



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.3607 OF 2017

Sunil Pandurang Mantri

R/a. 303, Bhima Building,

Sir Pochkhanwal Road,

Worli, Mumbai-400018

...Petitioner

Versus

1. The State Of Maharashtra

(Through Malbar Hill Police Station)

2. Khimchand Prithviraj Kothari

an adult Indian inhabitant having
his office at 131/133, Zaveri Bazar,
1st Floor Mumbai 400 002.

...Respondents

Mr.Prathamesh Samant a/w Mr.Siddhant Dalvi, for the Petitioner.

Mr. S. R. Agarkar, for the Respondent/State.

Mr. Yashpal Thakur a/w Mr. Mukund Pandya, for Respondent
No.2.

CORAM : N. J. JAMADAR, J.

RESERVED ON : 28th FEBRUARY 2024

PRONOUNCED ON : 10th JUNE 2024

JUDGMENT.:

1. Leave to amend so as to implead Khimchand Prithviraj Kothari, as party Respondent No.2. Necessary amendment be carried out forthwith.

2. Rule. Rule made returnable forthwith. With the consent of the learned Counsel for the parties, heard finally.
3. This Petition under Article 226 and 227 of the Constitution of India and Section 482 of Code of Criminal Procedure, 1973 (The Code) calls in question the legality, propriety and correctness of an order dated 5th August 2017, passed by the learned Additional Sessions Judge, Greater Bombay in Criminal Revision Application No. 137 of 2017 whereby the Revision Application came to be dismissed affirming the order passed by the learned Additional Chief Metropolitan Magistrate (A.C.M.M.) 40th Court, Mumbai on 10th August 2016 in C.C. No. 445/PW/2014 summoning the petitioner as an accused in the said case by invoking the powers under Section 319 of the Code.
4. The background facts leading to this petition can be stated in brief as under:
 - (i) Shyamsundar Chandulal Bhangar (A2) and Uma Shyamsundar Bhangar (A4) had entered into an agreement to sell flat No. 12A, Valkeshwar Ruby Terrace, Co-operative Housing Society, Valkeshwar road, Mumbai in favour of

Khimchand Prithviraj Kothari, the first informant-Respondent No.2. Shamsundar Bhangar (A2) and Mohanlal Bhangar (A3) had also agreed to sell flat No.12B in the said society to the first informant. Under both the agreements executed on 22nd July 2001, the accused (co-owners) had accepted a sum of Rs.62 lakhs each qua flat Nos.12A and 12B.

(ii) The first informant alleged that the accused Nos. 2 to 4 had executed transfer forms in favour of, and delivered the share certificates to, the first informant. The accused Nos. 2 to 4, however, did not complete the construction of the said building, as promised. Eventually, the development of the building came to be entrusted to M/s. Mantri Reality Ltd., of which the petitioner is the Director.

(iii) It is alleged that Mantri Reality Ltd. agreed to purchase flat No.12A and 12B for a consideration of Rs.1.85,00,000/- each and a sum of Rs.12,50,000/- was paid to the first informant by way of part consideration for each of the flats. The balance amount was to be paid within 90 days. M/s. Mantri Reality Ltd., however, committed default in payment of the balance consideration and, eventually, the said transactions

stood cancelled and the said amount came to be forfeited.

(iv) The first informant alleges, title search was taken in the year 2011. It transpired that Shyamsundar Bhangar (A2) and Uma Bhangar (A4), the co-owners of flat No.12A, had executed a gift deed in favour of Mohanlal Bhangar (A3) on 6th September 2010. On the very day Mohanlal Bhangar (A3) had executed a deed of transfer of the said flat in favour of M/s. Venkatesh Properties Pvt. Ltd., a company registered under the Companies Act, 1956. Likewise, Chandulal Shantilal Bhangar HUF through Satishkumar Bhangar (A1) and Mohanlal Shamsundar Bhangar (A3) executed a deed of transfer in favour of M/s.Venkatesh Development Services Pvt. Ltd. another company registered under the Companies Act, 1956, in respect of flat No.12B.

(v) The first informant thus lodged a report with the allegations that the accused Nos.1 to 4 had executed the instruments despite having agreed to sell flat No.12A and 12B and accepted consideration of Rs.62 lakhs each. Thereupon, First Information Report No.58 of 2012 came to be registered against the accused Nos.1 to 4 for an offence punishable under Section 420 read with Section 34 of the Indian Penal Code,

1860. Post completion of investigation, charge-sheet came to be lodged against the accused Nos.1 to 4 on 7th April 2015. The learned Metropolitan Magistrate framed charge against accused Nos.1 to 4 for an offence punishable under Section 420 read with Section 34 of the Indian Penal Code.

