

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

Judgment delivered on : February 04, 2016

+ BAIL APPLN. 2601/2015

SUDHA DIWAN & ORS. Petitioner

Through: Mr.J.P.Sengh, Senior Advocate with
Mr.Arun Sukhija, Ms.Vanessa Singh,
Advocates.

versus

STATE Respondent

Through: Ms. Manjeet Arya, Additional Public
Prosecutor for the State

CORAM:

HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

P.S.TEJI, J.

1. By this petition filed under Section 438 of Code of Criminal Procedure, 1973 (hereinafter referred to as the Cr. P.C.), the petitioners seek anticipatory bail in a case registered as FIR No. 879/2015 under Section 420/406/506/120B/34 of Indian Penal Code, at Police Station North Rohini, Delhi.

2. Petitioners, in this case are above 80 years old and the dispute in question relates to the transactions of money for the sale of property. The gist of the case of is that one Mr.Raj Garg (hereinafter

referred to as the complainant) has filed a complaint case against the petitioners herein alleging that the petitioners have induced him to enter into an agreement to sell dated 28.03.2014 for the purpose of causing wrongful loss to the complainant and wrongful gain to themselves and entered into an agreement to sell on 28.03.2014 in respect of basement, ground floor, first floor, second floor and third floor alongwith the roof rights of third floor of property bearing No.12 and 57, Pocket C-9, Sector 7, Rohini, Delhi on a total consideration of Rs.8 crores. The complainant paid a total sum of Rs.80 lacs by way of different cheques and the same were duly encashed. It is alleged that the complainant was assured by the petitioners that half of the property under sale was free from all encumbrances, such as sale, mortgage, gift, lien, decree, charges, surety, security etc. and the petitioners undertook to be responsible and liable for any defect. On demand, complainant paid another amount of Rs.1.75 crores to the petitioners and despite the fact that petitioners had undertaken to hand over vacant physical possession of the property under sale, they expressed their inability to get the same vacated on or before 27.09.2014 and the time was extended for the purpose of handing

over the possession to 15.01.2015 and further sum of Rs.5 lacs was paid by the complainant to the petitioners. Later the complainant found that the property under sale was facing various litigations before Delhi High Court as well as District Court, Rohini. It is further alleged that the petitioners have executed a sale deed in respect of the first floor of the said property in favour of Smt. Poonam Deswat for a sum of Rs.1,50,00,000/-. As per the complainant he tried to visit the house of the petitioners for tendering the balance sale consideration and to execute the sale deed upon which he came to know that the petitioners have shifted to Goa. After obtaining their Goa address, the complainant visited them and requested them to accept the balance sale consideration and it is only thereafter, it was disclosed that the litigation was pending between the petitioners and tenants and they sought further extension of time i.e., in last week of October 2014 and as such the initial agreement was extended upto 30.04.2015. It is further alleged that the petitioners have kept the complainant in dark about the agreement to sell dated 10.02.2015 with one Shri Rakesh Gupta, who was tenant in the property, in respect of basement and ground floor of the property for a total sale consideration of Rs.3

crores. Thereafter, complainant made a complaint to Police Station North Rohini, Delhi but no action was initiated against the petitioners and the complainant submitted further complaint to SHO, Police Station Rohini on 25.05.2015 but all in vain. Thereafter the complainant approached the Court under Section 156(3) Cr.P.C. and thereafter, FIR in question was registered.

3. On 02.12.2015, when the matter came up for hearing, both counsel for the parties agreed to appear before the Delhi High Court Mediation & Conciliation Centre for reaching to an amicable settlement between the parties. Accordingly, parties were directed to appear before Delhi High Court Mediation & Conciliation Centre on 16.12.2015 at 3.00 PM. The mediation report dated 12.01.2016 is received, wherein it is reported that the matter was discussed at length but despite best efforts, no settlement could be arrived at. The mediation ended as 'not-settled.'

