

(2019) 09 BOM CK 0106

In the Bombay High Court

Case No : Criminal Writ Petition No. 1690 Of 2007

V.B. Padode And Anr

APPELLANT

Vs

M/s. Indus Cruising And Shipping (P) Ltd And Anr

RESPONDENT

Date of Decision : 27-09-2019

Acts Referred:

Indian Penal Code, 1860 — Section 403, 405, 406, 409, 415, 420

Code Of Criminal Procedure, 1973 — Section 240, 482

Income Tax Act, 1961 — Section 230A, 269

Citation : (2019) 09 BOM CK 0106

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : G.S. Godbole, Vinay J. Bhanushali, Amit Kumar Bhowmik, S.R. Agarkar

Final Decision : Dismissed

Judgement

1. This Petition takes an exception to the Judgment and order dated 8th August, 2007 passed by the Learned Addl. Sessions Judge in Criminal Revision Application No. 333 of 2007, thereby confirming the order dated 03/07/2007 passed by the Learned Addl. Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai. By order dated 03/07/2007 the learned Magistrate directed to frame charge against the accused under Section 406, 420 of the Indian Penal Code.

2. Brief facts leading for filing the present Petition are as under:

It is the case of the Complainant that, Petitioner No. 1 is the Director of the Petitioner No. 2 Company registered under the Companies Act, 1956 and engaged in the business of Information and Technologies. On 2nd December, 1998 Respondent No. 1 herein filed a Criminal Complaint against the Petitioners before the learned Addl. Chief Metropolitan Magistrate 23rd Court at Ballard Pier, Mumbai. It is stated in the complaint that, on or about 9th April, 1997 Petitioner No. 1 acting as a Director of Accused No. 2 Company represented to 1st Respondent - Orig. Complainant that the Petitioners owned and possessed an

office premises on the 2nd floor together with mezzanine floor in the building known as Lawrence and Mayo, situated at 276, Dr. D.N. Road, Mumbai. Petitioner also made several representations that the said office could be sold to the Complainant Company. Petitioners further represented that they had clear title to the said premises. On such representations the Petitioners negotiated the sale of the office premises to the Company of the Complainant i.e. Respondent No. 1 herein. Accordingly, an agreement was entered into on 9th April, 1997 between the Respondent No. 1 Company and Petitioners. The agreement was signed by the Complainant and Petitioner No.1. Respondent No. 1 paid Rs. 41,00,000/- to the Petitioners on 09.04.1997 itself on the execution of the agreement. As per clause 2(b) of the Agreement i.e. Memorandum of Understanding (for sake of brevity hereinafter it will be referred as "MOU"). a sum of Rs. 1,23,00,000/- being the balance amount was payable by the Complainant within one month from the receipt of the following:-

- i). No objection granted u/s. 269 U.L. (3) of Chapter XX C of the Income Tax Act.
- ii). Income Tax clearance of the vendor u/s. 230 A of the Income Tax, 1961.
- iii). No objection from the society of this transaction and
- iv). Upon the vendor making payment of full stamp duty in respect of the agreement of sale dated 29.01.1993 and
- v). subject to the simultaneous execution of Deed of Transfer and other relevant documents of vendor in favour of the Purchaser and Upon the Vendor simultaneously delivering the vacant and peaceful possession of the said premises.

It is also stated that in terms of clause 12 of the said Agreement, the parties have agreed that in the event the purchaser fails to complete the transaction as per the MOU, then in that event the Vendor shall be entitled to terminate the agreement, and to forfeit the earnest money paid by the purchaser to the extent of 10% of the entire consideration i.e. a sum of Rs. 16,40,000/- and shall refund to the purchaser the balance of the earnest monies paid without interest. The Complainant also stated in the complaint that except item no. (i) and (iii) listed above none of the other obligations that were to be performed by the Petitioners were performed by them. In fact, Petitioner No. 1 dishonestly by misquoting the terms of the agreement has started pestering the complainant to shell out Rs. 1.2 Crores saying that he would otherwise forfeit the earnest money to the extent of 10% of the entire consideration i.e. Rs. 16.40 lacs, and would refund the balance without interest only when he found a buyer for the premises.

