Received on : 25-01-2007
Registered on : 25-01-2007
Decided on : 09-09-2008
Duration- Y M D
1 7 15

Exhibit No.

IN THE COURT OF DISTRICT JUDGE-1, & ADDITIONAL SESSIONS JUDGE, PUNE, AT PUNE.

(Presided over by Mr. R. Y. Shaikh)

CRIMINAL REVISION PETITION No. 86/2007

1. **Athena Financial Service Limited,**
   (Formerly Kinetic Finance Ltd),
   and Kinetic Fincap Ltd., prior thereto
   a Company incorpirated under
   Companies Act, 1956, and having
   its registered office at, 4704,
   Pune Mumbai Road, Pimpri Chowk,
   Pimpri, Pune- 411 018.

2. **Shri. Arun H. Firodia,**
   Age: Adult, Occup. Business,
   R/o- C-3, Abhimanshree, Pashan,
   N. D. A. road, Pune- 411 018.

3. **Ms. Sulajja Firodia Motwani,**
   Age: Adult,Occup. Business,
   R/o. 18/2, Chinchwad,
   Pune- 411019, through her
   Power of Attorney Holder,
   Mr. Ajay Raina, Age: Adult, Occup. Service,

4. **Mr. M. I. Kocher,**
   Age: Adult, Occup. Service,
   R/o. 4704, Pune Mumbai Road,
   Pimpri Chowk, Pimpri,
   Pune- 411 018.

5. **Mr. S. S. Nahar,**
   Age: Adult, Occup. Service,
   R/o. 4704, Pune Mumbai Road,
   Pimpri Chowk, Pimpri,
   Pune- 411 018.

6. Mr. D. M. Shingavi,
   Age: Adult, Occup. Service,
   R/o. 4704, Pune Mumbai Road,
   Pimpri Chowk, Pimpri,
   Pune- 411 018.

7. **Mr. M. S. Nair,**
   Age: Adult, Occup. Service,
   R/o. 4704, Pune Mumbai Road,
   Pimpri Chowk, Pimpri,
   Pune- 411 018.

8. **Mr. G. S. Kulkarni,**
   Age: Adult, Occup. Service,
   R/o. 4704, Pune Mumbai Road,
   Pimpri Chowk, Pimpri,
   Pune- 411 018.

9. **Mr. S. D. Joshi,**
   Age: Adult, Occup. Service,
   R/o. 4704, Pune Mumbai Road,
   Pimpri Chowk, Pimpri,
   Pune- 411 018. .. **<u>Petitioners</u>**

Versus

1. **State of Maharashtra.**

2. **ING Vysya Bank Limited,**
   Formerly known as Vsya Bank Ltd.,
   A body corporate incorporated under
   The Companies Act, 1956, having its
   Reg. & Corporate office at No.22,
   M. G. Road, Bangalore- 560 001,
   and branch office amongst others
   at 928, F. C. Road, Mantri House,

Pune- 411 004, represented though
Mr. V. V. Satyanarayana,
Its authorised officer.

3. **Mr. V. S. R. Swamy,**
Age: Adult, Occup. Service,
R/o. 6, Clasia Court, 40, Anand Park,
Aundh, Pune 411 007.

4. **Mr. Nagendra Rao,**
Age: Adult, Occup. Service,
R/o. Flat No.2, Chaitanya Ram
Apartment, 25/26, Prosperity
Society, Karve Nagar,
Pune- 411 052. .. **Respondents**

Appearances
1. Mr. S. K. Jain, Advocate for Petitioners.
2. Mr. Nevagi, Advocate for Respondent.

ORAL JUDGMENT
(Delivered on 9th of September, 2008)

1. Applicant- original accused Nos. 1 to 3 and 5 to 11, preferred this revision challenging order of issue process passed by Judicial Magistrate, First Class (A. C. Court), Pune in R. C. C. No. 2053/2006 on 11-10-2006.

2. Respondent No.2- original complainant- ING Vysya Bank Limited, formerly known as Vysya Bank Limited, is a corporate body registered under Companies Act, 1956, having its registered and corporate office at Bangalore and branch office at 928, F. C.Road, Mantri House, Pune, Applicant No.1, i.e, original accused No.1 is public limited company, incorporated under the provisions of Companies Act, 1956. Applicant No.1 was initially incorporated

under the name and style of 20th Century Kinetic Finance Limited as a joint venture between 20th Century Finance Corporation Limited and Kinetic Engineering Limited. Applicant No.2 was Chairman and applicant No.3 was Managing Director of applicant No.1. Respondent No.3 is an Executive Director of applicant No.1.

