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08 : 00 : 20

IN THE COURT OF JUDICIAL MAGISTRATE, F.C., MAHABALESHWAR
(Presided over by G. M. Sadhale)

Reg.Crim.Case No.295/2010
Exh. No.256

State of Maharashtra }
Through }
Panchgani Police Station } **Complainant**

Versus

1) Moin Haidar Bijali Khan }
Age : 53 yrs., Occu. : Construction, }
2) Kamil Moin Bijali Khan }
Age : 48 yrs.,Occu. : Construction , }
3) Firoj Jafar Ali Khan **(Trial Separated)** }
Age : 45 yrs.,Occu. :Business, }
All R/o. Kurvai, }
Tal.Kurvai, Dist. Vidisha, }
State- Madhya Pradesh. } **Accused**

Offence punishable u/s.420 r/w.34 of the Indian Penal Code

Advocates:-
Mr. M. R. Killedar, A.P.P. for the State
Mr. J. S. Rajebhosale, Advocate for the accused

JUDGMENT
(Delivered on 13th December 2018)

The accused Nos.1 and 2 have faced the trial for having committed an offence punishable under section 420 r/w 34 of the

Indian Penal code. Due to long absence of accused no. 3, the trial against accused no. 1 and 2 has been separated from the trial against accused Nos. 3 vide order passed by learned predecessor below Exh.1 dated 22/08/2016.

2) The case of the prosecution, in short, can be stated as follows :-

One Nazma Shahul Hamid (in short, 'the informant') lodged F.I.R. with Panchgani police station on date 27/11/2009 which was registered as Panchgani police station C.R. No.27/2009. In the said F.I.R. the informant Nazma contended that, in the year 1990 her son namely, Sayyad Khalid was studying at Anjuman Islam Public School at Panchgani. In the month of March 1992, she alongwith her husband had gone to Panchgani to attend school function. At that time, she met accused No.1 who was present there as a president of Lions Club. She, thereafter, time to time visited the house of accused No.1, where she got acquainted with accused Nos.2 and 3 i.e. wife and brother-in-law of accused No.1 respectively. In the year 1992, all the accused told the informant that, they have formed a partnership construction company namely Jilani Group of Panchgani and they have started to construct bungalows at Plateau View Housing Complex over the land C.T.S. Nos.376 and 390 at Panchgani. The accused persons told the informant that, to purchase bungalow No.11 she have to pay Rs.32,00,000/- as amount of consideration and Rs.4,00,000/- as registration fee. The transaction got finalized and the informant gave six cheques bearing dates 21/03/1995, 03/05/1995 and 06/05/1996 worth Rs.36,00,000/- to accused No.1. All the six cheques were given in the name of the construction company belonged to accused persons for purchase of the property and bungalow. On date 12/07/1995 the accused persons executed an agreement in favour of the informant and assured the informant that they shall hand over possession of property and bungalow on date 01/01/1998.

3) The informant further contended that, she regularly visited the site and asked accused No.1 about possession of the property. The accused persons, however, did not hand over possession of bungalow up to October 1998. As she felt it doubtful, she visited the site and found construction of compound wall to the said land. She again asked the accused No.1 for possession. Accused No.1 assured to hand over the possession on date 01/12/1998. However, he failed to do so. Thereafter, the informant again went to Panchgani and met accused No.1. At that time, the accused told her that the transaction is cancelled and that he will return the amount of consideration alongwith interest. The informant, however, told the accused No.1 about the increased value of said property which was reached upto Rs.96 lacs. The accused No.1 agreed to pay Rs.96 lacs but he expressed his inability to pay said amount at once. The accused No.1 agreed to issue cheques worth Rs.55,00,000/- and to pay remaining amount of Rs.41,00,000/- after sometime. Accordingly, the accused No.1 issued six cheques worth Rs.55,00,000/- bearing dates 05/12/1998, 25/12/1998, 20/01/1999, 30/01/1999, 31/03/1999, 10/01/1999. The informant presented two cheques bearing dates 05/12/1998 and 25/12/1998 which returned dishonour for the reason 'Funds Insufficient'. The informant was intending to file complaint against accused No.1, but she came to know that the accused No.1 had

gone to America alongwith family members.

4) The informant in her F.I.R. further contends that, on date 08/11/2001 the accused No.3 made telephonic call and stated her to come at Kurvai, Dist. Vidisha, Madhya Pradesh for discussion and to receive the amount. Accordingly, on 11/11/2001 the informant alongwith her son Sayyad Khalid went to Kurvai where the accused No.3 executed one receipt contending that, he will return the amount up to 15/09/2002. On date 27/01/2002 the accused No.3 again called son of the informant and told him to come at Kurvai to receive the amount on date 01/02/2002. He also told the informant to bring some metal toys from Hira Panna Shop Centre, Mumbai for his son. The informant alongwith her son visited the house of accused No.3 at village Kurvai alongwith said toys. However, the accused No.3 falsely implicated the informant in criminal case of the offences punishable under section 453, 427, 506B. Thereafter, the informant came to know that in the year 1998 accused No.1 prepared bogus documents and sold the bungalow to one Pradip Jain and possession is with said Mr. Jain. The informant came to know that the accused cheated her by giving false assurance to hand over possession of bungalow. But, as the accused Nos.1 and 2 went to America she did not lodge complaint. As the informant came to know that, the accused Nos.1 and 2 returned to India she lodged F.I.R. with Panchgani police station. Lastly, the informant contended that the accused persons, in a very same manner, also cheated several other peoples.

