodge a complaint with the Police Station, Nilanga for the offences punishable under Sections 406, 409, 420, 467, 468 read with 34 of IPC. However the police did not take any action. The respondent no.2 therefore filed a petition under Section 156(3) of Cr.P.C. in the Court of learned JMFC, Nilanga. The learned trial Judge passed an order on 15.09.2018 and complaint was placed for the verification. The learned Magistrate after recording verification of complaint directed the police to conduct an enquiry

under Section 202 of the Cr.P.C. and called for a report. The police submitted its report, the learned JMFC Nilanga on receipt of a report directed to issue summons under Section 204 of the Cr.P.C. for the offences punishable under Sections 420, 406 of the IPC.

9. The petitioners aggrieved by this order filed a Revision Application No.2/2021 in the Court of learned Sessions Judge, Nilanga. By order dated 17.08.2022, the learned Additional Sessions Judge after considering the grounds and after hearing the parties dismissed the said Revision Application. The learned Sessions Judge observed that the act of the petitioners shows cheating and misappropriation of the property of the partnership firm. Merely because civil dispute is pending between the parties, it cannot be said that it is only a civil dispute and no criminal offence is made out.

10. On all these facts, the learned Senior Counsel submits that this is purely a dispute between the partners of a partnership firm. A civil suit is already filed for rendition of account by the respondent no.2. Only to bring a pressure upon the present petitioners, a criminal complaint is filed. There are no ingredients present making out an offences under Sections 420 and 406. After the directions were issued under Section 202, the police carried out investigation and submitted a report. It is specifically concluded that after enquiry it is found that the dispute is of civil nature and no case is made out of criminal nature. However the Court below has failed to appreciate this report. The learned Senior Advocate in his support of submission relied upon the following reported judgments.

- (i) Bhuban Mohan Das Vs. Surendra Mohan Das AIR 1951 Calcutta 69
- (ii) Velji Raghavji Patel Vs. State of Maharashtra AIR (1965) 2 SC 1433
- (iii) Mahindra Dipchand Jain Vs. Ashok Sardarmal Parekh & Ors. 2008 Cri. LJ 3825
- (iv) Hridaya Ranjan Pd.Verma Vs. State of Bihar AIR 2000 (SCW) 2077
- (v) Alpica Finance Limited Vs. P.Sadasivan AIR 2001 (SC) 1226
- (vi) Anil Mahajan Vs. Bhor Industries Limited 2005 (10) SCC 228
- (vii) Prof. R. K. Vijayasathya and Anr. Vs. Sudha Seetharam and Anr. (2019) 16 SCC 739
- (viii) Pepsi Foods Ltd. And Anr Vs. Special Judicial Magistrate and Ors. (1998) 5 SCC 749

11. The learned Advocate for respondent no.2 submits that as per the partnership deed, the land gat no.240 was given to a firm. The firm borrowed the loan. The loan was sanctioned by the NABARD and Buldhana Society. From clause No.17 of the partnership deed, he pointed out that the land of Pandurang Attal was to be used for constructing a warehouse rented by the partnership firm. The land of petitioner no.1 from the same gat number ad-measuring 81 R was also to be used by the firm. Though the firm is not dissolved and though not

a single partner retired shows that the earlier firm is still in existence. Since the profit was not shared amongst all the partners, a civil suit was filed only for the purpose of sharing of profit and for rendition of account. He submitted that while submitting the documents in the office of Assistant Registrar, Society, the document was submitted showing that all the partners have signed the said document. It is specific case that the signature of partner Sundarlal and Bharatlal is forged and the signatures do not appear of these partners. In another document, only three partners are now shown to be partners of Bhagwant Warehouse, Omerga. He submits that this is clearly a forgery. He again invited attention to clause no.16 of the partnership deed, wherein it is mentioned that the terms of partnership are binding upon partners and their legal-heirs. He submitted that the complainant suspected the intention when the partners did not come forward to submit the account and therefore he made an enquiry in which he found that the documents of the partnership of the year 2013 are forged documents. Though it is a new partnership firm, still the property and the business of the earlier partnership firm is shown to be the property of new partnership firm and now the property is given to Buldhana Society on rent. He submits that the documents submitted to the DDR (Co-op), Latur are also forged.

