

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL WRIT PETITION NO. 15/2016.

Mr. Cedric Vaz,
major of age, businessman,
C/o edcon Real Estate Developers,
5th Floor, Sidharth Bandodkar Bhavan,
Panaji, Goa.

Petitioner

Versus

The Police Inspector/Station-in-Charge
and others.

Respondents

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Shri S.D. Lotlikar, Senior Advocate with Advocate Ryan Menezes for the petitioner.

Shri Pravin N. Faldessai, Additional Public Prosecutor for the respondent nos. 1, 2 and 3.

Shri S.G. Desai, Senior Advocate with Advocate A.V. Pavitharan, Advocate for the respondent no.4.

**CORAM : F.M.REIS & NUTAN D.SARDESSAI, JJ
RESERVED ON :14/06/2016.
PRONOUNCED ON :03/08/2016**

JUDGMENT:- (Per NUTAN D. SARDESSAI, J.)

1] Heard Shri S.D. Lotlikar, learned Senior Counsel with Advocate Ryan Menezes on behalf of the petitioner, Shri P.Faldessai, learned Additional Public Prosecutor for the respondents no. 1 to 3 and Shri S.G. Desai, learned Senior Counsel with Advocate A. Pavitharan for the respondent no.4.

2] Shri S.D.Lotlikar, learned Senior Counsel for the

petitioner invited attention to the complaint dated 27.10.2014 which made a reference to the Sale Deed but was not produced alongwith the plan. The complaint also made a reference to the plans purportedly in the possession of the complainant without in any manner disclosing how he came about to be in possession thereof. There was also no explanation at the instance of the complainant how he gained access to the plans purportedly forged by the Authorities and submitted that even assuming without admitting such a plan was forged, the complainant had nowhere spelt out who was the author of the plan and from where it had originated. The impugned order passed by the learned Magistrate did not at all justify a direction to register an FIR against the petitioner under Sections 466 and 468 IPC.

3] Shri S.D. Lotlikar, learned Senior Counsel placed reliance in **Priyanka Srivastava and another Vs. State of Uttar Pradesh and others [(2015)6 SCC 287]**. There was a complete non-application of mind by the learned Judicial Magistrate First Class in passing the order as he did and, therefore, the order had to be quashed and set aside in exercise of the power under Article 226 of the Constitution of India amongst others. Shri P. Faldessai, learned Additional Public Prosecutor submitted that the investigation was in progress and some statements had been recorded. Shri S.G.Desai, learned

Senior Counsel for the respondent no.4 contended at the outset that the building was constructed by the petitioner which was as per the forged plans. A perusal of the plans in the paper-book would show the manipulation done at the instance of the petitioner and, therefore, there was no reason and justification for the issue of a Writ as prayed by the petitioner. Shri S.G. Desai, learned Senior Counsel relied in State of **A.P. Vs. Golconda Linga Swamy and another [(2004)6 SCC 522]**, **State of T.N. Vs. Thirukkural Perumal [(1995)2 SCC 449]** and **T. Vengama Naidu Vs. T. Dora Swamy Naidu and Ors. [(2007)4SCR 348]** to press for the dismissal of the petition. Shri Lotlikar, learned Senior Counsel for the petitioner in reply contended that there was no basis for the learned Judicial Magistrate First Class to come to a finding as he did at para 4 of the impugned order in the absence of any averment in the complaint or the material on record. There was also no reference to any forged plan being used to get the Occupancy Certificate and yet the learned Judicial Magistrate First Class had hastily concluded so in the impugned order. The impugned order was, therefore, liable to be quashed and set aside.

4] It was nowhere in dispute at the instance of the petitioner and the respondent no.4 that there were strained relations between them on account of the dispute relating to the

parking to be provided to the respondent no.4 by the petitioner. Admittedly, there was no direct dealing between the petitioner and the respondent no.4 vis-a-vis the premises in his occupation, the complainant having come in possession thereof through the original purchaser of the flat, who had direct dealing with the petitioner and which fact emerged during the course of the arguments developed on behalf of each of the contesting parties to the petition. The case of the complainant-respondent no.4 was that he had purchased the office premises in the building constructed by the petitioner on the third floor pursuant to a Sale Deed dated 13.11.2013.