5) On the basis of the FIR, the Investigating Officer (in short, 'I.O.') Assistant Police Inspector Shri. J. D. Paigude investigated into the matter. During the course of investigation, the

I.O. recorded the statements of witnesses, seized the relevant agreements, receipts, cheques, memos and filed charge-sheet against the accused Nos.1 to 3.

6) My learned predecessor framed charge against accused Nos.1 and 2 at Exh.143 of the offence punishable under section 420 r/w section 34 of the Indian Penal Code. As per record, my learned Predecessor explained the contents of charge to accused persons in vernacular to which the accused Nos.1 and 2 pleaded to be not guilty vide their statements at Exh.144 and 145.

7) In order to prove the guilt of the accused persons the prosecution has examined in all 9 witnesses. The statements of accused Nos.1 and 2 under section 313 of Cr.P.C. were recorded at Exh.223 and 224 respectively. Both the accused persons denied the incriminating evidence as led by prosecution. Beside denials, both the accused stated that, they had executed an agreement for the purpose of security. They admitted the receipt of amount from the informant. However, they stated that, the informant paid the said amount as an investment and not for purchase of bungalow. The accused further stated that, the informant induced other persons / witnesses to extort more money from accused persons, and therefore the said witnesses deposed falsely against them.

8) In view of case of the prosecution, the following points arise for determination. The points, its findings alongwith reasons are as follows -

Points	Findings
(1) Whether prosecution proves that, the accused Nos.1 and 2 deceived the informant into a belief that they meant to deliver to her a bungalow property which they did not intent to deliver and thereby dishonestly and intentionally induced her to advance an amount of Rs.36,00,000/-, which was the property of the informant, upon the faith of such delivery and thereby cheated the informant and committed an offence punishable under section 420 r/w 34 of the Indian Penal Code ?	… In the Affirmative
(2) What order ?	As per final order.

Oral and documentary evidence

9) The prosecution has examined the informant Nazma as P.W.1 at Exh.148. Perusal of her examination-in-chief reveals that, she reiterated the contents of F.I.R. as it is. Her deposition shows that in her evidence no contradiction or omission has comes on record. In her examination-in-chief the F.I.R. Exh.149, the complaint letter given by her to Joint Police Commissioner Exh.150, a complaint letter given by her to DGP Mumbai Exh.153 and the cheques issued by accused No.1 Article 'C to J' were proved and marked. She identified the agreement (Exh.158) in question, its contents and the signature of accused No.1 and herself thereon. She identified the receipt article 'B' issued by accused persons.

10) As far as cross-examination of informant is concerned, some suggestions were put to her regarding the reasons for which the accused persons left India for America. She admitted in cross-

examination that, she had not filed complaint under section 138 of Negotiable Instruments Act against accused persons for dishonour of cheques. She admitted in cross-examination that, after cancellation of agreement the accused No.1 entered into agreement with Pradip Jain regarding bungalow No.11 and that said Mr. Jain is in possession of bungalow No.11. However, she further stated that, her false signatures were put over said agreement.

11) The prosecution has examined Sayyad Zaheer as P.W.2 at Exh.162. As per his deposition, one Sayyad Ahmed i.e. P.W.3 produced one agreement, some documents, cheques, slips and receipt pertaining to Plateau View Society and that the said documents were seized by I.O. in his presence by preparing seizer Panchnama Exh.163. In his cross-examination he stated that, he had gone to Panchgani police station alongwith P.W.3 Sayyad Khalid and that the informant is her aunt.

12) The prosecution has examined P.W.3 Sayyad Khalid i.e. the son of the informant at Exh. 166. He corroborated the testimony of the informant. As per his deposition he witnessed each transaction happened between informant and accused persons. In his cross-examination it has comes on record that accused persons orally stated them about the cancellation of the agreement and that the F.I.R. lodged by informant came to be registered only after they met with Joint Police Commissioner Shri.Rakesh Mariya at Mumbai.

13) The prosecution has examined one Shankar Wadkar at Exh.183 as P.W. No.4. As per his deposition, he worked as a Branch Manager at Wai Urban Bank, Panchgani. As per his deposition, the accused Nos.2 and 3 borrowed loan from said bank in the year

1993-94 and 1995 which has not been repaid by them and the bank, therefore, filed suit in Co-operative Court against them. In cross-examination he admitted that, he did not submit any document to I. O. to show that the accused Nos.2 and 3 borrowed loan amount.