3. It is also the case of the complainant that, complainant was not guided by legally versed person and were influenced by the Petitioners terrorizing tactics. Therefore, Complainant made a counter proposal, that the Petitioners should return to the complainant the balance of Rs. 24,60,000/-forthwith, and if he was unable to do so then the amount should be paid back within a definite time frame

with interest @ 24% p.a. with security for the payment. It is further stated that the Petitioners never intended to return any part of the amount, therefore they did not give any reply to counter offer of Complainant. Time went by and M/s. Mulla and Mulla, Craige Blunt and Caroe, Advocates, issued an advertisement in newspaper which proclaimed that the Petitioners intended to sell the office premises to their clients a 3rd party. By a letter dated 12th March 1998 addressed to the advertising advocates, Advocate of the Complainant set forth the correct state of affairs, objecting to the said second sale. They also wrote a letter to the accused on 16th April 1998 emphasizing that agreement entered into between the Petitioners and the complainant was still valid. Complainant learnt that MTNL had filed a suit before this Court for recovery of over Rs. 64,66,582/- lacs from the Petitioners, and when the MTNL proceeded to seek attachment / Court Receiver of the suit premises, a statement was made to the Hon'ble Court by the Counsel of the Petitioners that the property was already mortgaged to IDBI. It is averred by the complainant that from the said information, it is clear, that when the Petitioners made representations to the Complainant that the Petitioners had clear title and could sell the office premises to the complainant, the representations were false to their knowledge as the office premises was already mortgaged to IDBI. By such false representations, the Petitioners induced the complainant to part with a sum of Rs. 41,00,000/- and have thus committed an offence of cheating. On 09.04.1997 the Petitioners entered into an agreement of sale in respect of the office premises, they became constructive trustees in respect of the said premises and their subsequent attempt to sell the said premises to the 3rd party amounts to Criminal Breach of Trust by trustees under Section 409 of the Indian Penal Code.

4. The learned Additional Chief Metropolitan Magistrate after going through the complaints and evidence which was adduced before the Court and the documents produced on record, came to a conclusion that the complainant has made out a case under Section 240 of the Criminal Procedure Code for framing of charge under Sections 406 and 420 of the Indian Penal Code. By order dated 07/03/2007 the learned Additional Chief Metropolitan Magistrate, as stated herein above, directed the Accused Petitioners to remain present on the next date for framing of charge.

5. Being aggrieved by the said order of the learned Additional Chief Metropolitan Magistrate, the Petitioners filed a Revision bearing Criminal Revision Application No. 333 of 2007 before the learned Addl. Sessions Judge. As stated herein above, the learned Additional Sessions Judge, Greater Bombay by order dated 08.08.2007 rejected the application filed by the Petitioners. Hence this Writ Petition.

6. The learned counsel for the Petitioners submits that there is no sufficient material produced on record by the complainant to frame charge against the Petitioners. It is submitted that as per MOU, the Petitioners had discretion to extend time for completion of sale of the premises, but no such discretion was

ever given to Respondent No.1. Clause 12 of the MOU provided that in case of default by the Purchaser, vendor was allowed to forfeit Rs.16.40 Lakhs. The complainant could not arrange the balance amount as agreed to be paid as per MOU. In the letter of complainant dated 15/07/1997, the complaint has stated that he is unable to give the Petitioners the advance amount since the complainant is still in process of consolidating his funds. It is an admitted position that Respondent No.1 had no money to complete the transaction in question. The Petitioners are entitled for forfeiture of 10% of the Earnest Money, because of the default on the part of Respondent No.1. The complainant has falsely alleged that the Petitioners intended to sell the premises in question to third party. There was no dishonest intention on the part of the Petitioners, and therefore, the Revisionary Court has committed an error in holding that failure to return the amount constitute an offence under Section 406 of the IPC. There is no specific promise to return the property and therefore no offence of cheating under Section 420 as alleged against the Petitioners is made out. The Revisionary Court failed to appreciate that failure to fulfill promise to make certain payment, even assuming to be true, does not amount to any criminal offence. There was no document produced on record to support the case of the complainant that the property was mortgaged to Bank, and therefore, there is no evidence adduced on record to support the case of alleged offences. He submits that no false statement was made by the accused Petitioners, none of the offences are disclosed against the Petitioner, and there is no evidence to frame charge against the accused. According to him, at the most the contents of the complaint will disclose that it is a civil dispute triable by the Civil Court, but definitely not by any criminal court. It is therefore submitted that order directing to frame charge against the accused Petitioners is illegal and perverse. The learned counsel for the Petitioners submits that neither alleged offences under Section 406 and 420 of the Indian Penal Code are disclosed, nor material on record is sufficient to frame the charge, so also the allegations in the complaint at the most demonstrate that there was breach of an agreement/MOU for which civil remedy can be availed.