5] It is on account of the purported forcible closure of the underground parking by the petitioner was the respondent no.4 constrained to obtain the certified copies of the approved construction plans from the NGPDA and the CCP by recourse to RTI. It was further his case in the complaint that the construction plans obtained from the NGPDA and the CCP was duly stamped by the respective departments and that by his complaint dated 22.5.2014 he had requested the CCP and NGPDA to carry out the post-occupancy audit with regard to the illegalities committed by the Developer. It was his case that certain irregularities were noticed and alteration and deviation were carried out by the Developer without obtaining revision and/or modification of the

plans as required by law which had been done by the petitioner on behalf of M/s. Edcon Real Estate Developer to cheat and defraud the Government in connivance with the Commissioner of the CCP, the Municipal Engineer and the Assistant Municipal Engineer to cause losses to the Government and to benefit himself.

6] He built up a case that the illegal deviations were not matching with the approved construction plans obtained from the office of the CCP and the NGPDA. He had begun comparing the approved plans along with the plans in his possession and noticed that one construction plan showed gross and material irregularities which he identified as the forged plan bearing the signatures of the CCP Commissioner, the Municipal Engineer and the Assistant Municipal Engineer.

7] The complainant carved out a case in his complaint that a perusal of the forged plan clearly showed that it was not the plan as approved by the NGPDA since there were material deviations on the third and also fourth/fifth floor. The Developer had also not obtained any revision of the plans and/or approval of the deviations prior to the occupancy and had indulged in glaring forgery of a public document with the sole intention to cheat him and defraud the Government. The offence under Sections 466

and 468 IPC therefore, attracted and hence his complaint to proceed against the petitioner and the officials of the CCP to be punished under the relevant provisions of the IPC.

8] Much emphasis was led on the plan referred to as the forged plan and the other plan to show that the petitioner as the Developer had carried out the forgery and that it was apparent from the stamp of the TCP appearing on the plan unlike the plan referred to as the approved plan bearing the due endorsement of the TCP apart from those of the CCP. But however, there was no substantial difference between these two plans which were the sheet anchor of the case of the respondent no.4 to buttress the case of forgery.

9] Forgery under Section 463 IPC means whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery. Forgery for the purpose of cheating is provided for in Section 468 IPC and reads that whoever commits forgery, intending that the document or electronic record forged shall be used for the purpose of cheating,

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

10] Although the complaint is silent on the use of the forged document as genuine, it contemplates the offence under Section 471 IPC and reads that whoever fraudulently or dishonestly uses as genuine any document or electronic record which he knows or has reason to believe to be forged document or electronic record, shall be punished in the same manner as if he had forged such document or electronic record. The offence of forgery is both bailable and non-cognizable in nature though the offence under Section 471 IPC is cognizable and bailable while that under Section 468 IPC is both cognizable and non-bailable.

11] Shri S.D. Lotlikar, learned Senior Counsel for the petitioner also submitted that it was now well settled that a complaint had to be accompanied by an affidavit and in the absence thereof, the complaint was not tenable. Once again, a cursory perusal of the complaint would reveal that no doubt it is supported by an affidavit of the respondent no.4 affirming the contents thereof at paragraphs no.1 to 23 including legal submissions to be true and correct to the best of his knowledge in an omnibus manner but it does in any manner spell out which

contents were true to his knowledge and which were based on legal submissions. In **Priyanka Srivastava** (supra), Their Lordships of the Apex Court held that an application under Section 156(3) CrPC seeking a direction for the registration of an FIR must be supported by an affidavit, the purpose of which is to prevent the abuse of the process which is becoming more common nowadays.

12] **State of Karnataka and another Vs. Pastor P. Raju [(2006)6 SCC 728]** held that where the investigation in the matter was still under progress and no police report under Section 173 CrPC was submitted to the concerned Magistrate, quashing of the entire proceedings by the High Court under Section 482 CrPC was held not justified. **Kailash Dattatraya Jadhav and Ors. Vs. State of Maharashtra and ors. (MANU/MH/0714/2016)** sought quashing of an FIR by an application under Section 482 of the Code of Criminal Procedure, 1973 which was registered at the Sakinaka Police Station, Andheri, Mumbai. It was pointed out by the Court that the remedy under the Code was available to the applicants in view of the earlier decision in **Avinash Trimbakrao Dhondage Vs. State of Maharashtra (2016 ALLMR (Cri)985)** where a Division Bench of this Court had held that an order made by the learned Magistrate under sub-section (3) of Section 156 of the

Code was not an interlocutory order but a final order on an application under Section 156(3) CrPC and the remedy of revision was available under Section 397 CrPC.