(vi) Evidence of the first informant Khimchand Kothari (PW-1) was recorded. In the said evidence, Khimchand Kothari (PW-1) alleged that the inquiries revealed that, the petitioner had misused the custody of photostate copies of the documents, which the first informant had delivered while entering into MOU with M/s. Mantri Reality Pvt. Ltd. on 30th July 2007 and dishonestly did not pay the balance consideration and instead the registration fees for execution of the deeds of transfer of Rs.30,000/- was paid by the petitioner. It was further alleged that the directors of M/s.Venkatesh Development Services Pvt. Ltd. and M/s. Venkatesh Properties Pvt. Ltd. were the business partners of the petitioner. The first informant, thus, alleged that the petitioner had also played a vital role in the cheating.

5. Learned Additional Public Prosecutor filed an application under Section 319 of the Code and prayed to proceed against

the petitioner for the offences punishable under Sections 406 and 420 of the Indian Penal Code. By an order dated 10th August 2016, the learned Metropolitan Magistrate was persuaded to issue process against the petitioner for an offence punishable under Section 420 of the Indian Penal Code opining, *inter-alia*, that the evidence of the first informant made out a *prima-facie* case for cheating against the petitioner.

6. The petitioner carried the matter in revision before the learned Sessions Judge, Greater Bombay. By the impugned Judgment and Order dated 5th August 2017, the learned Additional Sessions Judge declined to interfere with the order passed by the learned Metropolitan Magistrate holding that, there was sufficient material to make out a *prima facie* case against the petitioner and learned Metropolitan Magistrate committed no error in invoking the powers under Section 319 of the Code.

7. Being further aggrieved and dissatisfied, the petitioner has invoked writ jurisdiction of this Court.

8. I have heard Mr.Prathamesh Samant, the learned Counsel for the petitioner, Mr.Agarkar, the learned APP for the State-Respondent No.1 and Mr.Yashpal Thakur, the learned Counsel for the first informant-Respondent No.2 at some length.

9. The Respondent No.2 has tendered compilation of documents including the copies of the MOU executed between the first informant and M/s.Mantri Realty Ltd., Gift Deeds dated 6th September 2010 and deeds of transfer of even date in favour of M/s.Venkatesh Properties Pvt. Ltd. and M/s.Venkatesh Development Services Pvt. Ltd. Learned Counsel took the Court through the material on record and the aforesaid documents.

10. Mr. Samant, the learned Counsel for the petitioner submitted that, the learned Magistrate committed a manifest error in invoking the powers under Section 319 of the Code, on the strength of a bald assertion that the petitioner also played a vital role in cheating the first informant. The learned Magistrate lost sight of the fact that, a higher degree of satisfaction is required to be recorded to proceed under Section 319 of the Code. Mr.Samant further submitted that, it is not the case that some new material was brought before the Court during the

course of evidence of the first informant. Nor was it alleged that the petitioner shared a common intention to deceive the first informant with the accused Nos.1 to 4. On the contrary, the material on record would indicate that, the petitioner had suffered a loss of Rs.25 lakhs, which the first informant had unjustifiably forfeited though the first informant had no title to the subject flats, which he had agreed to convey in favour of M/s.Mantri Realty Ltd. under MOU dated 30th July 2007. In these circumstances, proceeding against the petitioner for the offence punishable under Section 420 of Penal Code in respect of a totally distinct transaction between first informant and the petitioner's company was wholly unwarranted and legally unsustainable, submitted Mr. Samant.

11. Mr.Agarkar, Learned APP supported the orders passed by the learned Magistrate and the learned Additional Sessions Judge. It was submitted that, there is prima facie material to show that the petitioner had induced the first informant to enter into the MOU and, later on, resiled from the promise to purchase the subject flats. The fact that, the registration fee vide Pay Order No. 038419 was paid by M/s. Mantri Realty Ltd. was

pressed into service to establish the nexus between the petitioner and the transferee of accused Nos. 1 to 4.

12. Mr. Yashpal Thakur, the learned Counsel for first informant-respondent No.2, also supported the impugned orders and supplemented the submissions of learned APP. Mr.Thakur laid particular emphasis on the fact that the registration fee was credited from the account of M/s.Mantri Realty Ltd. It was urged that, the petitioner was also confederate in the plot to deceive the first informant. MOU's were executed to purchase the subject flats and later on the petitioner's company did not complete the transaction to the prejudice of the first informant. Eventually, the very subject flats came to be transferred to the entities, with whom the petitioner had intimate connection. If the totality of the circumstances is kept in view, according to Mr.Thakur, the complicity of the petitioner also emerges. Whether the charge merits conviction would be a matter for trial. Therefore, at this stage, this Court may not interfere with the impugned orders in exercise of extra-ordinary jurisdiction, urged Mr.Thakur.

