

Order below Exh. 25 in R.C.C. No. 155/2019

1. Accused have filed this application for discharge vide Section 239 of the Code of Criminal Procedure from the offence punishable under Sections 420 read with section 34 of the Indian Penal Code. It is contention of accused that prima facie, the offence is not made out against them. The informant had hidden some important facts from the police officer at the time of lodging FIR. Further, the FIR and other documents do not reveal any active role or involvement of accused No. 2 in crime. The charge-sheet and documents accompanied with it do not reveal any offence against accused. Therefore, they have prayed for discharge from above said offence.
2. My learned predecessor called Say of I.O. and APP. The learned APP filed his Say at Exh. 29 and opposed the application on the ground that it is not tenable in the eyes of law. The charge-sheet and documents reveal prima facie offence and there is sufficient evidence to frame charge against them. Documents accompanied with the present application cannot be considered at this stage. Therefore, he prayed for rejection of the application.
3. Heard learned advocate for accused and learned APP for prosecution. Perused the application, Say and record. The learned advocate for accused has argued that after considering the FIR and

compromise deed executed between accused and informant, the question arises on which date the offence was committed. The entire FIR does not reveal any role of accused No. 2. His name is deliberately inserted in crime. The entire charge-sheet and documents do not reveal that the accused committed crime under Section 420 of the Indian Penal Code. He has also relied on the judgments of **Samir Sahey @ Sameer Sahay Vs. State of U.P. & Anr., 2018 ALL SCR (Cri) 68 (2) Smt. Shyamla w/o. Mohandas Nair Vs. State of Maharashtra & Anr., 2015 ALL MR (Cri.) 2187 (3) Roshanlal V. Keny Vs. State of Goa, 2002 ALL MR (Cri) 664 .** On the other hand, learned APP has argued as per his Say. He has argued that the application at this stage is not tenable in the eyes of law. Prima-facie offence is made out against accused and there is sufficient evidence to proceed further and frame charge against them. Therefore, he has prayed for rejection of application.

4. It is the case of prosecution that the informant wanted to purchase a tractor for his day to day agriculture activity. Therefore, he inquired with proprietor of Vedant Tractor -Sudhakar Khairnar. He supplied necessary information to the informant. The informant was not having money and he wanted to purchase tractor on loan. He also told all information about the loan and told the informant to deposit 10% amount of tractor's price. He came to know that the

informant was not having 10% amount too. He informed that he is working at HDFC bank, branch Mumbai Naka in Tractor loan department and he is acquainted with all officers. He will help to get agriculture loan to deposit 10% amount. Therefore, the informant supplied 7/12 extract of Gat No. 23/1, 23/2 of Ubarde, Tal - Kalwan, Dist - Nashik and his five photographs. On 23/02/2015, the informant supplied stamp paper of Rupees 100 and 500 along with ten signed cheques of his Girna Bank, branch Kalwan account bearing No. 00407 and other necessary documents. Thereafter, he informed the informant that on 24/02/2015, agriculture loan of Rs. 5,88,000/- was sanctioned to him; he also informed that on 25/02/2015, bank will deposit the entire amount in to his HDFC Satana branch account. Therefore, the informant approached Satana branch; that time they told the informant that the agricultural loan amount of Rs. 5,88,000/- was deposited in his account and accused No. 1 transferred Rs. 5,79,793 to his account. Umesh Patole informed that with informant's cheque, accused No. 1 transferred amount from informant's account No. 50100080087320 into his account on 03/01/2015. Therefore, he got knowledge that accused without prior permission of the informant, with common intention transferred the said amount with the help of forged signed cheque bearing No. 001. Further, they have cheated Samadhan Aher, Vijay Nikam and Samadhan Kakulte.

5. Initially the FIR is registered under Sections 420, 468, 471, 504, 506, 34 of the Indian Penal Code. In the course of investigation, the I.O. recorded the statements of witnesses and collected documents. The I.O. also seized the documents on the information received from accused under Section 27 of the Indian Evidence Act. While deciding the present application, court cannot go beyond the charge-sheet. It is well settled that the documents accompanied with the application are not helpful to accused and court cannot rely upon it. Therefore, while deciding the present application, it is necessary to look whether the charge-sheet reveals any prima facie case against the accused persons and there is sufficient evidence to proceed further and frame charge against accused.

6. The FIR depicts that the informant is not the only victim. Therefore, the statements of other victims also need to be considered. The statement of Samadhan Aher reveals that he paid Rs. 4 lakh to both accused towards tractor price. Thereafter, some people of Anand Jadhav came to seize the tractor. They told that if he fails to deposit the amount, they will seize his tractor. Further, the statement of Samadhan Kakulte reveals that he gave rupees 1.68 lakh to Sudhakar Khairnar towards tractor price. Sudhakar Khairnar handed over new tractor to him. On 25/06/2015, Anand Jadhav seized

his tractor along with trolley and told him that he did not pay any amount of his tractor. He got knowledge that Sudhakar Khairnar did not give Rs. 1.68 lakh to Anand Jadhav and misappropriated it. Further, the statement of Vijay Nikam reveals that accused Sudhakar Khairnar promised to get RTO passing to tractor but he did not do the same. He gave Rs. 5,30,000/- to Sudhakar Khairnar towards part consideration of tractor. The statements of above witnesses reveal that both accused threatened to kill them or injure them. Therefore, prima facie offence punishable under Section 506 of the Indian Penal Code is made out against both accused.