3. Applicant No.1 is carrying on business of non-banking financial activities, more particularly leasing as well as hire purchase financing to Kinetic Two wheelers and were governed under the norms laid down by Reserve Bank of India. Applicants used to provide finance for two wheelers manufactured by Kinetic Engineering Ltd., under hire purchase agreement. Applicant No.1 was taking assistance for such hire purchase business from 21 banks including Respondent No.2, bank. Applicant No.1 has availed working capital term loan of Rs. 5 Crores. According to respondent No.2, vide sanction letter dated 25-01-2002, complainant- Bank, had sanctioned working capital term loan of Rs. 5 Crores on the terms and conditions set out therein. The sanction letter and the terms and conditions were accepted by accused No.4, now respondent No.4, for and on behalf of applicant No.1. According to Respondent No.2, applicant No.2 and 3 were incharge and responsible for the conduct of business of applicant No.1. Applicant No.4 was the Executive Director and applicant No.5 was an independent finance director of applicant No.1. Applicant No. 6 is present Executive Director of the Company, who is looking after the finance of applicant No.1. Though applicant Nos. 2 and 3 have recently resigned from their respective posts, the day to day affairs of the applicant No.1 are still controlled by them through professionals, i.e, applicant Nos. 7 to 11, who are at present Directors

of applicant No.1-Company.

4. According to complainant- Respondent No. 2, credit facilities granted to applicant No.1 were governed by terms and conditions set out in the working capital consortium agreement. Accused/applicant No.1 was to utilise the amount advanced to it by the SBI consortium only for the purpose of financing two wheelers and for purchasing machinery equipments and movable assets which was to be the subject matter of their leasing and hire purchase business. Applicant No.1 started defaulting in the due repayment of the debt due to the SBI consortium, as also started evading submissions of monthly stock, statements from August 2003 onwards. Applicant No.1 committed number of irregularities in maintenance of stock on hire and in maintenance of agreements, loan documents, etc, as shown in audit report. Accused/applicant No.1 through its official mooted the proposal for corporate debt re-structuring (CDR proposal) in the consortium meeting held on 6-12-2003 in order to distract the consortium members and also to hide the act of cheating and the fraud committed by them. The CDR proposal was nothing but an attempt on the part of applicant to differ and inordinately delay in repayment of its existing debt in respect of the funds advanced by the complainant and other consortium members.

5. According to Respondent No.2, act of applicant/accused of entering into a joint venture and changing the nature of business also shows the dishonest intention of the applicant to divert the funds acquired from the complainant and other consortium members to the benefit of the applicant. According to Respondent No. 2, special

investigation audit was conducted in January 2004 and the report was submitted. As per report, it is clear that applicant No.1 through all applicants, has fraudulently violated the terms and conditions of all the loan agreements jointly and severally with the intention to defraud the consortium bank members. Applicant/ accused misrepresented and fraudulently concealed crucial fact of having continued the transaction with Centurian Bank and thereby induced dishonestly the complainant and other consortium banks to part with the huge sums of money. The consortium members asked applicant/accused- Company to stop the said account with Centurian Bank, but accused refused to do the same with an ulterior motive to mis-appropriate the funds.

6. According to complainant, Respondent No.2, on account of working capital consortium agreement, applicant had no power to avail of any financial facilities from any other bank/ financial institution. Applicant misrepresented and fraudulently concealed this crucial fact of having current account with Centurian Bank since the year 2000. Applicant continued the transaction with Centurian Bank and thereby induced dishonestly the complainant and other consortium banks to part with huge sums of money. The act of applicant No.1-Company of transferring funds generated from business of the Centurian Bank instead of using the same for the repayment of the dues of complainant and other consortium bank and changing the name of applicant No.1/Company to Athena Financial Services Ltd., and then resignation of applicant Nos. 2 and 3 from said Company in order to get away from the liability by dis-associating themselves from the affairs of applicant No.1-Company,

are nothing but offences under Section 403, 405, 415, 420, 421, 422, 423 and 424 of Indian Penal Code. Applicant dishonestly mis-appropriated and converted to his own use, the property in breach of legal contract and is, therefore, guilty of criminal breach of trust, etc, and, therefore, applicant/accused committed offences u/s. 403, 407, 417, 420, 421, 422, 423 and 424 R/w Sec. 34 of Indian Penal Code.

