

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

+ **CRL.M.C. 4272/2014 & CrI.M.A. 16911/2014**

Date of Decision : March 10th, 2016

SANJAY KAUSHISH & ANR

..... Petitioners

Through **Mr.Aditya Bhardwaj and Mr.Vaibhav
Tomar, Advs.**

versus

STATE & ANR

..... Respondents

Through **Mr.Vinod Diwakar, APP.
Mr.Kirti Uppal, Sr. Adv. with
Ms.Monica Chugh Manchanda and
Ms.Sahiba, Advs.**

**CORAM:
HON'BLE MR. JUSTICE P.S.TEJI**

P.S.TEJI, J.

1. The present petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter shall be referred to as the "Cr.P.C.") has been filed by the petitioners for quashing of charge sheet filed in the Court of learned Metropolitan Magistrate, Saket Court Complex, New Delhi under Sections 406/420/34 IPC in Criminal Case No.3095/2/2014 arising out of FIR No.27/2014, under Sections 420/406 IPC, Police Station Sarita Vihar and for quashing of order dated 25.07.2014 passed by the learned MM taking cognizance and summoning the petitioners.

2. The facts, in brief, are that the respondent No.2/complainant-Splendor Landbase Ltd. got lodged the FIR in question against the petitioner Sanjay Kaushish and his son Karan Kaushish with the allegations that both the accused persons approached the complainant company in January, 2013 and offered to sell plots of land bearing Nos.8601 to 8630 admeasuring 5444 sq. yards situated at Desh Bandhu Gupta Road, Paharganj, New Delhi which was commonly known as 'Shiela Cinema Complex'. Accused Sanjay Kaushish represented himself to be an absolute owner and in possession of the said property; it was claimed that the said property was free from any claim; he had applied for getting the said property converted from leasehold to freehold and he would get the plan of the property approved from the authority concerned. The complainant agreed to purchase and re-develop the said property and had paid Rs.5 crores to accused Sanjay Kaushish by way of cheques along with a brief term sheet vide cover letter dated 15.01.2013 which was accepted by accused Karan Kaushish. It was further agreed that the complainant company shall pay a sum of Rs.10 crores to the accused persons upon their handing over physical possession of the freehold property. It was further agreed that in case accused persons fail to get the property converted to freehold within two months, they shall return Rs.5 crores along with interest @ 3% per month and additional Rs.5 crores as compensation/ damages. It was further alleged that the accused persons defaulted in getting the property converted to freehold. They handed over three cheques of Rs.50 lacs each and four cheques of Rs.1 crore each. The cheques of Rs.50 lacs each were encashed when

presented for payment. The complainant company deposited three cheques of Rs.1 crore each, but the same were dishonoured. Thereafter, a notice dated 23.10.2013 was issued to the accused persons and in reply dated 07.11.2013, it was claimed that the accused persons were not the absolute owner of the said property. It was also claimed by the accused persons that the cheques were not issued towards any obligation to repay any debt/liability. Vide letter dated 10.12.2013, accused persons agreed that they were ready to pay Rs.3 crores to the complainant towards full and final settlement of all claims.

3. On the basis of the complaint made to the police, the FIR in question was registered. After investigation, charge sheet was filed in the Court. Vide order dated 25.07.2014, the Trial Court took cognizance of the offence and summoned the petitioners under Sections 406/420/34 IPC. Feeling aggrieved by the filing of the charge sheet and the order taking cognizance and summoning the petitioners, the present petition has been filed by the petitioners for quashing the same.

4. The case of the petitioners is that the petitioner no.1 is the co-sharer in the property in question along with his brother and other family members. A partition suit was filed which is pending adjudication. On 24.03.2009, a preliminary decree was passed by this Court declaring 1/3rd equal and undivided share of the petitioner no.1 along with co-sharers in the property. It was also directed to get the property converted from leasehold to freehold. Vide order dated 18.11.2011, parties were allowed to get the property valued. The

property was valued for Rs.90 crores. Vide order dated 06.11.2012, petitioner no.1 was directed to pay a sum of Rs.28.33 crores to each of the co-sharers. In December, 2012, despite having the knowledge of the pendency of the civil suit, the director of respondent no.2-company approached the petitioner no.1 and proposed to enter into a joint agreement for purchase of share of the petitioner no.1 and co-sharers in the property and subsequent joint re-development of the property. Vide letter dated 15.01.2013, earnest money of Rs.5 crores by way of two cheques was given to the petitioner no.1 towards entering into a joint venture. On 07.02.2013, the petitioner no.1 sent an e-mail to the complainant company enclosing a draft MOU. While the terms and conditions were being negotiated, the complainant company backed out of the transaction citing adverse market conditions and asked for return of the earnest money.