14) The prosecution has examined one Joher Unwala Exh.187 as P.W.5. As per his deposition, the accused persons entered into registered agreement with his sister namely Munira and they agreed to sell one plot and to construct a bungalow admeasuring 600Sq.Mt.. That his sister had paid an amount of Rs.4,50,000/- to accused in the month of July 1998. As per his deposition, the accused did not raise any construction and went to foreign country and thereby cheated his sister. He, however, stated that his sister got possession of the plot. In his cross-examination he admitted that, his sister sold the plot in consideration of Rs.20,00,000/- in the year 2016.

15) The prosecution examined one Jagdish Charpe at Exh.188 as P.W.6. As per his deposition on date 04/07/1995 he brought one stamp paper worth Rs.20/- and as per his information one agreement was executed on same stamp paper in favour of one Dinesh Gupta.

16) The prosecution has examined Dinesh Gupta Exh.191 as P.W.7. As per his deposition, in the year 1994 by way of an agreement (Exh. 192) he agreed to purchase one bungalow in the construction scheme started by accused persons in final plot No.233B at Panchgani for Rs.10,00,000/- and he paid Rs.1,50,000/- to them by cheque. As per his deposition in the year 1995 accused

persons told him that, they are unable to give possession of bungalow and they agreed, by way of second agreement Exh.193, to pay Rs.24,00,000/-, two plots ad-measuring 500 sq. ft. and one bungalow and they cancelled the first agreement. As per his deposition, the cheuqes (Exh. 194 to 196) worth Rs. 22 Lacs issued by accused persons returned dishonoured and he came to know that, accused persons went to foreign country. As per his deposition, he had filed civil suit, in which possession of 8 bungalows were granted to him but as the said bungalows were occupied by third persons he did not take further action. In his cross-examination he admitted that, he did not file any complaint with police against accused persons.

17) The prosecution has examined one Prabodh Diwan at Exh.197 as P.W.1. As per his deposition he had entered into an agreement (Exh. 200) with accused persons to purchase plot No.7/1 at Silver Valley, Panchgani and he had paid Rs.1,33,000/- to them. He deposed that in year 1998 he gave Rs.16,00,000/- to accused persons as per their demand and agreed to sell two plots near Mala's factory. As per his deposition, the accused failed to perform the contract and handed over 3 cheques (Exh. 201 to 203) worth Rs.7,00,000/- which returned dishonoured as per return memos (Exh. 204 to 206). As per his deposition, he came to know that the accused left India and cheated him. In his evidence, one allotment letter Exh.207 was marked. In his cross-examination it has comes on record that, he came to know about the incident of firing by gun on the person of accused Nos.1 and 2 at Mumbai. He admitted that, on the next day of said incident the accused persons approached him and demanded the said amount. He admitted that,

he has not filed complaint in police station pertaining to cheating nor filed criminal case regarding dishonour of cheques.

18) Lastly, the prosecution has examined the Investigating Officer P.I. Shri. Paigude at Exh.217 as P.W.9. In his examination-in-chief the seizer panchnama and the F.I.R. lodged by informant were identified by him. As per his deposition, he traced the accused persons in the state of Maharashtra as well as in Nepal and arrested the accused No.3 as per the non-bailable warrant issued by the Hon'ble Supreme Court. He stated that, he had secured specimen of handwriting of accused No.3 which were forwarded by him vide letter Exh.218 to C.I.D. As per his deposition, it was transpired during his investigation that, the accused persons cheated the informant as well as one Dinesh Gupta and Prabodh Diwan and therefore he forwarded charge-sheet against them.

Arguments :-

19) Heard the learned advocate for accused persons as well as the learned A.P.P. for the state. Perused the synopsis of written argument submitted by the informant on record at Exh.233 as well as by A.P.P. at Exh.254 and the synopsis of written argument placed on record on behalf of accused Nos.1 and 2 at Exh.242.

Argument on behalf of the State :-

The learned A.P.P. argued as follows -

20) In the year 1999 itself the informant had filed complaint with D.G.P., Mumbai for taking action against the accused persons by taking aid of Interpol and as the accused persons went to America, she did not lodge FIR till year 2009. On the basis of the evidence of prosecution, the facts came on record in cross-

examination and the answers given by accused Nos.1 and 2 in their statement recorded under section 313 of Cr.P.C., the prosecution has proved its case beyond doubt. Inspite of consistent demand from the informant, the accused Nos.1 and 2 neither handed over possession of bungalow nor returned the amount of consideration to her and to fled to America which shows that the accused had an intention to cheat the informant since beginning. An opportunity was available to accused persons, but they did not put up their case in cross-examination regarding the nature of agreement and transaction. The informant never cancelled the agreement. The fact that the accused persons sold the bungalow to a stranger further corroborates the case of prosecution regarding the dishonest intention of accused to cheat the informant. Wrongful loss was caused to informant and wrongful gain to accused persons. He, therefore, submitted that the accused are liable for conviction.