7. Respondent No.2 filed complaint in the court of Judicial Magistrate, First Class,(A. C. Court), Pune on 7-07-2006. After going through contents of complaint, statement of complainant and documents, learned Judicial Magistrate, First Class came to conclusion that complainant has made out prima facie case for issuing process under Sections 403, 407, 417, 420, 421, 422, 423 and 424 R/w Sec. 34 of Indian Penal Code. Consequently, order of issue process has came to be passed on 11-10-2006. Feeling aggrieved by said order, applicants/original accused preferred this revision.

8. Heard learned Advocate Shri. S. K. Jain, appearing for applicants and Advocate Shri. Nevagi, appearing for Respondent No.2. After hearing both the sides at sufficient length and scanning bulky material placed on record, following points arise for my determination and I record my findings thereon as under, for the reasons to follow:

	POINTS		***FINDINGS***
1)	Whether order under revision is legal and proper ?	..	Yes.
2)	Whether order under revision calls for any interference ?	..	No.
3)	What order ?	..	As per final order.

REASONS

9. **POINT Nos. 1 and 2**:

Applicant/original accused admits availment of facilities of working capital term loan upto limits of Rs. 5 Crores, from Respondent No. 2. According to applicants, because of change in the policy of nationalised and other commercial banks in giving loans directly to customers for purchasing vehicles at lesser rates, business of non-banking Companies came to a stand still and all of them started suffering losses. Applicant-Company also suffered loss and, therefore, they could not pay the loan in time. At initial stages, applicant No.1 was regularly paying interest, but subsequently, on account of change of nature of business, there was default. Respondent No.2- Bank & other banks filed recovery proceeding before Debt Recovery Tribunal, Pune.

10. According to applicant, nature of dispute is civil. False complaint has came to be lodged in order to cause harassment of applicant. Respondent No.2 has made all Directors as accused without mentioning specific act to which they are liable to face criminal proceedings. Applicant No.1 is a Public Limited Company and as per settled position of law, Directors of Public Limited Company are not liable personally for the act of the Company. Applicants have not committed any offence. Complaint does not disclose any offence. Inspite of this, learned Judicial Magistrate, First Class, passed order of issue process without applying mind. Therefore, applicants pray for setting aside order of issue process.

11. According to learned Advocate Shri. Jain for applicants-

original accused, for offence of cheating and criminal breach of trust, intention or motive is required to be in existence at the time when inducement was made. In support of said contention, reliance is placed on the following case law:

(i) **S. W. Palnitkar Vs. State of Bihar, reported in (2002) 1 S. C. C. 241.**

(ii) **Mahadeo Prasad Vs. State of West Bengal, reported in AIR 1954 Supreme Court- 724;**

(iii) **Kiran Desai Vs. M/s. Nakolian Chemical (I) Pvt. Ltd, reported in 1999 Vo. 101(1) Bom. L. R. 541;**

(iv) **Ajay Mitra Vs State of M. P., reported in 2003 (3) S. C. C. 11;**

(v) **State of Kerala Vs. Parceed Pillai and another, reported in 1972 Cri. L. J. 1243, Supreme Court;**

(vi) **Motorola Vs. Union of India, reported in 2004 (1) Bom. C.R. (Cri.) 26;**

(vii) **Manoranjan Vs. M/s. Mech Cab Engineering Industries, reported in 1984 Cri. L. J. 1265;**

As per principles laid down in above case law, to hold a person guilty of cheating, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. Intention at the time of making the promise is essence of the offence of cheating or criminal breach of trust. Subsequent loss or change in circumstances, cannot lead to the interference that an evil intention was present. According to learned Advocate Shri. Jain, breach of contract cannot give rise to criminal offence. In support of said contention, reliance is placed on the case of <u>**Hridya Vs. State of**</u>

Bihar, reported in 2000 (4) S. C. C. 168;

In above case, it is observed that distinction between breach of contract and offence of cheating depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct, but for this, subsequent conduct is not the sole test, intention is the gist of the offence. From his mere failure to keep promise subsequently, such culpable intention right at the beginning, i.e. When he made the promise cannot be presumed. It is true that intention is the essence of offence of cheating or criminal breach of trust. However, intention is required to be gathered at the time of final hearing of the case. At the stage of order of issuance of process, learned Judicial Magistrate, First Class, is not expected to go through all these details and takeinto consideration probable defence of accused.

12. Learned Advocate Shri. Jain contended that nature of dispute is civil and civil proceeding to that effect has been initiated and, therefore, order of issue process deserves to be quashed. In support of said contention, reliance is placed on case of **Mrs. Umrao Devi Savatra Vs. State of Maharashtra, reported in 2004 Cri. L. J. 521, Bombay High Court.**

In above case, complaint shows that it was a matter of Khata Baki suit. It is held that Magistrate erred in entertaining complaint revolving around transaction of civil nature and issue process. However, facts of present case are quite different. In this case, complainant do not claim that it is only matter of recovery of due amount. Therefore,principles laid down in above case are not applicable to the present case.

