

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CrI.M.C.88/2011**

% *Judgment reserved on :12th July, 2011*
Judgment delivered on:23 August, 2011

AMBIENCE COMMERCIAL DEVELOPERS
PVT LTD & ANR

..... Petitioners

Through: Mr.Vikas Singh, Senior
Advocate with Mr. P. K. Aggarwal,
Mr.Rajiv Kapoor and Ms.Mercy
Hussain, Advs

Versus

THE STATE & ANR

..... Respondents

Through : Mr. M. P. Singh, APP
for R-1 with SI Kumar Kundan,
Crime Branch, EOW in person.
Mr.Ramesh Gupta, Senior
Advocate with Mr.Bharat Sharma,
Adv. for R2

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

- | | |
|---|-----|
| 1. Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported
in the Digest? | Yes |

SURESH KAIT, J.

1. Vide the instant petition petitioners have
challenged the FIR No.77/2008 registered against them
under Section 409/420/120B of the Indian Penal Code, 1860

at Police Station Economic Offence Wing on the complaint lodged by respondent No.2.

2. The facts of the case, in brief, are that on 15.12.2003, the petitioners company purchased a plot bearing No.2, Vasant Kunj Mall Area, New Delhi in open auction by Delhi Development Authority, (herein after referred to as DDA). Thereafter, somewhere in May 2004, respondent No.2/complainant had booked two shops No.G-48 and G-49 in Ambience Mall, Vasant Kunj, New Delhi, developed by the petitioner company vide terms and conditions of the allotment which were contained in the application for allotment.

3. Mr.Vikas Singh, Sr. advocate appearing for the petitioners submits, that as per clause No.7 of the aforesaid application, the lay out plans of the building were tentative and subject to change. In case of increase/decrease of total area, the rate per square feet was applicable to the changed area.

4. He further submits that, as per clause No.48, the application was under investor's category, hence, and the

allottee was not allowed to put the space to his own use and authorized the company to give the same on lease. The allottee was only entitled to the rental income.

5. Further it is stated that, due to the change of lay out plans the numbers of the shop were changed to shop Nos.G-42 & G-43 marginally measured little higher (about 6.5%). Accordingly, respondent No.2 was informed vide letter dated 09.06.2005 with regard to the change of numbers and change of area. There was no protest or objection till the civil suit was filed in January, 2008.

6. Ld. Senior counsel further submits that the respondent No.2 for the first time, i.e. few days before filing the civil suit, demanded physical possession on 12.12.2007.

7. On 07.01.2008, the complainant filed a civil suit in this Court being CS(OS) No.38/2008, wherein, vide order dated 09.01.2008, an ex-parte interim order was granted restraining the petitioners from creating a third party interest, or changing the lay out plan of two shops.

8. On 02.05.2008, respondent No.2/complainant lodged a complaint with Economic Offence Wing and same

was registered as FIR No.77/2008, which is for adjudication in the instant case, on the following basis:-

“a) The complainant booked two shops in Ambience Mall, Vasant Kunj, New Delhi developed by the petition;

b) The complainant had made a payment in the sum of Rs.2,28,98,182/- in respect of the said two shops;

c) The petitioners unilaterally changed the number and area of the shops; &

d) The petitioners were not delivering possession of the said shops to the complainant and completing the sale.”

9. Further submits that respondent No.2 was desirous to invest money in the project to be developed by the petitioners. Respondent No.2 voluntarily offered to deposit an advance amount with the petitioners to ensure the allocation of space in the said commercial property. More so respondent No.2 was so intrigued with the low prices offered by the petitioner, that he did not deem it fit to wait for the formal launch of the project by the petitioners for the development of the mall.

10. Further submits that against the deposit paid in advance in the month of March and May, 2004, petitioners

after obtaining all necessary clearances allotted two shops to respondent No.2 on 18.08.2004. Thereafter, alongwith the allotment letter, the petitioners also sent detailed '*terms and conditions*' titled as '*Salient Terms and Conditions for Allotment of a Commercial Space in "Ambi Mall" at Vasant Kunj Mall Complex, Nelson Mandela Marg, Vasant Kunj, New Delhi*'.

11. Ld.counsel for petitioners submits that the FIR in question was registered on 02.05.2008, on which even the petitioners did not have the occupancy certificate from DDA. The said certificate was ultimately issued to the petitioners on 27.08.2009 i.e. more than one year after the registration of the said FIR. The terms and conditions which were part of the allotment letter and the application form which are admittedly and duly signed by respondent No.2, clearly provided that the possession will be with the petitioners and they will be at liberty to lease / rent out the said space. This kind of a clause, now a days is commonly available with regard to similar agreements for allotment of spaces in malls so as to ensure proper zoning and quality of brands available in the mall.

12. Further submits that clause Nos.7, 34 and 48 of the terms and conditions which are relevant to the present controversy are reproduced as under:-

“Clause No.7. The lay out and building plans displayed at Company’s office are only tentative plans and the Company shall have right to make such variations, additions, deletions. Alterations, modifications, and changes therein as it may, in its sole discretion deem fit and proper or as may be required/done by any competent authority, which variations/additions/deletions/alterations/ may involve, all or any change/variation in its dimensions are a change/ variation in its area or layout etc. To implement any of the above charges/variations in its area or layout etc. To implement any of the above, changes/variations, supplementary agreement(s), if necessary or called upon by the Seller, will be executed. If there is any increase/decrease in the total area of the Commercial Space was booked. In such event, the Company shall be liable to refund without interest only the extra price and the other proportionate charges recovered or shall be entitled to recover the additional price and other proportionate charges without interest, as the case may be. If for any reason, the Company is not in a position to allot the Commercial Space applied for, in that case, the Company shall refund the amount deposited with it by the intending allottee with simple interest @ 6% per annum, calculated upto the date of refund in full and final settlement of all claims of the intending allottee. Thus, the total price of the said

Commercial Space and other charges shall be calculated and payable on the basis of the total area arrived at as per final dimensions of the said Commercial Complex and Space on completion of the said Commercial Complex and Building as per terms, pattern and manner specified herein and in the Commercial Space Buyers' Agreement.