13] It was urged on behalf of the applicants that the remedy under Section 397 CrPC was not at all an efficacious remedy inasmuch as the Revisional Court or the Sessions Court had no power to quash the FIR. As a consequence of an order being under sub-section (3) of Section 156 CrPC, the officer in-charge of the concerned Police Station was under an obligation to register an F.I.R. in accordance with sub- section (1) of Section 154 CrPC and therefore, it was submitted that as the Revisional Court cannot quash the FIR even assuming such remedy is available, it was not an efficacious remedy.

14] In **Kailash Jadhav** (supra), Their Lordships considered the Apex Court judgment in **Madhu Bala Vs. Suresh Kumar and others [(1997) 8 SCC 476]** where it was held that on the basis of an order of the Magistrate to investigate even in the absence of specific direction to register an FIR, the police is bound to register an FIR and bound to investigate into the same. Their Lordships considered the judgment in **Avinash Dhondage** (supra) where the Division Bench held that the order directing investigation under sub-section (3) of Section 156 CrPC is not

an interlocutory order but is in the nature of a final order disposing off a complaint and revision under Section 397 CrPC would be maintainable. But however, Their Lordships noted that there was no finding recorded by the earlier Bench in **Avinash Dhondage** (supra) that in view of the availability of a remedy under Section 397 of the Code, an application under Section 482 CrPC could not be entertained.

15] In **Kailsh Jadhav** (supra), it was reiterated as held by the Apex Court that once an order is made by the Magistrate under sub-section (3) of Section 156 CrPC the Court directing the investigation to be made, it is legal obligation of the Police Officer to register an FIR under sub Section (1) of Section 154 of the Code inasmuch as the registration of FIR in terms of sub-section (1) of Section 154 IPC is a condition precedent for commencing the investigation into the commission of a cognizable offence. In **T. Vengama Naidu** (supra), the Hon'ble Apex Court held that the FIR cannot be quashed at the stage of investigation. **State of Tamil Nadu Vs. Thirukkural Perumal [(1995) 2 SCC 449]** held that the High Court's power to quash an FIR and the criminal proceedings should be exercised sparingly keeping in view the guidelines laid down by the Supreme Court in various decisions. The High Court was not justified in evaluating the genuineness and reliability of allegations made in the FIR or the complaint on

the basis of the evidence collected during the investigation and referred to the judgment in **State of Haryana Vs. Bhajan Lal [1992 SCC (Cri) 426]**. **State of Andhra Pradesh** (supra) too reiterated that though the inherent jurisdiction of the High Court is wide, it has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in Section 482 CrPC. The power is to be exercised ex debito justitiae to prevent an abuse of the process of the Court but should not be exercised to stifle legitimate prosecution.

16] Admittedly as the records stand, the police had registered an offence against the petitioner under Sections 466, 468 and 120-B read with Section 34 IPC based on the complaint of the complainant. The investigation in the case is still in progress and no charge-sheet has yet been filed in the matter. It has been contended on behalf of the respondent no.4 that the plan forged at the instance of the petitioner showed variance in the ducts on the fourth and fifth floor plan which was not in alignment with those shown in the approved plan and these aspects had also to be properly investigated by the respondent no.1. Assuming at the highest that there is no basis in the case of the respondent no.4 on the purported forgery and/or inferences drawn by the learned Judicial Magistrate First Class in

that regard, nonetheless it cannot be overlooked that the investigation is still in progress. No doubt, the learned Judicial Magistrate First Class has proceeded on the basis of the submissions made before him on behalf of the respondent no.4 as the complainant to accept his version in a blanket fashion that one plan was furnished by the Developer to his predecessor and the second plan was procured by the respondent no.4 under the RTI.

17] The learned Magistrate had also accepted the contention on behalf of the respondent no.4 that the plan produced before him at Exhibit-A was forged unlike that the procured under the RTI Act which were bearing two distinct dates of approval and hastening to conclude that there was forgery done by the petitioner with the concerned Officials of CCP and TCP departments. It is apparent the learned Judicial Magistrate First Class was carried away by the submissions made before him at the instance of the respondent no.4 to pass the order as he did. There are inherent flaws in the order passed by the learned Magistrate, which calls for an interference in the exercise of the power under Section 482 CrPC.

18] We, therefore, partly allow the petition whereby the impugned order is quashed and set aside and the proceedings

remanded to the learned Judicial Magistrate First Class for a consideration afresh in the light of the observations as above.

NUTAN D.SARDESSAI, J

F.M. REIS, J

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