13. On the other hand, learned Advocate Shri. Nevagi contended that for offence of cheating and criminal breach of trust, etc, complainant is not required to reproduce all ingredients of the offence. In support of said contention, reliance is placed on the case of **Rajesh Bajaj Vs. State N. C.T. Of Delhi and others, reported in 1999 Cri. L. J. 1833, Supreme Court.**

In above case, it is held that it is not necessary that complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence, he is alleging. If factual foundation for the offence has been laid in the complaint, the Court should not hasten to quash criminal proceeding during investigation stage. In this case, complaint filed is in detail by giving reference of various clauses in agreement which took place between the parties and terms and conditions of sanction of loan facility. Having regard to nature of alleged offence, and material placed on record prima facie case is made out for issuing process.

14. In respect of filing debt recovery proceeding, Application No. 38/2004, before Debt Recovery Tribunal, Pune, complainant/Respondent No.2 claims that on account of that proceedings, criminal liability does not come to an end. In support of said contention, reliance is placed on following case law:

(i) **M/s. Medchi Chemicals and Pharma (Pvt) Ltd. Vs. M/s. Biological E. Ltd, and others, reported in 2000 Cri. L. J. 1487- Supreme Court;**

(ii) **T. S. Rajamani Vs. Randeep, reported in 2001 Cri. L. J. 4144- Guvahati High Court;**

(iii) **M. Krishnan vs. Vijaysingh, reported in (2001) 8 S. C. C. 645;**

(iv) **Lalmuni Dev (Smt) Vs. State of Bihar, reported in (2001) 2 S. C. C. 17;**

(v) **Kamladevik Vs. State of West Bengal, reported in 2001 Cri. L. J. 4733, Supreme Court;**

As per principles laid down in above case laws, both criminal law and civil law remedy can be pursued in diverse situation. As a matter of fact, they are not mutually exclusive, but clearly co-extensive and essentially differ in their content and consequence. The object of criminal law is to punish an offender, who commits an offence against a person, property or State for which the accused, on proof of the offence, is deprived of his liberty and in some cases,even his life.

15. In this matter, material appearing on record shows that applicant-Company entered into the working capital consortium agreement and also entered into another agreement dealing with Centurian Bank without disclosing the same. During special audit of the accounts of applicant, it was found that huge amount of money was credited in the Centurian Bank. It is further alleged that applicant-Company transferred huge amount in different account instead of routing the same towards relevant loan account as per agreement. The alleged act of fraud, dishonesty and cheating, etc, cannot terminate or extinguish on the decree of recovery of money. They will have to allow to be subjected to trial by the competent Court, so that corporate Managers and decision makers who are dealing with huge borrowed funds, face the trials.

16. In the case of **<u>Smt. Nagavva Vs. Viranna Shivlingappa and others, reported in AIR 1976 Supreme Court- 1947,</u>** Hon'ble Apex Court held that, at the stage of order of issue process, Magistrate has to satisfy himself simply on the material placed on record by complainant. Whether prima facie case has been made out so as to put the proposed accused on a regular trial and no detail enquiry is called for during the course of such enquiry. In this case, having regard to allegations made in complaint, it is clear that huge public fund has been borrowed by applicants. Said fund is required to be dealt with as per provisions of law and terms and conditions of agreement. On the basis of material appearing on record, it is clear that prima facie case for issuance of process is made out. Learned Magistrate has rightly appreciated material and thereafter passed order of issue process. Order of issue process passed by learned Judicial Magistrate, First Class, is correct and therefore, it deserves to be confirmed. Applicants have not brought on record any illegality in order under revision and, therefore, it calls for no interference. Hence, I answer point No. 1 as 'Yes' and point No. 2 as 'No'.

17. In the light of above discussion and my findings recorded herein above, I proceed to pass following order:

<u>ORDER</u>

Revision application stands dismissed.

PUNE.
Dated: 09-09-2008.

(R. Y. SHAIKH)
District Judge-1 & Addl. Sessions Judge, Pune.

I affirm that the contents of this P.D.F. file Judgment are same word for word as per original Judgment.

Name of Steno : B. D. Wabale.

Court Name : Shri. R. Y. Shaikh, District Judge-1 & Addl. Sessions Judge, Pune.

Date : 15-09-2008.