7. The learned counsel for the Petitioners relying upon the relevant clauses of the MOU so also the cross examination of the complainant submits that all the requirements/clauses stated in the said agreement have been complied with by the Petitioners within the time stipulated therein. It is also submitted that the complainant has admitted in his cross examination that the said requirements/clauses stated in the agreement to be fulfilled by the Petitioners have been complied with. The learned counsel invites attention of this Court to the cross examination of the complainant. He further submits that the learned trial judge has ignored the factual aspect that admittedly there was no charge created on the property and the Petitioner being the owner was legally entitled to deal with the same, and therefore, the transaction of the Petitioners with the Bank in 1997 would be of no material for adjudication of the dispute in question. He also submits that the learned Sessions Judge has ignored that the essence of offence

under Section 406 lies in the use of the property entrusted to a person by that person, in violation of any direction of law or any legal contract which he has made during the discharge of such trust. In the present case, the earnest money of Rs.41 lakhs was paid by the complainant to the Petitioners, and by a subsequent letter it was liable to be refunded to the complainant on finding a new buyer which had never occurred. The learned counsel further submits that the amount was withheld as per forfeiture clause and stamp duty paid on the said amount and against the legal claim for damages, and nevertheless the earnest money has not been used by the Petitioners contrary to any direction of law or contract which prescribes how the amount has to be dealt with and hence there cannot be any offence under Section 406. He therefore submits that the learned Sessions Judge was erroneous on facts and laws while rejecting the Revision preferred by the Petitioners. The learned counsel relying upon Anand Kumar Mohatta's case (supra) submits that mere failure to refund security deposit would not attract the offences under Sections 405 and 406 of the Indian Penal Code. The learned counsel relying upon Anil Mahajan's case (supra) also submits that mere failure to keep the promise at a subsequent stage, offence of cheating cannot be made out. In support of the aforesaid contentions the learned counsel for the Petitioners accused sought to place reliance on the following judgments :- 1] Unreported Judgment of Apex Court in Criminal Appeal No.1395 of 2018 in the matter of Anand Kumar Mohatta and anr v/s. State (Govt. Of NCT of Delhi) Department of Home and anr. 2] AIR 1996 SC 2452 in the matter of Central Bureau of investigation SPE,SIUI (X) New Delhi v/s. Duncans Agro Industries Ltd, Calcutta; 3] (2005) 13 SCC 699 in the matter of Murari Lal Gupta v/s. Gopi Singh, 4] 1967 The Bombay Law Reporter 280;Deochand Dulabhji Jogi v/s. Madanlal Gopikisan Sharma; 5] (2005) 10 SCC 228; Anil Mahajan v/s. Bhor Industries Ltd. & anr. 6](2015) 8 SCC 293; Vesa Holdings Private Limited and anr. v/s. State of Kerala and others and 7] (2013) 1 SCC 345; Satish Batra v/s. Sudhir Rawal 8] 2009 Cri.LJ 2824; Ajoy Kumar Ghose v/s. State of Jharkhand & Anr. The learned counsel for the Petitioners Accused therefore submits that Petition deserves consideration.

8. Respondent No.1 Complainant has filed affidavit in reply. The complainant reiterated his case in the said affidavit in reply. It is specifically stated in the said affidavit that Petitioner Accused No.1 assured the complainant that the title of the subject property was free hold and that, there were no encumbrances thereupon. It is further stated that the matter at hand pertains to outright cognizable criminal acts including cheating and criminal breach of trust even ex facie with mens rea and clear intention to commit the cognizable criminal acts by the Petitioners/accused.