5. Argument advanced by the learned counsel for the petitioners is that the charge sheet does not disclose any offence and the learned MM while taking the cognizance and summoning the petitioners has acted in a mechanical manner. The ingredients for the offence of criminal breach of trust and cheating are contradictory to each other and cannot form part of the same transaction. It is further argued that on a bare perusal of contents of the charge sheet, only a case of civil nature is made out and no criminal case is made out against the petitioners. In the present case, a civil dispute has been given the colour of a criminal offence. It is further argued that the respondent no.2 has already filed a suit for recovery of Rs.3.50 crores against the petitioners. The respondent no.2 has also filed a complaint under

Section 138 of the Negotiable Instruments Act, 1881 against the petitioners. It is further argued that the respondent no.2 was well aware of the status of the petitioner no.1 as one of the co-sharers in the property in question since the very inception of negotiations. It is further argued that out of the earnest money of Rs.5 crores, a sum of Rs.2 crores has already stand paid by the petitioner no.1.

6. In support of the above contentions, learned counsel for the petitioners has referred to a judgment in the case of ***G.Sagar Suri and another v. State of U.P. and others (2000) 2 SCC 636*** in which it was observed that since a criminal complaint under Section 138 of the N.I. Act was already pending against the accused persons, they would suffer the consequences if offence under Section 138 of the N.I. Act is proved against them. It was further observed that in any case there was no occasion for the complainant to prosecute the appellants under Sections 406/420 IPC and in his doing so it was clearly an abuse of the process of law and prosecution against the appellants for those offences was liable to be quashed. On similar point, judgment in the case of ***Robert John D'souza and others v. Stephen V. Gomes and another (2015) 9 SCC 96*** has been relied upon.

Next judgment relied upon by the petitioners is in the case of ***Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others (1998) 5 SCC 749*** in which it was observed that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the

Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and that would be sufficient for the complainant to succeed in bringing charge home to the accused.

Next judgment relied upon by the petitioners is in the case of ***Dalip Kaur and others v. Jagnar Singh and another* (2009) 14 SCC 696** in which it was observed that an offence of cheating would be constituted when the accused has fraudulent or dishonest intention at the time of making promise or representation. A pure and simple breach of contract does not constitute an offence of cheating. It was further observed that if the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating. On similar point, judgment in the case of ***International Advanced Research Centre for Power Metallurgy and New Materials (ARCI) and others v. Nimra Cerglass Technics (P) Ltd. and another* 2015 (10) SCALE 136** has been relied upon.

7. On the contrary, learned Senior Counsel for the respondent no.2 /complainant has argued that the ingredients of offence of cheating and criminal are satisfied in the present case inasmuch as the petitioners were having dishonest intention since the inception of agreement between the parties. It is further argued that the petitioner no.1 was well aware that he was not the absolute owner of the

property in question and he was just the 1/3rd co-sharer in the same, but despite the same he represented himself as the absolute owner of the property and entered into sale and re-development of the property with the respondent no.2 company. It is further argued that the petitioners have also assured the respondent no.2 company that they would get the property converted from leasehold to freehold within two months, but despite receiving the earnest money, the same has not been done with the dishonest intention of usurping the amount of Rs.5 crores. It is further argued that the petitioners received the money from the respondent no.2 under fraudulent and dishonest intention since very beginning of the transaction and they have committed the criminal breach of trust by not entering into fulfilling the assurances given while entering into negotiations.

8. In support of the above contentions, learned Senior Counsel for the respondent no.2 has relied upon judgment in the case of ***Rajesh Bajaj v. State NCT of Delhi and others (1999) 3 SCC 259*** in which it was observed that it is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the complaint, is not the need at this stage. It was further observed in para 10, which reads:

“It may be that the facts narrated in the present complaint would as well reveal a commercial

transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions.”

Next judgment relied on behalf of the respondent no.2 is in the case of ***Padal Venkata Rama Reddy v. Kovvuri Satyanarayana Reddy and others (2011) 12 SCC 437*** in which it was observed as under :

“It would not be proper for the High Court to analyse the case of the complainant in the light of all the probabilities in order to determine whether conviction would be sustainable and on such premise arriving at a conclusion that the proceedings are to be quashed. In a proceeding instituted on a complaint, exercise of inherent powers to quash the proceedings is called for only in a case in which the complaint does not disclose any offence or is frivolous, vexatious or oppressive. There is no need to analyse each and every aspect meticulously before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. The statement of witnesses made on oath to be verified in fact and materials put forth in the charge-sheet ought to be taken note of as a whole before arriving at any conclusion. It is the material concluded during the investigation and evidence led in court which decides the fate of the accused persons.”