4. Mr. J.P. Sengh, learned Senior Advocate appearing on behalf of the petitioners contended that the dispute between the parties is of civil nature and no criminal offence has been made out and it was the complainant who had defaulted in complying with the terms and

conditions of the agreement dated 28.03.2014 which was subsequently extended, but he failed to make the payment in the agreed time, therefore the petitioners had no option except to forfeit the earnest money. In this regard, the petitioners have also sent legal notice dated 05.05.2015 to the complainant to which he did not reply. It is further contended that the present case is of civil nature and is based on documentary evidence and there is nothing to recover from the petitioners. Moreover, the petitioners have not received any notice from the Investigating Officer to join the investigation. It is further contended that as per Section 54 of the Transfer of Property Act, an agreement to sell does not confer any right, title and interest and it is complainant who had not complied with the provisions of Section 16 of the Specific relief Act. Lastly, it is contended that the petitioners are more than 80 years old and are not previous convict and have unblemished record throughout their life and they are ready to join the investigation as and when required.

5. Ms. Manjeet Arya, Additional Public Prosecutor appears on behalf of the State and submits that the petitioners have entered into an agreement with the complainant which was to be performed by

30.04.2015 but the petitioners entered into another agreement to sell in respect of ground floor and basement of the property with one Mr. Rakesh Gupta on 10.02.2015. It is further submitted that a huge amount of money is involved in the present case and it indicates that there was some conspiracy between the petitioners for obtaining a whopping amount from the complainant. The Investigating Officer informed that the petitioners did not join investigation and are absconding and their houses were locked. In these circumstances, custodial interrogation of the petitioners is required for fair and complete investigation of the case. Therefore, the bail application of the petitioners deserves to be rejected.

6. I have heard the contentions raised by counsel for the petitioner as well as the submissions made by learned Additional Public Prosecutor for the State.

7. After going through the contents of the petition and the facts and circumstances of the case, no doubt, the petitioners have entered into an agreement to sell with another person – Mr. Rakesh Gupta, while the earlier agreement was in existence till 30.04.2015, but execution of agreement to sell does not confer any right or title in

favour of the purchaser. It is an admitted fact that the terms of the initial agreement to sell entered between petitioners and the complainant could not be performed for any reason whatsoever, and the main grievance of the complainant is that he had invested huge amount for purchasing the property in dispute. The complainant has all the civil remedies for his said grievance and the same is not the subject matter of the present bail application, therefore this is not required to go into the merit of the case. What requires for this Court is to see whether any custodial interrogation is required to unearth the truth or not. This Court observes that the dispute in question relates to agreement to sell and the payments are made through cheques which were encashed. It is also mentioned in condition No.4 of the agreement dated 28.03.2014 that half of the property under sale was free from all encumbrances such as sale, mortgage, gift, lien, decree, charge, surety, security etc. This Court also perused the clause 2 of the agreement to sell date 28.03.2014. For better appreciation of clause 2 of the agreement, the same is reproduced as under:-

“2. That the first party shall deliver the floor-wise possession of the above said properties at the time of payment of part consideration and the registration of Sale Deed for the respective floor in the following

manner...”

8. Perusal of the clause 2 of the agreement shows that a word ‘without’ has been cut. This Court also observes that clause 7 at page 3 has been inserted in handwriting and thereafter at page 4, clause 7 is again mentioned. Whether the word ‘without’ in clause 2 of the agreement was cut at the time of execution of the agreement or thereafter, is a subject matter of trial before the appropriate forum.

9. This Court also observes that the entire prosecution story revolves around the agreement to sell and its terms, which are already with the Investigating Officer. It is for the Trial Court to ascertain whether any criminal liability is made out against the petitioners or not. As far as custodial interrogation of the petitioners, this Court is of the opinion that all the documents are already with the Investigating Officer. Moreover, transactions were made through cheques and the same have been encashed and no further recovery is required to be effected from the petitioners in the present case.

10. In view of the aforesaid discussion and considering the fact that the petitioners are senior citizen aged about 80 and 87 years and the fact that the conclusion of trial of this case is likely to take time, this

Court is inclined to grant anticipatory bail to the petitioners.

Accordingly, it is ordered that in the event of arrest, the petitioners – Sudha Diwan, S.K. Diwan and Dinesh Diwan be released on bail subject to furnishing their personal bonds in the sum of Rs.30,000/- each with two sureties of the like amount to the satisfaction of the Trial Court.

11. The petitioners are directed to appear before the Investigating Officer as and when required and to cooperate in the investigation. They are further directed not to tamper with the evidence, not to influence the prosecution witnesses and not to leave the country without prior permission of the Court concerned.

12. It is made clear that any observations made hereinabove, shall not have any bearing on the merits of the case.

13. In view of the aforesaid directions, the present bail application is disposed of.

(P.S.TEJI)
JUDGE

FEBRUARY 04, 2016
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