<u>Argument on behalf of Accused Nos. 1 and 2</u> :-

21) On the contrary, the learned advocate for accused Nos. 1 and 2 argued as follows - that there were 23 bungalows in the scheme, but except the informant no other person made complaint against the accused persons. There is 11 years delay in lodging of F.I.R. which remained unexplained by the prosecution. It is admitted by the informant that, she has entered into the contract after verification of documents and that accused did not show her any false and fabricated document. The reasons for which accused persons went to America are proved on record in view of the contents of the certified copy of judgment passed by the Hon'ble Supreme Court in Contempt Petition No.344/1998. It is admitted by the informant that, before the contract she had no complaint

against the accused. The nature of the transaction is of civil nature and ingredients of Section 420 of the Indian Penal Code are not attracted to the case at hand. The Special Civil Suit No.106/1999 filed by the informant against accused persons was dismissed for default and admittedly the informant had not filed complaint under section 138 of the Negotiable Instruments Act. There is no documentary evidence on record to show that, P.W.7 and P.W.8 had ever filed any cheating case against the accused. The remaining witnesses are trumped up and fabricated. He, therefore, submitted that the accused persons are entitled for acquittal.

REASONS

As to Point No.1 :-

As to elements of cheating :-

22) The learned advocate for accused persons placed his reliance on following case-laws :-

1] SVL Murthy V/s.State represented by CBI, Hyderabad & Ors.
2] Daungarshi Madanlal Zunzunwala V/s. Deviprasad Omprakash Bajoria, 1985 Mh.L.J. 450.
3] Gulabrao Kadwe V/s. State of Maharashtra, 2011 All.M.R. (Cri.) 3248.

The ratio laid down in the aforesaid case-laws can be sum up as follows :-

> 'For the purpose of stating an offence of cheating, the complainant is required to show that, the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regards to failure on the part of the accused to keep his promise, in absence of culpable intention at the time of making initial promise being absent, no offence under section 420 of I.P.C. can be said to have been made out. Such a dishonest intention cannot be inferred from the mere fact that, the accused could not subsequently fulfill the promise. Essential ingredients must be averred in the complaint itself so as to spelt out offence punishable

under section 420 of I.P.C.'

23) The learned A.P.P., on the other hand, placed his reliance on the following case laws -

1] **Edmund S. Lyngdoh V/s. State of Meghalaya, 2014 AIAR (Cri.) 1009.** In which the Hon'ble Supreme Court held that,

> 'Statement made by accused in his defence under section 313 of Cr.P.C. can certainly be taken aid of to lend credence to other evidence led by the prosecution. Such statement of accused must be considered not in isolation, but in conjunction with the other prosecution evidence.'

2] **Sathya Narayanan V/s. State represented by Inspector of Police, 2013 AIAR (Cri.) 1**

3] **Harivadan Babubhai Patel V/s. State of Gujrat, 2013 Cri.L.J.3944.** In which the Hon'ble Supreme Court held that,

> 'If the accused failed to giving satisfactory explanation to an incriminating circumstance which was within their special knowledge, the court can consider such failure of his as an additional link which completes the chain.'

24) As far as the case at hand is concerned, the case of the prosecution is based on one agreement for sale alleged to be executed between informant P.W.1 Nazma and accused No.1. In the evidence of P.W.1 Nazma the agreement for sale Exh.158 was marked. The learned Advocate for accused persons argued that the agreement was not duly proved. On this point, the learned A.P.P. placed his reliance on the following case law :-

Bama Kathari Patil V/s. Rohidas Arjun Madhavi And Anr., 2004(2) Mh.L.J.752. In which the Hon'ble Bombay High Court held that,

> 'Exhibiting a document does not mean that, the document is proved and non exhibiting a document does not mean that the document is not

> proved. It is open to the party to contend at the stage of arguments that the document though exhibited, has not been proved in accordance with law.'

25) Perusal of record shows that, in cross-examination of P.W.1 Nazma, certain questions were put to her regarding the agreement. It has comes on record in cross-examination of P.W.1 Nazma that, before execution of the agreement she had no complaint about cheating against the accused persons. In cross examination of informant it has also comes on record that, after cancellation of the agreement Jilani Construction Company executed an agreement with one Pradip Jain relating to bungalow No.11. It has also comes on record that, before execution of agreement accused Nos.1 and 2 did not show the informant any false or bogus documents.

26) As far as statements of accused Nos.1 and 2 under section 313 of Cr.P.C. are concerned, the deposition of P.W.1 Nazma relating to execution of agreement and amount paid by her to accused persons were put to said accused persons. The accused Nos.1 and 2 in turn stated that, the informant had paid the amount to them as an investment and not for bungalow, The Accused nos. 1 and 2 further stated that the agreement was executed for the purpose of security for earnest. The above stated facts are evident to show that an agreement was entered into between the informant and accused persons. No documentary or oral evidence is placed on record by accused persons to show that an agreement was executed between them only for security purpose and they received an amount of Rs.36,00,000/- as an investment and not for sale of bungalow. Except agreement Exh.158, no other agreement entered

into between informant and accused persons is on record. Without which the case put forth by accused Nos.1 and 2 cannot be believed to be true. In view of the aforesaid evidence, the agreement Exh.158 is duly proved on record. The agreement Exh.158 shows that, it was executed in the name of accused Nos.1 and 2 as developers M/s. Jilani Construction. It shows that, accused Nos.1 and 2 were party to the agreement.