Clause No.34. The Company shall endeavour to complete the construction of the said Commercial Complex within a period of 03 years from the date of execution of the Commercial Space Buyer's Agreement, subject to timely payment by the intending allottee of sale price, stamp duty and other charges due and payment according to the Payment Plan applicable to him or as demanded by the Company. The Company after obtaining certificate for occupation and use from the competent authorities shall hand over the Commercial Space to intending allottee for his occupation and use and subject to the intending allottee having complied with all the terms and conditions specified herein and in the Commercial Space Buyer's Agreement. In the event of his failure to take over and/or occupy and use the Commercial space allotted to him within thirty (30) days from the date of intimation in writing by the Company, then the same shall like at his risk costs and the intending allottee shall be liable to pay to the Company holding charges @ Rs.25/- per feet of the super area per month for the period of such delay. If the Company fails to complete the construction of the aid complex within 03 years as aforesaid except the reason specified herein and in Commercial Space Buyer's Agreement, then the

Company shall pay to the intending allottee compensation @ Rs.25/- per sq.ft of the super area per month for the period of such delay provided the intending allottee has paid all the dues to the company as per payment plan. The adjustment of holding charges or compensation shall be done at the time of conveying of the Commercial Space and not earlier. The holding charges shall be a distinct charge in addition to maintenance charges and not related to any other charges as provided in the application and Commercial Space Buyer's Agreement. However, in case the intending allottee has already made the full payment of price and other charges to the Company, then the intending allottee(s) shall be deemed to have taken possession of the said Commercial Space and he shall be liable to pay to the Company any expenditure regarding the caretaking/ maintenance or any other charges of the said Commercial Space from that date onwards over and above the holding charges as above.

Clause No.48. The company shall be entitled to define and prescribe the zoning and usage of the said space. The space shall be used only for the specified purpose. The applicant is applying under the Investor's category and would not put the space to his own use and authorizes the company to give the same on lease/license, to any person in its sole discretion and on the terms and conditions agreed to by the company at any annual rental not less than 9% of the investment made by the intending allottee. Subsequent lease/ license renewal shall also be done by the company. Intending allottee agrees to execute and get registered all such documents as the

Company may desire. The intending allottee shall not transfer the space to any person without the consent in writing of the company. In case of refusal, the company shall have option to repurchase the same at the then prevailing/applicable rate as determined by the company. This clause is the essence of the Contract. In case of any breach, the allotment shall stand determined and the intending allottee shall be entitled to refund of the amounts paid by him after forfeiting of the earnest money etc. and the company shall have right to re-enter the said commercial space or to stop the supply of essential services including electricity and water to the said commercial space till it is restored into its prescribed used."

13. Admittedly respondent No.2, while accepting the allotment, signed on the terms and conditions provided to the respondent No.2 at the time of allotment.

14. The case of the respondent No.2 is that while signing the said terms and conditions, he did not read the clauses thereof. No allegations, whatsoever have been made out by respondent No.2 for any efforts made by them so as to prevent respondent No.2 from reading the terms and conditions.

15. Ld.counsel for petitioners further submits that as per as the clauses quoted above, it was clear that the area

allotted was tentative and was likely to change and also that the possession was to be given on completion as per clause 34. Vide clause 48 it was specified as under:-

“Applicant is applying under the investor category and would not be entitled to a minimum rental not less than 9% of the investment made.”

16. It is submitted that clause No.48 clearly provided that it was the essence of the contract that in case of any breach, the allotment shall stand determined and the intending allottee shall be entitled to refund of the amounts after forfeiting the earnest money and the company shall have the right to re-enter the said commercial space or to stop the supply of essential services, including electricity and water till it is restored into its prescribed used.

17. It is further submitted that clause No.34 provides that although the possession was to be given for the use of the applicant, but the use was specified in clause No.48, the applicant would not put the space to his own use and authorised the company being the same on lease/licences to any person in its sole discretion.

18. Ld.Sr.Advocate further submits that as per the above mentioned clauses, respondent No.2, is the applicant for the said commercial space, who became dishonest after signing the salient terms and conditions for allotment and was looking for an excuse to circumvent clause 48, which was agreed to and voluntarily signed by him. In the terms and conditions by contending *inter alia* that the applicant was entitled to the delivery of the possession for using the space for himself.

19. Ld counsel for the petitioners submits that the applicant in this behalf filed a civil suit in this Court being CS(OS) No.38/2008 and prayed for the following reliefs.

“(a) For a decree of declaration in favour of the plaintiff and against the defendant No.1 declaring that the action of the defendant No.1 in revising payment plan in shop Nos.G-48 and G-49 (new Nos.G-42 & G-43) at the ground floor at Ambi Mall, Plot No.2, Vasant Kunj, Nelson Mandela Marg, New Delhi are null and void, having no existence in the eyes of law.

(b) granting decree of permanent perpetual injunction in favour of the plaintiff and against the def No.1 restraining the defendant No.1, its directors, employees, officials, agents, representatives, attorney, successors, servants or anyone acting on its behalf from allottee

Ground Floor Shop Nos.G-48 and G-49 (new Nos.G-42 & G-43) in Ambi Mall, Plot No.2, Vasant Kunj, Nelson Mandela Marg, New Delhi to any person other than the plaintiff and further for a permanent perpetual decree for restraint/prohibition against the defendant No.1 company from handing over possession of any other commercial space/shop in Ambi Mall at plot No.2, Vasant Kunj, Vasant Vihar, New Delhi of the defendant No.1 to any other allottee till such time vacant peaceful possession of the said shop Nos.G-48 and G-49 (new Nos.G-42 & G-43) is handed over by the defendant No.1 company to the plaintiff and further order restraining the defendant No.1 or anyone acting for an on its behalf from in any manner carrying on any further constructions, alterations, interior work, etc. at Ambi Mall, Plot No.2, Vasant Kunj, Nelson Mendela Marg, New Delhi.