9. I have carefully considered the submissions of the learned counsel for the parties and various decisions relied upon by them.
10. The ingredients of Section 420 IPC are deception of any person;

or fraudulently or dishonestly inducing any person to deliver any property; or to obtain consent from that person for retaining any property and finally, intentionally inducing that person to do or omit to do anything which he would not do or omit. In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made.

11. In the present case, from the complaint made by the complainant company, it is apparent that there was dishonest intention on the part of the petitioners in representing the complainant company that the petitioner no.1 was the absolute/exclusive owner of the property in question. On such a representation of the petitioner no.1, the complainant company agreed to purchase and re-develop the property in question for which earnest money of Rs.5 crores was given to the petitioners. At the time of entering into the agreement, it was agreed between the parties that the petitioners would get the property converted from leasehold to freehold within two months of receiving the money. It was only in the reply to the legal notice, the petitioners admitted that they were not absolute owner of the property in question and later on agreed to pay Rs.3 crores as full and final settlement of all the claims. It has been demonstrated from the record that the petitioners were having dishonest intention to induce the complainant company to pay the money to the petitioners for selling and re-developing of the property in question claiming the petitioner no.1 as the exclusive/absolute owner of the property. By doing so, the petitioners have caused wrongful gain to themselves and wrongful loss to the complainant company.

12. The essential ingredients of criminal breach of trust are also present in the present case as it has been shown that the petitioners failed to get the property converted from leasehold to freehold despite receipt of earnest money from the complainant company.

13. This Court is of the view that a commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also be involved in a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not. In the present case, ingredients of cheating and criminal breach of trust are present.

14. The contention raised by the petitioners to the effect that petitioner no.1 already informed the complainant company about the position of the petitioner no.1 as co-sharer of the property in question, is a question of fact which cannot be decided in the petition under Section 482 Cr.P.C. and it is to be decided by the Trial Court after adducing evidence by the parties. Such contentions are the defence of the accused persons/petitioners-herein which can be decided only after evidence and material placed on record.

15. In similar circumstances, the Hon'ble Apex Court in the case of ***Shankara Co-op Housing Society Ltd. Vs. M. Prabhakar and Ors.*** ***AIR 2011 SC 2161*** observed that :

“The High Court in its writ jurisdiction, will not enquire into complicated questions of fact. The High Court also does not sit in appeal over the decision of an authority whose orders are challenged in the proceedings. The High Court can only see whether the authority concerned has acted with or without jurisdiction. The High Court can also act when there is an error of law apparent on the face of the record. The High Court can also interfere with such decision where there is no legal evidence before the authority concerned, or where the decision of the authority concerned is held to be perverse, i.e., a decision which no reasonable man could have arrived at on the basis of materials available on record. Where an enquiry into complicated questions of fact is necessary before the right of aggrieved party to obtain relief claimed may be determined, the court may, in appropriate cases, decline to enter upon that enquiry, but the question is always one of discretion and not of jurisdiction of the court which may, in a proper case, enter upon a decision on questions of fact raised by the Petitioner.”

In the case of *The State Vs. Mariya Anton Vijay and Ors.* (2015) 9 SCC 294, it was observed that :

“101. S.B. Johari's case (supra) was also a case where the High Court had quashed the charge at the instance of accused persons in exercise of its inherent jurisdiction by appreciating the material filed by the prosecution along with charge-sheet. The High Court therein had held that no case was made out on the basis of the contents of the charge sheet and the material filed in support thereof as in the opinion of the High Court, it was insufficient to frame the charge against the accused for their

prosecution for commission of offence punishable Under Section 5(1)(d) and (2) of the Prevention of Corruption Act. The accused were accordingly discharged by the High Court without compelling them to face the trial on merits.

102. In an appeal filed by the State against the order of the High Court, this Court allowed the State's appeal, set aside the order of the High Court and upheld the charge sheet and the charges which were framed by the trial court and laid down the law which we have reproduced in para 88 above.

103. Coming back to the facts of this case, the High Court committed the same error which was committed by the High Court in S.B. Johari's case (supra) because in this case also the High Court went into the questions of fact, appreciated the materials produced in support of charge sheet, drawn inference on reading the statements of the accused, and applied the law, which according to the High Court, had application to the facts of the case and then came to a conclusion that no prima facie case had been made out against any of the accused for their prosecution under the Arms Act. This approach of the High Court, in our considered view while deciding petition Under Section 482 of the Code was wholly illegal and erroneous.”

16. In view of the above discussion, this Court is of the considered opinion that the petitioners have failed to make out any case for quashing the charge sheet or order taking cognizance or summoning the petitioners as accused persons. This is not a fit case to exercise the jurisdiction under Section 482 Cr.P.C.

17. The present petition is accordingly dismissed.
18. Application CrI.M.A. 16911/2014 is also disposed of.

(P.S.TEJI)
JUDGE

MARCH 10, 2016
dd