27) Section 415 of I.P.C. consists of two parts. In the first part inducing must be fraudulent or dishonest. In the second part the inducing must be intentional but not fraudulent or dishonest. It is relevant here to reproduce illustration(g) to Section 415 of I.P.C.

> **Illustration (g)** :-
>
> 'A' intentionally deceives 'Z' into a belief that 'A' means to deliver to 'Z' a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces 'Z' to advance money upon the faith of such delivery. 'A' cheats; but if 'A', at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

28) So, a promise made without intention to perform the same, amounts to cheating. In view of the said legal provision, the facts of present case are required to be considered.

29) The informant met the accused Nos.1 and 2 in the year 1989. In the year 1992, the accused stated to the informant that they have formed one partnership firm namely Jilani Group of Panchgani and proposed the informant to purchase the bungalow property. After talks, they agreed to execute agreement by which

the accused agreed to sale bungalow No.11 in consideration of Rs.32,00,000/- and Rs.4,00,000/- as registration fee. Accordingly, in the month of March and May 1995 the informant paid an amount of Rs.36,00,000/- to accused persons by way of six cheques. It is not the case of the accused that they did not receive said amount. Only thing is that, according to accused the reason for which they received said amount was different. But that is not proved. On date 12/07/1995 i.e. after receiving entire amount of consideration the accused executed agreement to sale Exh.158 in favour of the informant and agreed to hand over possession of bungalow on date 01/01/1998 i.e. after 5 months from the date of agreement. But, the accused failed to do so. On demand made by the informant, the accused persons assured her to hand over the possession on 01/12/1998. However, the accused failed to do so. It has comes on record that, after 01/12/1998 the accused told the informant that the agreement is cancelled and they are ready to pay the amount of consideration with interest.

30) Here it is necessary to note that, no documentary evidence is on record to show that, the agreement Exh.158 was cancelled bilaterally by executing a separate deed of cancellation of agreement to sale. It shows that, the accused Nos.1 and 2 unilaterally cancelled the agreement without obtaining consent of the informant. It has also comes on record that, after knowing the fact that the accused cancelled the agreement, the informant visited the premises and she found that the work of compound wall was going on. In cross-examination of the informant it has comes on record that, in the month of February 1999 she visited the premises and found that the work upto plinth level and of the compound wall

has been raised. At the same time she came to know that, one Pradip Jain was raising construction of said bungalow.

31) The above stated facts show that, though the accused persons received an amount of Rs.36,00,000/- in the year 1995, they did not start the construction of bungalow till year 1998. Inspite of giving assurance of handing over possession of bungalow on date 01/01/1998 and 01/12/1998, they did not start construction of bungalow even after expiry of said dates. It has comes on record that, the accused persons sold said bungalow to one Pradip Jain. Needless to say that, the concerned sale transaction with Pradip Jain was for consideration. This fact shows that, the accused persons received an amount of Rs.36,00,000/- from the informant and without performing their part of contract or even without showing their willingness to perform their part of contract, they sold said bungalow to third person i.e. Pradip Jain for consideration by cancelling the agreement with informant unilaterally. It shows that, the accused persons caused wrongful loss to the informant and gained wrongful gain. It is an example of unjust enrichment.

32) As far as cross-examination of the informant is concerned, some suggestions were put to the informant that, in between year 1995 to 1998 the construction company belonging to accused persons was suffering from heavy loss, that for that reason their bungalow namely 'Ark Bungalow' was auctioned, that the son of accused Nos.1 and 2 was kidnapped and there were life threatening situations and for that reasons they were constrained to leave India and to go at America. The learned Advocate for Accused Nos. 1 an2 also relied upon the certified copy of judgment passed

by Hon’ble Supreme Court in Contempt petition no. 344/1998 (Exh. 221), in which regarding the absence for considerable time, the accused asserted that, ‘in October 1998 the contemnor and his family were victimized by some underword elements with life threatening consequences, that the son of accused No.1 was kidnapped and released for ransom and therefore they decided to to leave the country.

33) If such were the facts, then there was a reason for accused persons to receive money from the complainant because in between year 1995 to 1998 they were suffering huge loss and financial troubles and they were required to pay some amount as a ransom to underworld elements. Had there been an intention of accused persons to perform the promise given to the informant at the time of receiving consideration amount or of execution of agreement Exh.158, they would have been shown their willingness to perform their contract. However, the above stated facts clearly show that, not a single act showing willingness to perform the promise was done by the accused persons.