(c) granting decree of mandatory injunction against the defendant No.1 and in favour of the plaintiff for the execution and delivery of space buyers agreement.

(d) granting decree of specific performance in favour of the plaintiff and against the defendant No.1 of the allotment letter dated 18.08.204 and the execution of ownership and transfer documents in favour of the plaintiff for the said shop Nos.G-48 and G-49 (new Nos.G-42 & G-43) and for handing over of the possession of the said shops at Ambi Mall, Plot No.2, Vasant Kunj, Nelson Mendela Marg, New Delhi.

(e) Awards costs including exemplary costs for the present proceedings, in favour of the plaintiff and against the defendant No.1; and

(f) any further or other order(s) which this Hon'ble Court may deem fit and proper in favour of the plaintiff, in the facts and circumstances of the case, be passed.

20. Ld.counsel for the petitioners has argued that the respondent No.2 in 'prayer (b)' of the suit had prayed for possession; no issue with regard thereto was framed in the suit. The said suit has been decreed in favour of respondent No.2 with some observations against petitioner No.1, but no decree for possession has been passed in favour of the respondent No.2.

21. Further submits that, it is relevant and pertinent to mention that while decreeing the suit, this Court directed the petitioner to execute "Commercial Space Buyer's Agreement". The said agreement also contained clause Nos.7, 34 & 48 which provided that no possession had to be handed over to the respondent No.2.

22. Ld.Single Judge has further held that, the injunction is to continue only till the compliance of the directions i.e. the execution of "Commercial Space Buyer's

Agreement". Therefore, after execution of the said agreement, the petitioner would be at liberty to lease out/rent out the said space in terms of the "Commercial Space Buyer's Agreement" which provides for 9% return in terms of the clause No.48; that no possession has to be handed over to the respondent No.2 and the petitioner would be at liberty to deal with the space allotted in terms of the clause No.48 after the execution of the "Commercial Space Buyer's Agreement".

23. Ld.counsel for the petitioners has submitted that with a view to harass and blackmail the petitioners and to further create criminal proceedings in regard to civil dispute, which is covered by admitted terms and conditions of a contract, respondent No.2 appears to have filed a complaint dated 02.05.2008 (i.e. after about five months of filing of the suit) and the present FIR No.77/2008.

24. Further submits that the only allegation against the petitioners is that, they had become dishonest and were not handing over the possession of the said shops to the respondent No.2/complainant. The respondent No.2 had

himself signed the terms and conditions, wherein he had categorically agreed that he was applicant under the investors category and was not entitled to use the space for himself and secondly, on the date of the FIR, the occupation certificate had not been handed over to the petitioners by DDA and hence there was no question of handing over the physical possession to the respondent No.2/complainant.

25. It is submitted that the FIR is clearly an attempt to put pressure and to arm-twist the petitioners, to somehow wriggle out of the effect of clause No.48 in order to illegally take possession of the commercial space by respondent No.2; when clearly as per the said clause, any attempt by respondent No.2, resiled from the said clause would tantamount to termination of the allotment itself and respondent No.2/complainant would only be entitled to refund of the deposit made by him after taking the earnest money paid by the respondent No.2/complainant. Thus, the FIR was a dishonest attempt by respondent No.2/complainant to escape from the terms of the allotment and to seek something which was clearly barred under the same.

26. Ld.senior counsel further submits that the FIR is an abuse and misuse of process of law with a view to pressurise the petitioner and to succumb to the illegal and illegitimate demands of respondent No.2/complainant. Respondent No.2 had tried to instigate other persons, however all other persons have realised and know the terms and conditions and have amicably settled and resolved the matter with the petitioners.

27. It is stated, the petitioners have not handed over actual physical possession to a single allottee in view of clause 48 of the terms and conditions and no court has till date directed handing over possession to any allottee. Further submits that clearly the “Commercial Space Buyer’s Agreement” is strictly in line with the terms and conditions enumerated alongwith the applicant letter and hence the decree of the Id.Single Judge in favour of respondent No.2 is merely a paper-decree.

28. In support of the aforesaid submissions, Id.counsel has relied upon the decision in the case of **State of Haryana & Ors Vs. Bhajan Lal, 1992 Supp (1) SCC**

335 which lays down the principles under which the FIR can be quashed. One of the principle is – ‘Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

29. Recent judgment of the Supreme Court confronting the view taken in the case of **Bhajan Lal (supra)** regarding quashing of the FIR in case of **Rajeswar Tiwari & Ors Vs. Nanda Kishore Roy 2010 (8) SCC 422** wherein in para No.31 it was held as under:

“31. In State of Haryana V. Bhajan Lal 1992 Supp (1) SCC 335, a question came for consideration as to whether quashing of the FIR filed against the respondent Bhajan Lal for the offences under Section 161 and 165 IPC and Section 5(2) of the Prevention of Corruption Act was property and legal. Reversing the order passed by the High Court, this Court explained the circumstances under which such power could be exercised. Apart from reiterating the earlier norms laid down by this Court, it was further explained that such power could be exercised where allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding

against the accused. No doubt, at the stage of quashing an FIR or complaint, the High Court is not justified in embarking upon an inquiry as to the probability, reliability or genuineness of the allegations made therein."

In ***Madan Mohan Singh Vs. State of Gujarat & Another*** **2010 (8) SCC 628** wherein in para No.17 it was held as under:

"17. We have already explained that the baseless and irrelevant allegations could not be used as a basis for prosecution for a serious offence under Section 306 IPC. Similarly, we have already considered Section 294(b) IPC also. We have not been able to find anything. Under such circumstances, where the FIR itself does not have any material or is not capable of being viewed as having material for offences under Section 306 and 294(b) IPC, as per law laid down by this Court in State of Haryana V Bhajan Lal 1992 Supp (1) SCC 335, it would be only proper to quash the FIR and the further proceedings."

In ***R.Klayani Vs. Janak C. Mehta & Ors*** **2009 (1) SCC 516** wherein in para Nos.15 & 16 it was held as under:

"15. Propositions of law which emerge from the said decisions are:

(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first information report unless the allegations contained therein,

even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the Court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."