9. The learned counsel appearing for Respondent No.1 complainant submits that the complainant has paid Rs.41,00,000/- to accused No.2 on 09/04/1997 itself on the execution of the MOU and balance amount of Rs.1,23,00,000/- was to be paid within one month from the receipt of the certain documents mentioned in the said MOU. It is also submitted that later on the complaint learnt that MTNL

had filed a suit for recovery of amount from the accused and, when the MTNL proceeded to seek attachment of the suit premises, a statement was made before the Court by the advocate of the accused that the property was already mortgaged. It is submitted that the Petitioners have falsely represented Respondent No.1 that, they had clear title to the premises in question. The learned counsel for Respondent No.1 therefore submits that the accused induced the complainant to part with a sum of Rs.41,00,000/- and therefore committed an offence of cheating under Section 420 of the IPC. It is also submitted that the complainant came to know by an advertisement in Newspaper that the accused intended to sell the said premises to third party. Therefore according to the learned counsel for Respondent No.1, subsequent attempt to sell the premises to the third party, that too without returning the money entrusted by the complainant, amounts to criminal breach of trust on the part of Petitioners accused, and therefore, the accused committed an offence under Section 406 of the IPC. It is also submitted that the Petitioners never intended to return any part of the amount. In support of the aforesaid contentions, the learned counsel for Respondent No.1 Complainant has placed reliance on the observations/ratios laid down in the following judgments in 1] (1999) 3 SCC 259, Rajesh Bajaj v/s. State NCT Delhi 2] SLP (C) Nos. 25043-25045 of 2008; Kalabharati Advertising v/ s. Hemant Vimalnath Narichania & ors. 3]Civil Appeal Nos.4012-4013 of 2012 SLP(C) Nos.14163-14164 of 2012; A Shanmugam v/s. Ariya K R K M N P Sangam; 4] AIR 2001 SC 3846; Kamaladevi Agarwal v/s. State of West Bengal & ors. 5] AIR 2000 SC 1869; Medchl Chemical & Pharma (P) Ltd v/s Biological E Ltd. & ors. 6] Supreme Court Criminal Appeal No.1028 of 2001; M Krishnan v/s Vijay Singh & Anr. 7] High Court of HP, Cr. MMO No.43 of 2011; Smt. Madhavi Ramesh Dudani v/s. Ramesh Kimatrai Dudani and 8] AIR 2019 SC 847; Smt. Kamal Shivaji Pokarnekar v/s. The State of Maharashtra.

10. The learned counsel for Respondent No.1 further submits that the Petitioners, while making the representations to the complainant regarding clear title of the subject property, had dishonestly concealed the facts that the subject property is mortgaged with the bank and filing of suit by MTNL, and therefore, as per provision of Section 415 of the Indian Penal Code, a dishonest concealment of facts is a deception. The learned counsel for Respondent No.1, relying upon judgment of the Supreme Court in M/s. MEDCHL Chemicals and Pharma pvt. Ltd. v/s. M/s. Biological E Ltd and others reported in AIR 2000 SC 1869, submits that the jurisdiction as envisaged under Section 482. of the Criminal Procedure Code as such is rather limited and restricted and is undue expansion is neither practicable nor warranted. The learned counsel for Respondent No.1 also, relying upon the judgment of this Court in Chintaman vs Dnyaneshwar and anr reported in 1974 Cri.LJ 542, submits that the complainant acted on the representations of the Petitioners and in belief of the truth thereof, and therefore, the ingredients of the complaint and evidence and material produced on record clearly discloses the conduct and dishonest intention of the Petitioners to cheat the complainant. He therefore submits that this is a clear cut criminal breach of liability on the part of

the Petitioners. The learned counsel for Respondent No.1 further submits that the intentions of the Petitioners since beginning are oblique and with intent to deceive the complainant. He also submits that non-disclosure of the correct status vis-a-vis the property, admittedly the Petitioners continue to unlawfully withhold the monies of the complainant, and therefore, the Petitioners ought not to be allowed to take advantage of their wrongs. The learned counsel for Respondent No.1, therefore, submits that the Writ Petition may be rejected.

11. Heard the learned counsel for the parties. With their able assistance perused the pleadings and grounds taken in the Writ Petition, annexures thereto, affidavit in reply of Respondent No.1, and the reasons assigned by both the Court below.