7. The statement of Samadhan Aher and Samadhan Kakulte reveals that they have paid Rs. 4 lakhs and 1.68 lakhs to accused towards tractor price. Accused supplied tractor to them. Thereafter, some people of Anand Jadhav threatened to seize Samadhan Aher's tractor and seized Samadhan Kakulte's tractor on account of non-deposit of tractor amount. The statement of other witnesses corroborate the statement of these witnesses on account of payment of money to accused. Further, the statement of Bhausahen Ragho Jadhav reveals that he has not received any amount towards tractor sell to Samadhan Aher and Samadhan Kakulte from accused. Therefore, he seized Samadhan Kakulte's tractor and trolley. The statement of witnesses reveal that accused misappropriated the said amount and

committed the offence of criminal breach of trust. Therefore, the offence punishable under Section 406 of the Indian Penal Code is made out against both accused.

8. Now, coming to the question of FIR and charge under Section 420; it is essential that there must be dishonest intention since inception to attract the offence punishable under Section 420 of the Indian Penal Code. The contents of FIR reveal that accused Sudhakar transferred the amount of Rs. 5,79,793/- from informant's account to his own account through cheque No. 001. The informant has stated that he has not signed the said cheque. The charge-sheet does not reveal that the I.O. has seized the disputed cheque. Further, the supplementary statement of the informant and compromise deed reveal that owing to some technical issue, contract of sale of tractor was broken. Accused No. 1 promised to repay the amount of Rs. 5,53,500/- to the informant. He also delivered cheque No. 168332 to the informant. The said cheque was dishonoured and accused is convicted under Section 138 and with compensation amount of Rs. 11 lakhs to him. However, the accused failed to pay that compensation amount to the informant.
9. The supplementary statement and compromise deed between the informant and accused No. 1 reveals that primary contract between them was dissolved.

Therefore, it cannot be said that accused had dishonest intention to cheat the informant since inception. Further, in **Samir Sahey @ Sameer Sahay Vs. State of U.P. & Anr., (Supra)** the appellant was accompanied with his father, when his father assured that the money of the respondent will not be lost and it shall be responsibility of his father. Therefore, the Hon'ble Apex Court held that there was no dishonest or fraudulent intention of the applicant. The fact of above case and the case in hand, are not similar

10. Further, the Ld. advocate for accused relied on the second judgment of **Smt. Shyamla w/o. Mohandas Nair Vs. State of Maharashtra & Anr. (supra)** The Hon'ble Bombay High Court observed that, the F.I.R. does not stated any date or period of time, when respondent got knowledge about the registration of previous sale-deed. Therefore, the Hon'ble Bombay High Court allowed appeal and discharged the applicant from the offence P.U.S. 420 of I.P.Code. In the present case also, the F.I.R. does not reveal any specific date and period, when the accused fraudulantly and dishonestly deceived the informant.

11. Further, the Ld. advocate for accused relied on the third judgment of **Roshanlal V. Keny Vs. State of Goa** (supra). The Hon'ble Bombay High Court held that when the charges of misappropriation and

cheating raising only suspicion against the accused, but not grave or strong suspicion against accused, then the accused is entitled for discharge. In the present case, witnesses and informant specifically stated that the accused misappropriated their money. Further the statement of other witnesses also reveal that, in front of them they have paid money to the accused towards payment of tractor. But, accused failed to hand-over that money to Bhausahab Jadhav. Further, the compromise deed executed between accused no.1 and the informant reveals strong prima-facie suspicion against accused. Therefore, there is not only suspicion, but grave and strong suspicion against accused under Section 406 of the Indian Penal Code. Hence, with due respect, ratio laid down by the Hon'ble Apex Court and Bombay High Court, are not helpful to the accused.

12. On the other hand, FIR, supplementary statement and compromise deed reveals that accused has failed to repay the amount to the informant. Further, the bank statement of the informant and accused reveal that he received amount of Rs. 5,79,793 from the informant. The compromise deed create an obligation on accused to hand over it to the informant, but the accused failed to discharge the same. Therefore, the offence punishable under Section 406 of the Indian Penal Code is made out against accused No. 1.

13. The above discussion reveals that both the accused have committed the offence under Section 406 and 506 of the Indian Penal Code. The offence under Section 406 of the Indian Penal Code is not added in the charge-sheet against accused. The Court has to apply its mind at the time of framing of charge and can frame charge under different heads. Further, the above discussion reveals that they have not committed the offence under Section 420 of the Indian Penal Code. Therefore, they are entitled to be discharged from the offence punishable under Section 420 of the Indian Penal Code vide Section 239 of the Code of Criminal Procedure. Hence, I pass following order

ORDER

- 01] Application is allowed.
- 02] Accused are discharged from the offence P.U.S. 420 of the Indian Penal Code, vide Section 239 of Cr.P.Code.
- 03] Accused shall remain present on next date to frame charge against them U/s. 406 and 506 of the Indian Penal Code.

Place : Kalwan.
Date : 17/02/2022

(D.M.Gitte)
Judicial Magistrate, F.C.,
Kalwan.