16. It is furthermore well known that no hard and fast rule can be laid down. Each case has to be considered on its own merits. The Court, while exercising its inherent jurisdiction, although would not interfere with a genuine complaint keeping in view the purport and object for which the provisions of Sections 482 and 483 of the Code of Criminal Procedure had been introduced by the Parliament but would not hesitate to exercise its jurisdiction in appropriate cases. One of the paramount duties of the Superior Courts is to see that a person who is apparently innocent is not subjected to persecution and humiliation on the basis of a false and wholly untenable complaint."

30. The counsel also relied upon a recent judgment of Supreme Court reported in ***Keki Hormusji Vs. Mehervan Rustom Irani State of U.P. 2009 (6) SCC 475*** where in the court held that:-

“Even as regards to the availability of the remedy of filing an application for discharge, the same would not mean that although the allegations made in the complainant petition even if given the face value and taken to be correct in its entirety, do not disclose an offence or it is found to be otherwise an abuse of the process of the court, still the High Court would refuse to exercise its discretionary jurisdiction under Section 482 of the Code of Criminal Procedure Code.”

31. Further submits that the Supreme Court in several decisions has held that if a dispute is of civil nature, the criminal court will not be justified to proceed with the matter if the criminal justice system is being used to settle the civil dispute. A recent judgment of the Supreme Court to this effect in ***V.Y. Jose and Another Vs. State of Gujrat & Another*** is reported in ***2009 (3) SCC 78*** as under:-

“22. We may reiterate that one of the ingredients of cheating as defined in Section 415 of the Penal Code is existence of an (Sic fraudulent or dishonest) intention of making

initial promise or existence thereof from the very beginning of formation of contract.

23. Section 482 of the Code of Criminal Procedure saves the inherent power of the Court. It serves a salutary purpose viz. a person should not undergo harassment of litigation for a number of years although no case has been made out against him.

28. A matter which essentially involves dispute of a civil nature should not be allowed to be the subject matter of a criminal offence, the latter being not a short cut of executing a decree which is non-existent. The superior courts, with a view to maintain purity in the administration of justice, should not allow abuse of the process of court. It has a duty in terms of Section 482 of the Code of Criminal Procedure to supervise the functioning of the trial courts."

32. Ld.counsel for petitioners has also drawn the attention of this Court, to para No.13 of the order passed by this Court in CS(OS) No.38/2008 which reads as under:-

"In view of the foregoing narration, I hold that the Allotment letters Ex.P1 and Ex.P2 constitute a complete and enforceable contract for allotment of the shops in question and the plaintiff had been always willing and ready to perform its part of the Agreement i.e. to execute the Commercial Space Buyers Agreement and, therefore, the plaintiff is entitled to the specific performance of the Allotment Letters (Ex.P1 and Ex.P2) requiring the first defendant to execute Commercial Space Buyers Agreement with the

plaintiff in respect of the shops in question upon payment of dues, if any. These three issues are answered in the aforesaid terms.”

33. It is submitted and prayed that the FIR was registered by the complainant/respondent No.2 is clearly a abuse of the process of law and this should quash the same at the threshold rather than permitting misuse of process law to continue.

34. On the other hand, Mr.Ramesh Gupta, Id.Senior counsel for respondent No.2 submits that the instant petition for quashing the FIR was filed by the petitioner is misconceived and not maintainable as the inherent powers under Section 482 Code of Criminal Procedure to quash the criminal complaint is an extreme power, which must be exercised with abundant caution that to in the rarest of the rare cases. It is stated, the petitioners committed the offence of criminal conspiracy and criminal breach of trust and cheating by defrauding huge amount of money to the tune of Rs.2,28,98,182/-.

35. Ld.Senior Advocate for respondent No.2 further submits that, the petitioners in the year 2004, in order to

move up funds from the market for their under construction project called Ambi Mall at Vasant Kunj, New Delhi came out with a fraudulent plan for sale of commercial space in the said mall. The petitioners dominant motive was to collect huge amount of money from the buyers and not to transfer/deliver or part with the possession of commercial space. Right from the beginning the petitioners had dishonest and fraudulent intentions which clearly are borne out from their subsequent conduct and actions, that even after making an advance payment of Rs.2,28,98,182/- towards purchase of the commercial space in the project, the possession of the shops has not been handed over to them and the petitioners duped several other persons in the similar way. The complainant has paid the aforesaid amount through various cheques payable at State Bank of India, NOIDA; ABN Amro Bank, New Delhi.

36. Further submits that the petitioner company even received part consideration amount from the complainant company even before being handed over the possession of the plot by DDA and also before the execution of the perpetual lease deed. The company asked various allottees

to make their complete payments by 02.06.2006 despite having the knowledge that the building plan has not received the sanction from the competent authority. The revised building plan was sanctioned on 25.04.2007.

37. Ld.senior counsel for respondent No.2 submits that the petitioner had fraudulent and dishonest intention from the outset at the time of booking of the commercial space by not to give possession of the shops. The *modus operandi* has been done to generally deprive the buyers of their legal rights of ownership/possession by prevailing upon the unsuspecting buyers to sign the standardised application forms concealing the terms and conditions by using deception.

38. As submitted, it is a settled law that the dishonest concealment of facts amount to fraud. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is also well settled that misrepresentation also amounts to fraud.

39. Further submits that the conduct of the petitioner since the beginning was not only unethical but also contrary to the terms and conditions of the agreement.