13. Before Adverting to deal with the aforesaid rival submissions, it may be opposite to note few uncontroverted facts. In fact, there appear two sets of transactions, qua the subject flats. Initially, the accused Nos.2 to 4 had entered into agreements for sale of the subject flats in the year 2001 in favour of the first informant and had allegedly accepted consideration of Rs.62 lakhs for each of the flats. Subsequently, it is alleged, as there was no development by the accused Nos. 2 to 4, the project came to be entrusted to M/s.Mantri Realty Ltd. and the latter had entered into MOU dated 30th July 2007 to purchase the subject flats from the first informant for a consideration of Rs.1,85,00,000/- each. Indisputedbly, under the said MOU dated 30th July 2007, the first informant had received a sum of Rs.12,50,000/- towards each flat by way of part consideration. Incontrovertibly, the subsequent transactions of sale between the first informant and M/s.Mantri Realty Ltd., did not materialize.

14. In the facts of the case, this Court need not delve into the reasons for the failure of transactions under the MOU dated 30th July 2007 between the petitioner and M/s. Mantri Realty Ltd.,

elaborately. Who was the party in default, would be a matter for adjudication in an appropriate proceedings. What, however, is of critical salience is the claim of the first informant on oath that as M/s. Mantri Realty Ltd. did not comply with the terms of MOU, the amount of Rs.25,00,000/- which M/s. Mantri Realty Ltd. had paid to the first informant was (thus) forfeited and the MOUs came to an end as cancelled. What is the effect of this position of the first informant on the alleged complicity of the petitioner for an offence punishable under Section 420 of the Indian Penal Code ?

15. Before exploring an answer to the aforesaid question, I deem it appropriate to consider the nature and import of the jurisdiction to be exercised by the court under Section 319 of the Code. Especially, the degree of satisfaction required to be arrived at by the Court.

16. The provisions of Section 319 of the Code empower the Court to proceed against the person, who is not an accused, if in the course of any inquiry into, or trial of an offence it appears from the evidence that, such person appears to have committed an offence. Evidently, Section 319 vests power in the Court so

as to equip the Court to do justice by proceeding against the culprit, even if such person was not sent for trial. Even where the Investigating Agency does not send the person, who appears to be privy to the crime, the Court is not rendered powerless and, in an appropriate case, the Court may proceed against such person if it appears from the evidence that he may have committed the offence for which the co-accused is/are already facing the prosecution.

17. From the phraseography of Section 319(1) of the Code, the conditions for exercise of the powers by, and limits of jurisdiction of, the Court are also self evident. The power is, in a sense, of extra-ordinary in nature. The Court must record the satisfaction that the person, who is not sent as an accused, appears to have committed the offence. Such satisfaction must be recorded on the basis of evidence. Such being the nature of the power, it has to be exercised with care and circumspection and not in a casual and mechanical manner. The avowed purpose of vesting the power in the criminal Court is to equip the Court to do justice.

18. A useful reference in this context can be made to the decision of the Supreme Court in the case of *Lal Suraj Alias Suraj Singh and Anr. Vs. State of Jharkhand*¹, wherein the contours of the power under Section 319 of the Code were explicated by the Supreme Court, as under:-

“11. Section 319 of the Code is a special provision. It seeks to meet an extraordinary situation. It although confers a power of wide amplitude but is required to be exercised very sparingly. Before an order summoning an accused is passed, the trial Court must form an opinion on the basis of the evidence brought before it that a case has been made out that such person could be tried together with the other accused. There is no dispute with the legal proposition that even if a person had not been charge-sheeted, he may come within the purview of the description of such a person as contained in Section 319 of the Code.”

19. In the case of *Sarabjit Singh and Anr. Vs. State of Punjab and Anr.*,² the necessity of exercising this power with care and circumspection and to advance the cause of justice, was emphasised as under:-

“20. We may notice that in *Y. Saraba Reddy V. Purhur Rami Reddy*³, this Court opined: (SCC p. 776, para 8)

"11...Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates that evidence of witnesses given in Court..."

21. An order under Section 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses

1 (2009) 2 SCC 696

2 (2009) 16 SCC 46

3 (2007) 4 SCC 773

seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction. For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.