12. It is an admitted position that MOU was executed on 09/04/1997 between the parties in respect of the premises in question for a total consideration of Rs.1.64 Crores, out of which Rs.41 Lakhs was paid by Respondent No.1 to the Petitioners accused subject to the Petitioners obtaining certificates under Section 230A and 269 of the Income Tax Act, NOC from Society, payment of Full stamp duty in respect of agreement of sale dated 29/01/1993. It is also an admitted position that as per clause 12 of the said MOU, in case of default by the Purchaser, the vendors would be allowed to forfeit Rs.16.40 lakhs. If the averments in the complaint are carefully perused and read in its entirety, the ingredients of offences are attracted, and consequently the alleged offences have been disclosed.. It would be apt to reproduce paragraphs 6, 7 and 8 of the complaint which reads thus :-

"6. We learnt that MTNL had filed a suit in the High Court of Judicature at Bombay for recovery of over Rs.64,66,582/-lacs from the Accused and when the MTNL proceeded to seek attachment/Court Receiver of the suit premises, a statement was made to the Hon'ble Court by the Counsel of the Accused/Defendants that the property was already mortgaged to IDBI.

7. The above information brought to light the fact that when the accused made representations to us that they had clear title and could sell the office premises to us, the representations were false to their knowledge as the office premises was already mortgaged to IDBI. By such false representations, the Accused induced us to part with a sum of Rs.41,00,000/- and have thus committed an offence of cheating. On or about 9/4/97 the Accused entered into an agreement of sale in respect of the office premises, they became constructive trustees in respect of the said premises and their subsequent attempt to sell the said premises to the 3rd party amounts to criminal breach of trust by trustee u/s. 409 of IPC. This offence was committed/attempted to be committed on or around February/March 1998.

8. Without prejudice to above and in any view of the matter, the Accused have no defence or justification, they have not preferred any - to retain Rs.25,00,000/- and wrongful retention of the same is conclusively, indisputably criminal breach of trust and/or misappropriation punishable u/secs. 403, 406 of

the Indian Penal Code. The amount was received and misappropriated by the Accused in their office. Hence the complaint is being filed in the Hon'ble Court."

A conjoin reading of paragraphs 6 to 8 would clearly disclose the alleged offences. The Supreme Court in the recent judgment in *Sau Kamal Shivaji Pokarnekar* (supra) has taken a view that quashing the criminal proceedings is called for only in a case where the complaint does not disclose any offence, or is frivolous, vexatious, or oppressive. Paragraphs 4, 5, 6 and 9 of the said Judgment are relevant and the same are reproduced herein under for the sake of ready reference :-

4. The only point that arises for our consideration in this case is whether the High Court was right in setting aside the order by which process was issued. It is settled law that the Magistrate, at the stage of taking cognizance and summoning, is required to apply his judicial mind only with a view to taking cognizance of the offence, or in other words, to find out whether a *prima facie* case has been made out for summoning the accused persons. The learned Magistrate is not required to evaluate the merits of the material or evidence in support of the complaint, because the Magistrate must not undertake the exercise to find out whether the materials would lead to a conviction or not.

5. Quashing the criminal proceedings is called for only in a case where the complaint does not disclose any offence, or is frivolous, vexatious, or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same. It is not necessary that a meticulous analysis of the case should be done before the Trial to find out whether the case would end in conviction or acquittal. If it appears on a reading of the complaint and consideration of the allegations therein, in the light of the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for the High Court to interfere.

6. Defences that may be available, or facts/aspects which when established during the trial, may lead to acquittal, are not grounds for quashing the complaint at the threshold. At that stage, the only question relevant is whether the averments in the complaint spell out the ingredients of a criminal offence or not.

9. Having heard the learned Senior Counsel and examined the material on record, we are of the considered view that the High Court ought not to have set aside the order passed by the Trial Court issuing summons to the Respondents. A perusal of the complaint discloses that *prima facie*, offences that are alleged against the Respondents. The correctness or otherwise of the said allegations has to be decided only in the Trial. At the initial stage of issuance of process it is not open to the Courts to stifle the proceedings by entering into the merits of the contentions made on behalf of the accused. Criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be of a

civil nature. If the ingredients of the offence alleged against the accused are prima facie made out in the complaint, the criminal proceeding shall not be interdicted."

(underlines added)

13. Therefore it is clear that when there is a prayer for quashing criminal proceedings at the stage of issuance of process/summons/notice, the relevant consideration is, whether the averments in the complaint attract the ingredients of the alleged offences and consequently, whether the alleged offences are disclosed or otherwise. In the facts of present case, it is abundantly clear that if the allegations made in the complaint are taken on its face value and read in its entirety, the same would indicate that the alleged offences are disclosed.