40. Ld.senior counsel for respondent No.2 submits that the complainant booked two shops @ Rs.13000/- per square feet, at basic sale price. The word basic sale price denotes an understanding regarding the proposed sale only. Even in the payment plan, the word basic sale price has been mentioned. Clause 8 of the payment plan says **“the company would pay penalty to its customers @ Rs.25 per square feet per month for any delay in handling over the product beyond 30 months from the date of execution of the agreement or sanction of building plan whichever is later with moratorium period of six months.”**

41. It is submitted that the terms and conditions of the two allotment letters which form the basis of the Civil Court decree passed by this Court in CS(OS) No.38/2008 dated 31.305.2011, which clearly mentioned as under:-

*“allotment of space of retail shop in Ambi Mall”
“in response to your application dated for*

allotment for space for retail shop in Ambi mall at plot NO.2, Vasant Kunj, mall complex, Nelson Mandela Marg, Vasant Kunj, New Delhi and your agreeing to the terms and conditions enumerated herein, we are pleased to allot you retain shop No.G-49 having approximately 68.19 Sq Mtrs (734.01 Sq. Ft) of super area of space on ground floor under instalment payment plan as per enclosed payment plan. Kindly note that the above allotment is subject to your execution of commercial space buyer's agreement."

42. It is submitted that bare perusal of the two allotment letters clearly shows that these letters do not disclose that the application made by the respondent No.2 was under the investor's category or that the allotment of the space for retail shop was under this category. In additions to clause Nos.1,4, 7, 14, 15, 34, 36, 45, & 49 are representations just to drive an intending allottee to believe that the purposed booking is for sale purchase and nothing beyond that. Clause No.1 defines earnest money

"the amount paid with the application for the allotment or thereafter to the extent of 15% of the basic sale price whether paid under down payment plan or instalment payment plan"

Thus, the petitioner company with his oblique motives and malafides intentions sold the commercial space of the complainant company to some other party and the complainant had been allotted shop Nos.42 and 43. Clause No.14 of the application suggests that, **“the right to transfer be given to the allottee only and the petitioner company has no right to change the location of the shops or allot/transfer the shops to some other party.”**

43. Therefore, the terms and conditions clearly laid down that there was an agreement for sale, and possession was to be handed over to the intending allottees. Headlines of the letter read as: **“Salient terms and conditions for allotment and sale of a commercial space.”**

44. Thus, it was clear intention of the petitioners right from the beginning, just to utilise the hard earned money of the allottee as it is evident from the brochure and later on take cover under clause No.48 render them with no option. The malafide design and ulterior conspiracy is evident from

the fact that not even a single allottee was stayed with the earlier allotted shop numbers.

45. Ld.senior counsel for respondent No.2 has pointed out that the conduct of the petitioner is also evident from the fact that a large number of persons who had booked their shops in 'Ambi Mall' have taken recourse to legal proceedings. Apart from theirs, FIR Nos.75 and 76 of 2008 were registered on the basis of the complaint by different complainants. The intention of the petitioners is clear that they never intended to hand over the shops to respondents and others, thereby, the intension to dupe various other persons involved. Most of the allottees have withdrawn from the project after knowing the facts and circumstances and due to the evident *malafide* intentions of the petitioners, the allottees are not going to own the booked commercial space despite having invested huge amounts.

46. Further submits that the petitioners never had any intention of honouring the commitment i.e. to give possession of the shops in question and deliberately made

the respondent No.2 part with huge amount of money for its own *malafide* purpose with a fraudulent and dishonest conduct/intention, which, in fact amount to cheating.

47. The petitioners have also written a letter to the investigating officer wherein also it was clearly claimed by the petitioners that ***“as we have already explained to you, we have not delivered possession of any shop to any person whomsoever. There is no question of delivery of possession as on date. We have not till date cancelled the allotment of M/sPardiam Exports Pvt Limited in respect of the shops in question.”***

48. Ld.senior counsel for respondent No.2 submits that the contention of the petitioner company is based upon clause No.48 of the application form, but the same is complete contradiction of clause No.34, what they have said in clause No.48 of the agreement. It is clear from the clause No.34 that the possession of the commercial space was to be handed over to the complainant company and, therefore, contention of the petitioner company that the possession was never to be handed over is in contradiction of clause

No.48. The inclusion of such a clause, like clause No.48, clearly shows that there was a intention of fraudulent intent to cheat right from the beginning with the misrepresentation and ambiguous terms and conditions.

49. Further submits that a bare perusal of the FIR *prima facie* discloses the commission of offences as the petitioners committed the offences of cheating and criminal breach of trust by a public servant or by a banker, merchant or agent. In the instant case, the petitioners are entrusted of property of which they are duty bound to account for and thereby committed the offence under Section 409 IPC and other offences.

50. Ld.senior counsel for respondent No.2 vehemently argued that in exercise of its power under Section 482 Code of Criminal Procedure, the Court has to consider the complaint as well without examining merits of the allegations i.e. genuineness at this stage. The powers possessed by the High Court under Section 482 Code of Criminal Procedure are very wide and to be used very

sparingly, the very plentitude of the powers requires great caution in its exercise.

51. Further submits that the police has completed the investigation and the charge-sheet is in the process of scrutiny in the Prosecution Branch and also to be filed before the Court concerned, and therefore, the only remedy lies before the petitioners is to raise these pleas before the Trial Court. The present petition is an endeavour on the part of the petitioners to short-circuit the procedure. The petitioners have a legal right to make their submission before the court concerned.

52. Ld.senior counsel for respondent No.2 has relied upon the case of **Jagdish Kumar Dhingra Vs CBI : 2010 3 LRS 326 (Delhi)** wherein it has been held as under:-

“Section 482 Code of Criminal Procedure inherent powers of High Court exercise of inherent powers conferred upon high Court under Section 482 Code of Criminal Procedure are wide enough to encompass almost all situations in order to prevent abuse of process of any court or to otherwise secure ends of justice – if procedural law provides for an equally efficacious remedy to the party concerned, then naturally high Courts would be reluctant to invoke powers under Section 482

Code of Criminal Procedure – by moving instant petition under Section 482 Code of Criminal Procedure of the code seeking quashing of the charge-sheet, the petitioners is obviously trying to short-circuit the procedure for trial provided in the code, which cannot be permitted. Charge-sheet has been filed in a warrant trial case on the strength of police report. It is apparent that section 239 provides an efficacious remedy to the petitioner to make his submissions against framing o charge against him before the trial court – no reason found to short circuit the procedures prescribed by Code of Criminal Procedure for prosecution of warrant cases based on police report, by invoking inherent powers under Section 482 Code of Criminal Procedure – petition dismissed”.