22. The observation of this Court in *MCD Vs. Ram Kishan Rohtagi*⁴ and other decisions following the same is that mere existence of a prima facie case may not serve the purpose. Different standards are required to be applied at different stages. Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction.

23. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof, viz., (i) an extraordinary case and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied.”

20. It would be advantageous to consult the Constitution Bench Judgment of the Supreme Court in the case of *Hardeep Singh Vs. State of Punjab and Ors.*⁵ wherein the Constitution Bench delved into a number of facets of the power under Section 319 of the Code. The Supreme Court, *inter-alia*, considered the following question:-

“Question (iv)- What is the degree of satisfaction required for invoking the power under Section 319 Cr.PC.?”

4 (1983) 1 SCC 1

5 (2014) 3 SCC 92

After an elaborate analysis, the Supreme Court answered the question and postulated the legal position as under:-

93. Section 319(1) CrPC empowers the court to proceed against other persons who appear to be guilty of offence, through not an accused before the court. The word “appear” means “clear to the comprehension”, or a phrase near to, if not synonymous with “proved”. It imparts a lesser degree of probability than proof.”

105. Power under Section 319 Cr.PC. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.PC. In Section 319 Cr.PC. the purpose of providing if ‘it appears from the evidence that any person not being the accused has committed any offence’ is clear from the words “*for which such person could be tried together with the accused.*” The words used are not ‘for which such person could be convicted’. There is, therefore, no scope for the Court acting under Section 319 Cr.PC. to form any opinion as to the guilt of the accused.

117.5 Though under Section 319 (4)(b) Cr.PC. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.PC. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial - therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.”

21. On the aforesaid touchstone, reverting to the facts of the case to explore an answer to the aforesaid question of impact of the position taken by the first informant with regard to the MOU dated 30th July 2007, it is imperative to note that the stand of the first informant that the transaction evidenced by MOUs dated 30th July 2007 stood cancelled on account of default on the part of M/s.Mantri Realty Ltd. to pay the balance consideration and complete the transaction and the sum of Rs.25,00,000/- stood forfeited, constitutes repudiation of the agreement, plain and simple. Having chosen to forfeit part consideration and also repudiate the contract, it was not open for the first informant to allege that the petitioner had entered into the said transaction with intention to deceive the first informant.

22. It is trite law that there is an essential distinction between failure to perform the promise and cheating. Mere failure to perform the promise would not constitute cheating unless the intention of the party in default was dishonest since the inception of the transaction. In the case at hand, as it emerges from the allegations in the FIR itself that, the accused Nos. 1 to

4 did not complete the transaction of sale which they had entered into with first informant in the year 2001, and execute the registered conveyance. In that view of the matter, whether the first informant could have conveyed title in favour of M/s.Mantri Realty Ltd., *prima-facie*, appears debatable.

23. Such being the nature of the transaction between petitioner and the first informant, and the first informant having already repudiated the contract and forfeited a sum of Rs.25,00,000/- on account of the purported failure of M/s.Mantri Realty Ltd. to complete the transaction, *prima facie*, the elements of deceit coupled with injury did not appear to have been made out.

24. The endeavour of Mr.Agarkar and Mr.Thakur to rope in the petitioner by placing reliance on the alleged transfer of a sum of Rs.30,000/- towards registration fee in respect of the instrument executed in favour of the transferees of the accused Nos.1 to 4, is too fragile a circumstance to *prima facie* sustain complicity of the petitioner for the offence punishable under Section 420 of the Indian Penal Code. I find substance in the submission of Mr.Samant that, there is *prima facie* no material to draw an

inference that the petitioner shared the common intention with accused Nos. 1 to 4 to cheat the first informant.

25. The conspectus of aforesaid consideration is that the learned Magistrate did not keep in view the principles which govern the exercise of power under Section 319 of the Code. The order to summon the petitioner was passed on the strength of a guess hazarded by the first informant that the petitioner had also played a vital role in cheating the first informant. The learned Additional Sessions Judge also failed to correct the mistake committed by the learned Magistrate.

26. I am, therefore, impelled to allow the petition. Hence, the following order:-

ORDER

- (i) Criminal Writ Petition stands allowed in terms of prayer clause (A);
- (ii) The impugned order as well as the order dated 10th June 2016 passed by the learned Magistrate below Application (Exhibit-49) in C.C. No.445/PW/2014 summoning the petitioner stand quashed and set aside.

(iii) The learned Magistrate, seized with C.C. No. 445/PW/2014, is requested to make an endeavour to conclude the trial as expeditiously as possible.

(iv) Rule made absolute in the aforesaid terms.

(v) No costs.

(N. J. JAMADAR, J.)