12. The learned Advocate for respondent no.2 further submits that after noticing this, a legal notice was sent on 13.07.2016 and it is only thereafter the complaint was filed in the Court. He pointed out from paragraph no.8 of the order passed by the trial Court that the Court has specifically observed that the parties had entered into a partnership business under the name and style as 'Bhagwant Warehouse', wherein, it is seen that the accused persons have given their land to the firm. It is specifically recorded that the property, which was already given to the earlier partnership firm is now given for a different purpose behind back of the complainant. This act clearly amounts forgery and cheating and notice has been rightly issued against the petitioners. He pointed out that even a permission was sought from Gram Panchayat Office, Nilanga for construction of a godown by a partnership firm. He submits that the judgments on which reliance is placed by the learned Senior Counsel for the petitioners, are not applicable to the present case in view of the facts and circumstances. He submits that both the learned Courts below have rightly passed the order and no interference is required.

13. Before going for a discussion and to arrive at conclusion, it would be proper to consider the legal position as stated in the judgments relied upon by the learned Senior Advocate. The first judgment in the case of Bhuban Mohan Das (supra), specific questions were referred to the full bench. The first question relevant for our purpose was can a charge under Section 406, Penal Code be framed against a person who, according to the complainant, is a partner with him and is accused of the offence in respect of property belonging to both of them as partners?

. In paragraph no.9 of the said judgment, it is held that to establish a criminal

breach of trust, it must be shown that the person charged has been entrusted with the property or with dominion over property. It is necessary to show that such person has held the property in a fiduciary capacity. In paragraph no.14 of the said judgment, it is held that if a partner receives money on behalf of the partnership does not receive it in a fiduciary capacity. In such case a partner could not be charged with offence of breach of trust by reason of his failing to account for that money. Similarly, if a partner is holding property belonging to the partnership, he is holding it as one of the partners, entitled to hold it and, therefore, it cannot be said that he was holding it in a fiduciary capacity. Ultimately it is held that the only remedy available to a co-partner is for rendition of account and until such an account is taken it cannot be said whether the co-partner has any interest at all in the asset or money. It is further held that even after dissolution of the firm, co-partner has no right to sue for his share of an asset. In this case, allegation is that the property, which was given for the use of the earlier partnership firm is shown to be of the subsequent firm and is given to society on lease.

14. In the judgment of Velji Raghavji Patel (supra), the Hon'ble Apex Court has also considered the case of Bhuban Mohan Das (supra). It is held that before a person can be said to have committed criminal breach of trust it must be established that he was either entrusted with or entrusted with dominion over the property which he is said to have converted to his own use or disposed of in violation of any direction of law etc. It is further held that every partner has dominion over property of a firm by reason of the fact that he is a partner. It is held that the prosecution must establish that dominion over the assets or a particular asset of the partnership was by a special agreement between the parties, entrusted to the accused person. It is held that a partner has undefined ownership along with the other partners over all the assets of the partnership. If he chooses to use any of them for his own purposes he may be accountable civilly to the other partners but he does not thereby commit any misappropriation.

15. In the case of Mahindra Dipchand Jain (supra), one of the partners had withdrawn the amount deposited in the account of firm without consent of other partners. In this fact, it was alleged that the said partner had committed an offence of criminal breach of trust under Section 406 of the IPC. It is held by the Hon'ble Court that in such facts, the learned Magistrate had erred in issuing process in said case. If the first partner had not given accounts it was open for other partner to file proper proceeding rather than resorting to criminal action against first partner.

16. In the case of Hridaya Ranjan Pd.Verma (supra), the Hon'ble Apex Court considered the definition of CHEATING in Section 415 of the Code. It is held in paragraph no.14 and 15 of the said judgment, which reads as below.

14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to

do. in the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.

. Thus, what is necessarily to be seen while considering the offence of cheating is that whether there was fraudulent or dishonest intention at the time of making the promise. In our case, it is found that the earlier partnership was entered into 2002, whereas the second alleged partnership is of the year 2013, thus it cannot be said that there was any intention since inception to deceive the partners. It also cannot be said that there was an element of inducement on the part of the petitioners.