53. I note, the investigating authority has also filed detailed status report wherein a date-wise detail of various sanctions/proceedings has been mentioned which reads as under:-

“15.12.2003: *M/s.Rampat Estate (P) Ltd was declared successful bidder in respect of the plot No.2, Nelson Mandela Marg, Vasant Kunj, Phase – II, New Delhi.*

30.10.2004: *Registrar of Companies approved change of name of the company as M/sAmbience Developers Pvt Ltd.*

21.04.2004: *The possession of the land was handed over to M/sAmbience Developers Pvt Ltd.*

27.04.2004: A perpetual lease deed was executed.

28.02.2005: Sanction u/s 12 of the Delhi Development Act, 1957 (Building Plan).

27.11.2006: Ministry of Environment and Forest granted permission/NOC.

25.04.2007: Revised Building Plans were sanctioned."

54. Ld.senior counsel for respondent No.2 submits that on perusal of the above mentioned details, the payment clause as given to the various allottees, including the present complainant states that the entire payment was to be made by 02.06.2006, when the application for occupation certificate was likely to be moved by the petitioner company. However, it does not show about the stages of various sanctions to be obtained by the petitioner company as have been demonstrated in the above details. The building plan was sanctioned only on 28.02.2005 and revised building plan was sanctioned on 25.04.2007. The petitioner company had asked various allottees to make their complete payment by 02.06.2006. As is mentioned in the status report filed by the investigating authority that out of 38 allottees most have withdrawn from the said project, after

knowing the fact that they would not own the booked commercial spaces despite having invested handsome amount in the same.

55. It is further submitted that the judgment dated 31.05.2011 passed in CS(OS) No.38/2008 Id.Single Judge in para Nos.7 & 8 has observed as under:

“7. According to the plaintiff, a criminal case of cheating etc. is already pending against the defendant regarding the mala fide conduct of the defendant to initially enter into agreement with innocent allottees and to collect huge amount of money for construction of the mall and thereafter, when the question of handing over the possession of the shops came, defendant illegally relied upon Clause-48 of the Space Buyer’s Agreement to wriggle out of their obligation and to put an end to the agreement.

8. Whereas according to the learned counsel for the defendant, since Commercial Space Buyer’s Agreement was not executed, therefore, no valid and subsisting contract existed between the parties in respect of the two Allotment Letters (Ex.P1 and Ex.P2). Clause – 48 of the Application Forms (Ex.PW1/DX1 and Ex.PW1/DX2) has been relied upon by the defendant’s counsel to substantiate the aforesaid stand of plaintiff being entitled to annual rent of not less than 9% of the investment made. Reliance has been placed upon decisions reported in ‘Om Builders (P) Ltd vs. Rdward Keventer (Successors) Pvt Ltd’ 40

(1990) DLT, 'Mayawati vs Kaushalya Devi' (1990) 3 SCC 1; 'Ganesh Shet vs. Dr.C.SG.K. Setty & Ors' (1998) 5 SCC 381 and 'M/s Mirahul Enterprises vs. Vijay Srivastava' AIR 2003 Delhi 15, to contend that in a suit for specific performance, the evidence and proof of agreement must be absolutely clear and certain and the grant of specific performance is discretionary and has to be exercised on sound principles."

56. Also observed in para No.9 of the said judgment as under:-

"9. There can be no dispute with aforesaid proposition of law. A scrutiny of the evidence on record reveals that plaintiff's witness Mr. A. M. Shah (PW-1) has asserted in evidence that after making substantial payments towards the allotment of the shop in question, the possession of the same was not given to the plaintiff and in this regard letter of 09th September, 2007 (Ex.PW1/12) was sent to the defendant and the Commercial Space Buyer's Agreement was never handed over to the plaintiff. The second witness of the plaintiff i.e. Mr.Sanjay Mishra (PW-2) has asserted that on several occasions during the visits to the office of defendant No.1, he had requested for copy of Commercial Space Buyer's Agreement but it was not supplied on one pretext or the other. The third and the last witness of the plaintiff Mr.Madhup Mehta (PW-3) has stated in his evidence that the Application Forms (Ex.PW1/DX1 and Ex.PW1/DX2) though contains his signatures but the clear

understanding was that the plaintiff would get the possession of the shops in question. This witness (PW-3), has stated that Mr.Vinod Aggarwal (DW-2 of defendant No.2) at the time of booking of the shops in question had told that the Application Forms were not yet printed and they shall be given when the Allotment Letter of the shops in question is issued. Regarding the Application Forms (Ex.PW1/DX1 and E.PW1/DX2), what this witness (PW-3) has to say is as under:-

Q Whether you had read the terms and conditions as incorporated in the application forms which you received in August, 2004?

A. I did not read the terms and conditions as mentioned in the application form.

Q Whether you had disclosed to the plaintiff company that you had signed the application forms and returned the same to the representative of Mr.Vinod Aggarwal?

A. I had disclosed to the plaintiff company that I have received the allotment letters and have returned the application forms duly signed."

57. Further, Id.senior counsel for respondent No.2 has relied upon the case of **State of Karnataka and Another vs. Pastor P. Raju, MANU/SC/3533/2006: (2006) 6SCC 728** wherein it has been held in para No.9 as under:-