34) The accused persons gave six cheques to the informant towards repayment of amount of consideration and interest thereon and also promise to pay remaining amount Rs.40,00,000/- afterwards. It has comes on record in evidence of informant that, out of said cheques, two cheques returned dishonour. As per record rest of four cheques were not presented by the informant for encashment. However, it has also come on record that, on date 04/12/1998 the accused left to America. The dates of two cheques which returned dishonour were 05/12/98 and 25/12/98. It shows that, said cheques bears the dates on which the accused persons

were not in India, but left India to America. Rest 5 cheques were bearing dates 10/01/99, 20/01/99, 31/01/99, 31/03/99 and 30/06/99. It shows that accused persons issued post dated cheques and left India for America. When first two cheques returned dishonour for reason 'Funds Insufficient', then there is a reason to believe that, the informant did not present rest of the cheques with a belief that no arrangement has been made by the accused persons for encashment of the cheques. Nothing on record to show that, the accused persons have maintained required amount with their account for the purpose of encashment of said five cheques. A cheque issued without making requisite arrangements for its encashment amounts to cheating.

35) Inspite of laps of 3 years from the date of receiving consideration amount, the accused did not start any construction and besides giving mere assurance they did nothing to perform their part of contract. Had the accused persons been unable to perform their promise for any unavoidable reasons, they would have made arrangement for repayment of the amount as per the promise given by them to the informant. That was not done.

36) The learned A.P.P. for State placed his reliance on the following case-law :-

Sarwan Singh V/s. State of Punjab, 2003 Cri.L.J. 21.

In which it was held that,

> 'It is a rule of essential justice that, whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that, the evidence tendered on that issue ought to be accepted.'

37) As far as evidence of P.W.8 Prabodh Diwan is

concerned, as per his deposition, in the year 1998 the accused agreed to sale him two plots for Rs.16,00,000/-. As per his evidence the accused did not perform their part of contract and gave cheques towards repayment of consideration amount which were dishonoured. In his cross-examination it has comes on record that, an incident of firing by gun on the person of accused Nos. 1 and 2 was happened at Mumbai and on the very next day on the said incident the accused persons came to P.W.8 Prabodh Diwan and they demanded money from him. The reason for which the incident of firing took place, the reason for which the construction company of accused persons suffered loss, the reason for which their son was kidnapped, their bungalow was auctioned and there was eminent danger to their life is not explained on record by the accused persons by way of cross-examination or by way of defence evidence. There was an opportunity of explaining or putting up their case by way of cross-examination. That was not done. Therefore, the above stated facts shows that, during the relevant period of time during which the agreement Exh.158 was executed, the accused persons were in need of money for the reasons best known to them.

38) The conduct of accused Nos.1 and 2 pertaining to non performance of their part of contract, or to not showing, even remotely, their willingness to perform their part of contract and their failure to repay the amount of consideration with interest are evident to show that, since beginning the accused persons had an intention of non performance of the contract. The subsequent conduct of the accused as comes on record clearly shows that, the accused with dishonest intention of non performing the promise, deceived the informant to deliver the amount of consideration and

thereby cheated her.

39) There is no doubt on record that, the accused persons were entitled to construct and sale bungalow No.11 to the informant. Therefore, the fact that the accused did not show any false and bogus documents to the informant before agreement is irrelevant. So also there was no occasion for the informant to believe that, the accused will not perform their part of contract. Therefore, the fact that the informant did not feel cheated before execution of agreement is also irrelevant.

40) It has comes on record in cross-examination of P.W.2, P.W.3 that, the accused orally told them about the cancellation of agreement which is evident to show that, accused unilaterally and without concurrence of the informant cancelled the agreement. This fact further corroborates to the fact that the accused had dishonest intention since beginning. It is not a case where the promise honestly made initially could not live up subsequently.

41) As far as the evidence of P.W.7 Gupta and P.W.8 Diwan is concerned, they corroborated the case of the informant that, the accused persons executed same kinds of agreement with them and failed to perform the same. Both the said witnesses admitted in cross-examination that, they did not lodge F.I.R. against accused persons about the cheating with police station. However, the certified copies Exh.241/9 and 241/10 shows that, P.W.7 Gupta and P.W.8 Diwan filed private criminal case bearing R.C.C. No. 263/2010 and 24/2011 against present accused persons of the offence punishable under section 420 of I.P.C. Both these certified copies shows that, said proceedings were disposed of because the

complainant threrin compounded the offence and accused persons came to be acquitted as per Section 320(8) of Cr.P.C. This fact shows that, though the P.W.7 Gupta and P.W.8 Diwan did not lodge F.I.R. with police station, they had filed private complaints which were compounded by them. Said cases were not decided on merits. Why the complainant i.e. P.W.7 Gupta and P.W.8 Diwan compounded said cases is a question of facts. Accused had a opportunity to bring on record reason behind the said by way of cross-examination. That is not done. It shows that, the evidence of P.W.7 Gupta and P.W.8 Diwan corroborates, to some extent, the version of the informant that, besides the informant the accused persons also made contract with other persons and failed to perform the same.