17. In the case of *Alpic Finance Limited (supra)*, it is held that there has to be an allegation that the accused made any willful misrepresentation or there was fraud or dishonest inducement on the part of the accused and thereby the complainant is made to part with the property. In this case, it is clear that the property was belonging to late Pandurang Attal and the petitioner no.1. There is no case of the respondent no.2 that he was made to deliver any property belonging to him whereby the trust was created.

18. Considering the judgment in the case of *Anil Mahajan (supra)*, it is seen that the judgment is delivered by relying upon the case, which is already discussed in *Alpic Finance Limited (supra)*.

19. The further judgment in the case *Prof. R. K. Vijayasathya and Anr. (supra)*, the Hon'ble Apex Court has held that a condition necessary for an act to constitute an offence under Section 406 of the Penal Code is that the accused was entrusted with some property or has dominion over a property. It was observed that no act on part of the accused has been alleged discloses an intention to induce to deliver any property to the petitioners and thus it was held that no offence under Section 420 was made out.

20. The last judgment is in the case of Pepsi Foods Ltd. And Anr. (supra). The learned Senior Advocate for petitioners pointed out the paragraph no.28 of the said judgment, wherein it is held that summoning of an accused in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course. The accused can directly approach the High Court under Section 482 of the Code or Article 227 of the Constitution.

21. Considering all the above aspects and specifically the acts involved in the case, it is clearly seen that the partnership deed was executed and the partnership firm was established in 2002. The property belonging to late Pandurang Attal and petitioner no.1 was to be used for the partnership business and warehouse was to be constructed on the same land. There is no case made out by the respondent no.2 that he was induced by the accused persons to deliver any property with dishonest intention. There is also no case seen that the respondent no.2/complainant has delivered any property belonging to him whereby a trust is created and property was under dominion of the petitioners. When the property belonging to petitioner and late Pandurang Attal was used for the partnership firm, the land was never transferred in the name of firm. By reading clause 17 of the partnership deed, it is clear that property was only to be used for partnership business. The arrangement continued till 2011 it is only after 2011, as per the allegation, the petitioners stopped giving the account to the respondent no.2. In the partnership deed, there is nothing to show that the partners cannot establish a different partnership firm. Therefore in this case, it appears that no case is made out under Section 406 and 420 of IPC for which process is issued by the learned JMFC, Nilanga. In the order of Magistrate, it is found that it is observed that prima facie the property, which was used by the petitioners for the business of the earlier firm is given to some other persons. It is further observed that this act appears to be prima facie with an intention to cause wrongful loss to the informant. The observation so far offence under Section 420 is only that prima facie it appears that the offence of cheating has taken place. The learned Magistrate as well as the Revisional Court failed to appreciate that no property belonging to complainant was ever delivered in favour of the accused. The learned Court below appears to be under impression that the rights over property belonging to the petitioner was transferred in the name of earlier partnership firm. It was in fact a land of the accused was only to be used for a partnership business. There is no delivery of property belonging to the complainant in favour of petitioner or the firm. It is clear that no case is made out attracting ingredients of criminal breach of trust.

22. Considering these aspects, it is seen that the learned Magistrate has failed to appreciate that it was purely a civil dispute between the partners. The Court has proceeded only on the allegations made by the informant and has come to conclusion that offence is made out. Even the Sessions Court has not properly appreciated the grounds and the facts of the case and has arrived at erroneous conclusion. In view of the same, this Court holds that the order of issuance of summons dated 22. 12.2020 passed by the learned JMFC, Nilanga below Exhibit

No.1 in R.C.C. No.256/2017 and the order dated 17.08.2022 passed by the learned Sessions Judge, Nilanga dismissing the Criminal Revision Application No.2/2021, both suffered from illegality and deserve to be quashed and set aside. In the result, the Writ Petition is allowed and disposed off accordingly. Rule is made absolute in terms of prayer clause ' B'.

[KISHORE C. SANT, J.]

23. At this stage, the learned Advocate for the respondent requests that the effect of the judgment be stayed for a period of two weeks. His request is opposed by the petitioners. Looking to the nature of order passed by this Court, this Court does not feel it necessary to stay the order. Hence, the request is refused.