"There is another aspect of the matter which deserves notice. The FIR in the case was lodged

on 15.1.2005 and the petition under Section 482 Cr.P.C. was filed within 12 days on 27.1.2005 when the investigation had just commenced. The petition was allowed by the High Court on 23.2.2005 when the investigation was still under progress. No report as contemplated by Section 173 Cr.P.C. had been submitted by the incharge of the police station concerned to the Magistrate empowered to take cognizance of the offence. Section 482 Cr.P.C. saves inherent powers of the High Court and such a power can be exercised to prevent abuse of the process of any Court or otherwise to secure the ends of justice. This power can be exercised to quash the criminal proceedings pending in any Court but the power cannot be exercised to interfere with the statutory power of the police to conduct investigation in a cognizable offence. This question has been examined in detail in *Union of India v. Prakash P. Hinduja & Anr.* (2003) 6 SCC 195, where after referring to *King Emperor v. Khwaja Nazir Ahmad* AIR 1945 PC 18, *H.N. Rishbud & Inder Singh v. The State of Delhi* AIR 1955 SC 196, [State of West Bengal v. SN Basak](#) AIR 1963 SC 447, [Abhinandan Jha & Ors. v. Dinesh Mishra](#) AIR 1968 SC 117 and [State of Bihar & Anr. v. JAC Saldanha & Ors.](#) (1980) 1 SCC 554, it was observed as under in para 20 of the reports :-

"20. Thus the legal position is absolutely clear and also settled by judicial authorities that the Court would not interfere with the investigation or during the course of investigation which would mean from

the time of the lodging of the First Information Report till the submission of the report by the officer in charge of police station in court under Section 173(2) Cr.P.C., this field being exclusively reserved for the investigating agency."

This being the settled legal position, the High Court ought not to have interfered with and quashed the entire proceedings in exercise of power conferred by Section 482 Cr.P.C. when the matter was still at the investigation stage."

58. Per-contra, Id.senior counsel for petitioner has drawn the attention of this Court towards the FIR in question and submits that the respondent No.2 has mentioned that:-

"we have been provided no such unilateral laid terms by chance, nor have we signed any such documents but the accused company has still illegally refused to deliver us possession and fraudulently and dishonestly withholding out ownership rights. Further we have reasons to suspect that Shri Raj Singh Gehlot and the officials of the accused company are selling/leasing out commercial space so constructed out of the funds from original buyers and illegally and unlawfully trying to create third party interest in furtherance of criminal conspiracy."

59. Further, Id.counsel has drawn the attention to page No.45 of the petition towards the relief sought by

respondent No.2 in CS(OS) No.38/2008 and submitted that out of four prayers; 'prayer (a)' was rejected; 'prayers (b) & (c)' were granted; and 'prayer (d)' was not granted. Further submits that possession has not been granted by the Id.Single Judge in the decree. Though the decree is being challenged, however, respondent No.2 cannot lead oral evidence as against written documents.

60. Admittedly, the present issue is under challenge as a civil dispute, being filed by respondent No.2 initially by way of suit in this Court being CS(OS) No.38/2008, and thereafter, made the complaint and lodged the FIR. Further, he has drawn the attention of this Court at page No.185 of the paper book which is a copy of the letter dated 18.08.2004 and of letter dated 06.04.2009 written by the petitioners to respondent No.2. The relevant extract whereof are as under:-

"In response to your application dated 25.05.2004 for allotment of space for Retail Shop in Ambi Mall at Plot No.2, Vasant Kunj Mall Complex, Nelson Mandela Marg, Vasant Kunj, New Delhi and your agreeing to the terms and conditions enumerated therein, we are pleased to allot you Retail Shop No.G-49 having approximately 68.19 sq.mtrs.

(734.01 sq. ft) of Super Area of space on Ground Floor under Instalment Payment Plan as per enclosed Payment Plan. Kindly note that the above allotment is subject to your execution of the Commercial Space Buyer's Agreement on Company's standard format, contents of which have been explained and understood by you and your compliance of all the terms and conditions as given in your application for allotment of space and due performance and compliance of all your obligation as contained in the said Application Form and Commercial Space Buyer's Agreement".

"As we have already explained to you, we have not delivered possession of any shop to any person whomsoever. There is no question of delivery of possession as on date. WE have not till date cancelled the allotment of M/s Padiam Exports Private Limited in respect of the shops in question. Moreover, their status is as it was on the first day, i.e., the day of acceptance of their Application Forms. We submit hereunder certain facts relating to the development and construction of the Ambience Mall as under"

61. After hearing both the parties, I find on perusing the Annexure J at page No.126 with heading "**Application for Allotment of Space for Showroom/Retail Shop/Restaurant/ Other**". It is evident from the application that the applicant had read, understood and signed the Salient Terms and conditions of allotment, and

same is attached to this application. The applicant had agreed to abide and be bound by the terms and conditions of the allotment. It is further clear that from the application that the applicant had agreed to sign and execute as and when desired by the company. The contents of which, had been read and understood and further agreed that till the commercial space Buyer's Agreement is signed and executed, there shall be no complete contract of sale. Further, agreed that the applicant shall not be entitled to enforce the same in any Court of law. If however, the applicant fails to execute and return the duly signed and executed Commercial Space Buyer's Agreement within 30 days from the date of its dispatch by the company then the application shall be treated as cancelled and the earnest money paid by the applicant shall stand forfeited. Further agreed to abide by the terms and conditions of the application including those relating to the payment of sale price and other charges, forfeiture of earnest money as laid down therein and the execution of the Commercial Space Buyer's Agreement.

62. On perusal of the clause No.34, of salient terms and conditions, it is clearly mentions about the scheme i.e. “Commercial Space Buyer’s Agreement”. It is also clarified further, that the agreement is to be entered by the allottee with the company after he has made full payment of the earnest /allotment money and/or any other money due to the company as provided therein.

63. In clause No.7, the lay out and building plans displayed at the Company’s office were only tentative plans and the Company shall have right to make variations, additions, deletions, alterations, modifications and changes therein, as it may, in its sole discretion, deem fit and proper as may be required/done by any competent authority.

64. In clause No.34, it is also clearly mentioned that the company shall endeavour to complete the construction of the same Commercial Complex within a period of 03 years. The company after obtaining the certificate for occupation and use from the competent authority shall hand over the commercial space to the intending allottee.

65. On perusal of clause No.48, it is very clearly mentioned that the space shall be used only for specified purpose. The application is to apply under the Investor's Category and would not put the space to his own use and authorises the company to give the same on lease/licence, to any person in its sole discretion and on the terms and conditions agreed to by the company at an annual rental not less than 9% of the investment made by the intending allottee.