42) The learned Advocate for accused persons cited the following case laws. Abdul Sattar Mahetab Khoriwale & Ors. V/s. State of Maharashtra & Anr. 2011 All.M.R. (Cri.) 3221, Mohd. Muddasar Ansari s/o. Afsar Ansari V/s. State of Maharashtra & Ors. 2011 All MR (Cri.) 3089 and Faruqu Abdual Jahura & Ors. V/s. State of Maharashtra, 2011 All.M.R. (Cri.) 3217. These case-laws are relating to invocation of inherent powers under section 482 of Cr.P.C. by the Hon'ble High Court to quash F.I.R.

43) Perusal of cross-examination of prosecution witnesses reveals that, no suggestions was put to either of the witness to suggest that the accused persons were willing to perform their part of contract since beginning but for certain circumstances they subsequently unable to perform the same. No doubt some circumstances were brought on record in cross-examination that, the construction company of accused was suffering loss during the

year 1995 to 1998, that their son was kidnapped, their bungalow was auctioned and there was danger to their life. However, mere suggesting said facts are not enough. The question is that when the accused persons received huge amount of consideration, then why they did not apply the same for construction of bungalow. As stated above, the accused persons approached P.W.8 Diwan and demanded the amount on a day subsequent to a day on which the incident of firing took place. These facts go against accused persons because the question arise is for what purpose the accused persons applied the amount received by them from P.W.1 Najama and P.W.8 Diwan. No justifiable reason is placed on record by them. It shows that, though the accused persons entered into agreement and received consideration amount, without applying the same towards fulfillment of the contract they applied the same for any other reason best known to them. It shows that, since beginning they had possessed an intention to induce the informant to enter into the contract without any intention to perform the promise. The prosecution, therefore sufficiently and beyond reasonable doubt proved the guilt of the accused persons that they have committed an offence punishable under section 420 of the I.P.C.

<u>AS TO CIVIL NATURE OF THE TRANSACTION</u> :-

44) The learned advocate for accused placed his reliance on the following case-laws :-

1] **Mr.Jitendra nathmal Joshi @ Sharma V/s. The State of Maharashtra & Anr., reorted in 2011 All. M. R. (Cri.) 2597.**

2] **Avinash Vinayrao Chopde V/s. State of Maharashtra & Anr., reported in 2011 All.M.R. (Cri.) 2823.**

The ratio laid down in the aforesaid case-laws can be sum up as follows :-

> 'When bare reading of the F.I.R. does not constitute or disclose the commission of any cognizable offence, the police were certainly not were entitled to investigate into the matter. The investigation machinery cannot be allowed to be used for the recovery of money, for which, remedy lies in filing a civil suit for appropriate relief.'

45) On the contrary, the learned A.P.P. placed his reliance on the following case-laws :-

1] **Suresh s/o. Bhagwanrao Puri V/s. State of Maharashtra & Anr., reported in 2017 All.M.R. (Cri.) 465**
2] **Jairam s/o.Nathu Salunkhe V/s.State of Maharashtra & Anr., reported in 2017 All.M.R. (Cri.) 459 (S.C.)**
3] **Athena Financial Service Ltd. & Ors. V/s. State of Maharashtra & Ors., reported in 2008 All. MR. (Cri.) 148**
4] **V. Kothari and others V/s. State of U. P. and others, reported in 1991 Cri.L.J. 1606.**
5] **Arun Bhandari V/s. State of U.P. and others, reported in Criminal Appeal No.78 of 2013 decided on 10th January 2013.**

The ratio laid down in aforesaid case-laws can be sum up as follows :-

> 'Merely because civil remedy may also be available to complainant, that by itself cannot be a ground to quash criminal proceedings. The civil remedy for recovery of loan advanced by itself cannot be termed as bar in continuing with complaints on allegations of cheating, fraud and dishonesty. Several disputes of a civil nature may also contains the ingredients of criminal offences and if so will have to be tried as criminal offences even they also amount to civil disputes.'

46) In view of the ratio laid down in above stated case-laws if facts of present case are considered, the above analysis clearly shows that the prosecution complete the chain of circumstances and

established that the accused persons had dishonest intention at the time of making promise. It further shows that, this case contains the ingredients of criminal offences i.e. elements of cheating. It is not a case involving a pure dispute of civil nature. Non filing of complaint under section 138 of N.I. Act does not hit case of the prosecution. Because accused persons left India for America on date 04/12/1998 and returned to India in the year 2009.

REGARDING DELAY IN LODGING OF FIR :-

47) The F.I.R was filed on date 27/11/2009 i.e. after 11 years from the date when the informant felt cheated. It is necessary to consider whether the informant approached the police to set the criminal law in motion for the first time in the year 2009 or else. The letter Exh.153 shows that, the informant gave a complaint letter to D.G.P., Mumbai on date 09/07/1999 contending same facts as contended in F.I.R. Exh.148. It was her specific prayer in the said complaint letter to take action against accused Nos.1 and 2 through interpol who were abroad at that time after duping many customers towards tune of 40 to 80 Crores. She, therefore, requested to take action through interpol so that nobody fall as prey to them and to bring them back to India and get justice.