14. The complainant, after came to know that, the Petitioners-Accused intended to sell the premises in question to third party, by their advocate's letter dated 12/03/1998 the complainant has objected the notice published in Times of India dated 10/03/1998 in respect of the the sale of the premises in question. By the said letter it is specifically informed to the solicitor of the accused that the complainant has a lien and claim on the premises in question to the extent of Rs.41,00,000/- plus interest at the rate of 24% and hence requested the said solicitor of the accused not to go ahead with the sale until the dues of the complainant are paid. Reading of the said letter would disclose that the complainant is interested in purchasing property. Without returning the amount back to the complainant, a notice was published on behalf of the Accused in the newspaper for second sale which, according to the complainant, would indicate breach of trust on the part of accused.

15. It is pertinent to mention at this stage that in cross examination much store was laid on Exhibit D-1 which is a letter dated 15/07/1997 addressed by the Complainant to the Accused company. By said letter dated 15/07/1997 (Exhibit D-1) the complainant has informed the Petitioners that he is unable to give the Petitioners the advance amount since the complainant is still in process of consolidating his funds. Though it is the case of the accused that the complainant had no money to complete the transaction, in the cross examination, PW No.1 has clarified that mentioning about consolidating his funds means to check his accounts, bank balances etc before making final payment to the accused. It is true that the said witness (PW 1) has given certain admissions, however, the facts remain that if the evidence of PW-1 is considered in its entirety, the same is sufficient along with other material collected by the prosecution agency to frame the charge.

16. It is required to be noted that there is no any document placed on record by the Petitioners to show that complainant made a request in writing to terminate the agreement. It is the contention of the Petitioners that the complainant orally told that he has no money to pay balance amount. Even to prove the authenticity of the said contention of the Petitioners, evidence is required to be led during the

course of trial. Therefore the contention of the Petitioners that as the complainant did not pay the balance amount within the stipulated period as mentioned in the MOU, and therefore, the Petitioners were constrained to terminate the agreement cannot be accepted as an undisputed position in the absence of any document placed on record by the Petitioners to that effect, and when the said fact is disputed by the complainant. It is the allegation of the complainant that the Petitioners have not complied with all the requirements/ clauses of the MOU within the stipulated period. That matter also needs to be considered by the Trial Court. Therefore it is not desirable to undertake exercise of the aforesaid disputed question of facts while exercising writ jurisdiction.

17. Only in order to find out whether there is a case for framing the charge, it may be appropriate to make a reference to the evidence adduced by the complainant through one of the Directors Mr. Amarjitsingh Vidhyarathi (PW-1). In his examination in chief he has specifically stated that the accused never informed him till date that, he had paid the stamp duty on the business premises when he acquired the said premises from his predecessor in title. It is also stated that he was informed by the accused that the said premises was free from any encumbrances. It is further stated that he came to know from the plaint in Suit No.5361 of 1998 that as far back in 1994 the accused had mortgaged the property to M/s. ICICI Bank and because of that he could never have given the property to him. PW No.1 has specifically stated in his examination in chief that he told the accused that first the accused should complete his part of deal and then the complainant will make the full payment, and also proposed that the accused could keep with them Rs.16,45,000/- out of the total amount of Rs.41,00,000/- and return the balance of Rs.24,60,000/-. It is stated that as per cancellation clause contained in MOU, the complainant was ready for cancellation of the MOU, however, the accused did not pay him back and made a false representation that the title was clear. PW No.1 has also stated that the accused had not given any reason as to why he was not returning the balance amount as per clause in MOU.

18. The learned counsel for Respondent No.1 complainant invites attention of this Court to the plaint of Suit No.5361 of 1998 filed by ICICI Limited against the accused company for recovery of amounts advanced and/or lent to the accused and the Defendant No.1 therein i.e. the accused company agreed to mortgage/ charge/hypothecate of the immoveable and moveable properties mentioned in Exhibits A, A-1 and B thereto with the Plaintiff Bank. In Exhibit-A the description of the immoveable property has been shown. It is specifically averred in the plaint that at the request of the Defendants therein, the plaintiff bank agreed to grant three loans by sanction letters dated 08/01/1993, 25/03/1994 and 07/12/1994. It is clear from the reading of the averments made in the said plaint that on failure on the part of the accused to make payment of loans to the Plaintiff bank, the bank had filed the said suit for recovery of the loans amounts and appointment of Court Receiver and for injunction. It is also clear from the averments of the said suit that the accused have mortgaged the premises with

the ICICI Bank.