66. In clause No.48 itself it is also clearly clarified that the intending allottee shall not transfer the space to any person without the consent in writing of the company. In case of refusal, the company shall have option to repurchase the same at the then prevailing applicable rate as determined by the company. This clause is the essence of the contract. In case of any breach, the allotment shall stand determined and the intending allottee shall be entitled to refund of the amounts paid by him after forfeiture of the earnest money etc. and the company shall have the right to re-enter the said commercial space or to stop the supply of essential services including electricity and water to

the said commercial space till it is restored into its prescribed use.

67. I find force in the arguments of Id.senior counsel for petitioners that till date not even a single person has been allotted any shop for his personal use in this scheme. Under this scheme, all shops are of commercial category and not even a single shall been given on sale for the use of any individual.

68. I find force in the arguments of Senior counsel for respondent No. 2 that the powers under Section 482 Code of Criminal Procedure can be exercised to prevents the abuse of the process of any court or otherwise to secure the ends of justice. This power can be exercised to quash the criminal proceedings pending in any court and the power cannot be exercised to interfere with the statutory powers of the police to conduct investigation in a cognizable offence.

69. I am aware of the settled law laid down by Supreme Court in ***State of Bihar and Anr V. JAC Saltanha and Other (1980) 1 SCC 554***, wherein it was held that the court would not interfere with the investigation or during the

course of investigation; which would amount from the time of the lodging of the FIR, till the submission of the report by the Officer Incharge of the police station in Court under Section 173(2) Code of Criminal Procedure. This field is exclusively reserved for investigating agency.

70. I am also aware, as is held by Supreme Court in ***Keki Hormusji (supra)***, wherein it was held that the availability of remedy of discharge does not bar the petitioner under Section 482 Code of Criminal Procedure.

71. Further held, if a dispute is of civil nature, the criminal court will not be justified to proceed with the matter if the criminal justice system is being used to settle the civil dispute.

72. In ***V.Y. Jose (supra)*** to this effect as discussed above, in para 23, it was held that Section 482 of Code of Criminal Procedure saves the inherent power of the court. It serves a salutary purpose that a person should not undergo harassment of litigation for a number of years although no case has been made out against him.

73. In para 28 of the above discussed case, if a matter which essentially involves dispute of a civil nature should not be allowed to be the subject matter of a criminal offence, the latter being not a short-cut of executing a decree which is non-existent. The superior courts with a view to maintain purity in the administration of justice should not allow abuse of the process of Court.

74. In my opinion, clause Nos.34 and 48 are to be read together. Clause No.48 elaborates the clause No.34. Therefore, both the clauses cannot be read separately. I also find force that if the shops are sold to individuals, then the concept of 'Mall' would be defeated. The concept of 'Mall' is to provide space to different branded companies under one roof and the petitioners are bound to give minimum 9% return of the total investment amount. Though, I am conscious about the settled law that power under Section 482 of the Code should be used sparingly and in rarest of the rare cases, however, the settled law is that if a case of civil nature and the party wants to put pressure through lodging FIR, then the Court should come forward and exercise its power under Section 482 of the Code.

75. The present case totally revolving around the agreement which was signed by respondent No.2. He had the liberty to go through each and every page of the contract before signing, and if at all, there was any confusion, the clarification would have been sought by him then and there at that very stage.

76. I note that the respondent No.2 is emphatically relied upon some words mentioned in the terms and conditions and interpreting the same in his favour; whereas by relying on a few words, he concede the agreement in totality, signed by him, which at best can be a matter of interpretation, which is possible in civil case pending. The respondent No.2 is overlooking the clear cut terms and conditions contained in clause Nos.34 & 48.

77. In my opinion, the applications were invited and the respondent No.2 booked the space in the year 2004, after M/sRampat Estate (P) Ltd and was declared successful bidder on 15.12.2003 in respect of the plot No.2, Nelson Mandela Road, Vasant Kunj Phase – II, New Delhi. Thereafter, on 30.01.2004, the Registrar of Companies approved the

change of name of the company as M/s Ambience Developers Private Limited. The perpetual lease deed was executed on 27.04.2004. Sanction under Section 12 of the DDA Act was granted on 28.02.2005 and Ministry of Environment and Forests granted permission on 27.11.2006 and finally on 25.04.2007 revised building plan was sanctioned. As per the agreement, the building was supposed to be completed within 03 years and the entire payment was paid on 02.06.2006. Thereafter, the building was constructed in the year 2010 and the present FIR was registered at the time when the structure of the building was not complete i.e. on 02.05.2008. The revised building plan was sanctioned on 25.04.2007; therefore, respondent No.2/complainant were under the wrong impression that the shops will be ready within 03 years with effect from 2004.

78. Investors understood that when they are applying for shops with certain specific terms and conditions and that they are not going to get possession thereof, in consonance with the said terms and conditions.

79. It is also not the case of the respondent No.2 that the petitioners have not constructed the building and cheated the complainant. The structure of the building is ready, but due to interim injunction granted by this Court in CS(OS) No.38/2008, which was later made absolute. For this reason, the petitioners are unable to proceed further.

80. It is clearly enumerated in the terms and conditions that endeavour of petitioners to complete the building in 03 years, however, it took time in completion of certain formalities for getting the building plans sanctioned. Therefore, the petitioners could start construction after revised building plans got sanctioned i.e. on 25.04.2007.

81. Therefore, I am of the opinion that the present FIR as lodged at a pre-mature stage. If the petitioners have breached any of the clauses of terms and conditions as agreed, then the civil remedy lies, which were admittedly resorted to by respondent No.2. This case is purely of a civil nature. The respondent cannot be allowed to misuse the criminal process to put the pressure upon the petitioners.

82. In view of aforementioned discussion, Criminal M.C. No.88/2011 is allowed & the FIR No.77/2008 registered against the petitioners u/s 409/420/120B Indian Penal Code, 1860 at police station Economic Offence Wing is hereby quashed alongwith the proceedings emanating therefrom, if any.

83. No order as to costs.

SURESH KAIT, J

August 23, 2011

MK