48) It shows that, it is not for a first time on 27/11/2009 the informant approached the police machinery, but she approached the police machinery for taking suitable action through interpol on date 09/07/1999 i.e. just after she felt cheated at the hands of accused. It was the duty of police machinery to take action against the accused persons or to investigate into the matter by treating Exh.153 as F.I.R. Because there is no specific form provided for lodging of F.I.R. What has been done by the police machinery on

the basis of complaint Exh.153 is not on record. When the informant lodged complaint and availed help of police machinery in the month of July 1999 and accused persons were abroad, it was not expected on her part to do anything more to get justice. She lodged F.I.R. on date 27/11/09 when she came to know that, accused persons returned India and residing at Dist. Vidisha, state of Madhya Pradesh. No fault on the part of informant is proved on record in alleged and so called delay in lodging of F.I.R. Therefore, the argument advanced on behalf of accused that, there is inordinate delay of 11 years in lodging of F.I.R. cannot be accepted because it is properly explained by the prosecution.

49) In view of the aforesaid discussion, the prosecution has proved the guilt of the accused nos. 1 and 2 beyond reasonable doubt. I, therefore answer point no. 1 in the affirmative. The accused nos. 1 and 2 are, therefore, liable for conviction and to be sentenced for commission of an offence punishable under section 420 r/w 34 of the Indian Penal Code. It is necessary to hear the accused persons on the quantum of sentence. I, therefore, take a pause.

50) Heard the accused Nos.1 and 2 in person. The accused Nos.1 and 2 submitted that, the reasons for which they left India for America are on record. The learned advocate for accused Nos.1 and 2 submitted that, it is the first offence of the accused Nos.1 and 2. He, therefore, prayed that minimum sentence and minimum fine may be imposed on the accused persons.

51) The learned A.P.P. submitted that, the accused persons have cheated not only the informant, but also several other persons

and in view of the serious nature of the offence maximum sentence and heavy fine may be imposed on the accused persons.

52) The offence punishable under section 420 of the Indian Penal Code is serious in nature. The offence under section 420 of the Indian Penal Code is punishable with imprisonment of either description for a term which may extend to seven years and also be liable to fine. The incident took place in between year 1995 to 1998. In the year 1998 the accused Nos.1 and 2 left India for America. As per record the informant invested an amount of Rs.36,00,000/- for purchase of bungalow property. The contents of complaint letter Exh.153 shows that, the informant had invested her savings with accused persons by disposing her residential property with a view to spend her retired life peacefully at Panchgani. As per record in the year 2009 while lodging F.I.R. the age of the informant was 58 years. So at present she is near about 68 years old. It shows that the informant is fighting since last 20 years to get justice.

53) As far as case of accused persons is concern, it appears that they both crossed the age of 60 years. However, in view of the nature and value of property involved in the offence, the pains and trauma suffered by the informant, the accused persons are not entitled for leniency. As per record the accused Nos.1 and 2 had secured anticipatory bail. The question of giving set off, therefore, does not arise. In view of said facts to sentence the accused persons for R.I. for the period of 2 years and to impose a fine of Rs.20,000/- each would subserve the ends of justice. Hence, to answer point No.2, the following order is passed :-

ORDER

(1) Accused No.1 namely, Moin Haider Bijali Khan and accused No.2 namely, Kamil Moin Bijali Khan are held guilty vide Section 248(2) of the Code of Criminal Procedure of the offence punishable under section 420 r/w 34 of the Indian Penal Code.

(2) The accused Nos.1 and 2 are sentenced to suffer Rigorous Imprisonment for two (2) years and to pay fine of Rs.20,000/- (Rs. Twenty Thousand only) each; in default to suffer further Rigorous Imprisonment for six (6) months.

(3) Out of total fine amount, an amount of Rs.35,000/- be paid to informant Nazma Shahul Hamid vide provision of Section 357(1)(b) of Cr.P.C. as a compensation for loss caused to her by the offence, after the appeal period is over.

(4) The accused Nos.1 and 2 to surrender their bail bonds.

(5) The accused Nos.1 and 2 shall furnish P.R. bond of Rs.15,000/- each with one surety each in like amount vide provision of Section 437(A) of Cr.P.C.

(6) The case be kept pending and the seized articles i.e. the muddemal property be preserved for trial against accused No.3 Firoz Jafar Ali Khan.

(7) Copy of this Judgment be given forthwith, free of cost, to accused Nos.1 and 2.

Date : 13/12/2018.
Mahabaleshwar.

(G. M. Sadhale)
Judicial Magistrate, First Class,
Mahabaleshwar.

(S. S. Chorage)
Steno (L.G.)