19. From the discussion as aforesaid, and as it is averred in the complaint, it is prima facie clear that since beginning the accused suppressed the fact from the complaint that the premises in question has been mortgaged with the bank and that the MTNL has filed a suit for recovery of dues. The complainant has made out a prima facie case that the accused had dishonest intention right from inception to cheat the complainant. Though the accused by their letter dated 13/10/1997 informed the complainant that they are terminating the MOU and, they shall forfeit the amount of total consideration and refund the balance of earnest amount, the accused did not act accordingly. This act of the accused therefore shows that the accused never intended to ensure execution of MOU or to return the said amount. The averments made in the complainant prima facie demonstrate that since inception the accused had an intention to cheat the complainant. The learned Additional Chief Magistrate has properly appreciated the evidence adduced on record and after going through the evidence, material and documents produced on record, has rightly come to a conclusion that the complainant has made out a case for framing the charge for the offences punishable under Section 406 and 420 of the Indian Penal and accordingly directed the accused to remain present for framing charge. The Revisionary Court did not deem it appropriate to interfere with the order passed by the learned Chief Metropolitan Magistrate. The Revisionary Court has recorded a finding that, it can be safely said that when the accused executed MOU in favour of the complainant, he was well aware that the premises in question was not fully free from encumbrance and bank could have reasonably claimed against the property in question. It is also observed by the Revisionary Court that though the actual mortgage deeds might not have been executed by the accused in 1997, but there were agreements to encumber the property and any court would have attached the property before judgment in any suit if filed on the date of MOU 09/04/1997.

The Revisionary Court therefore came to a conclusion that the promise given by the accused definitely not honest and truthful.

20. To sum up, according to the complainant, there is no compliance of all the requirements/clauses of the MOU by the Petitioners within the stipulated period, nowhere the Petitioners are placed any document on record showing that the complainant in express words before writing letter dated 15/07/1997 has communicated the Petitioners that the complainant is not in a position to take steps in furtherance of MOU. As already observed, it is clear from the letter dated 13/10/1997 that the Petitioners agreed to refund the amount to the Petitioners, however, till date the said refund has not been done by the Petitioners, on the contrary, the Petitioners advertised the subject property for sale to third party, which according to the complainant, amounts to breach of trust. As already observed herein above, the Petitioners gave impression to the complainant that there is clear title to the subject property, however, prima facie it appears that

since inception the Petitioners had intention to cheat the complainant. In the facts of the present, it needs to be noted that till hearing of this Writ Petition, admittedly the Petitioners did not refund the amount as mentioned in their letter dated 13/10/1997 which they agreed to pay to the complainant.

21. It is pertinent to mention at this stage that the facts of the present case stand on different footing vis-a-vis the judgments (supra) cited by the learned counsel for the Petitioners. The ratio laid down in the recent judgment of the Supreme Court in Kamal Shivaji Pokarnekar (supra) squarely applies to the present case, wherein it is observed by the Supreme Court that criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be of a civil nature, and if the ingredients of the offence alleged against the are prima facie made out in the complaint, the criminal proceedings shall not be interdicted.

22. There are concurrent findings recorded by both the Courts below. There is prima facie satisfaction recorded by both the Courts below against the accused as regards framing of charge. No perversity can be found with the concurrent findings recorded by the Courts below. There is no legal infirmity in the orders passed by the Courts below.

23. In the light of aforesaid discussion and considering the allegations made in the complaint, the material placed on record, and the reasoning assigned by both the Courts below, no case is made out to cause interference in the impugned orders. The Writ Petition stands rejected. Rule stands discharged.

24. The learned Chief Judicial Magistrate, after framing the charge against the accused, would decide the said complaint on its own merits and in accordance with law, uninfluenced by the observations made herein above. All contentions raised on merits are kept open for being agitated before the Trial Court. The question as to whether the Petitioners accused committed breach of trust and/or cheated the complainant would be decided only during trial after giving opportunity to the parties to lead evidence in that regard.