IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1217 OF 2017

1. Suresh Gangaram Agarwal & Anr. ... Petitioners

Vs

1. State of Maharashtra & Ors. ... Respondents

Mr. Niranjan Mundargi i/b Mr. Santosh S. Musale for the Petitioners.

Mr. K.V. Saste, APP, for the Respondent - State.

CORAM : S.C. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.

THURSDAY, 30TH MARCH, 2017

P.C. :

1 The petitioners seek quashing of an FIR registered with Narpoli Police Station, Bhiwandi, District Thane (CR No.1-380 of 2016). The offences alleged are punishable under sections 406, 417, 420 read with 34 of the Indian Penal Code.

2 It is the claim of the petitioners that the FIR has been registered by the third respondent to this writ petition.

3 The petitioners are arrayed as accused Nos.2 and 3. One Nagesh Sakharam Dighaskar owned and possessed a certain immovable property / land. That is more particularly described at page 3 paragraph 2(i) of the petition. That Nagesh and his family developed this property in a joint venture with M/s. V.A. Developers. The accused No.1 Vikas Anil Singh is the proprietor of this V.A. Developers. The ratio of 60% and 40% for developed area is agreed between M/s. V.A. Developers and Dighaskar family. The agreement was registered in the office of the Sub-Registrar, Bhiwandi. Accordingly, accused No.1 constructed various godowns. The complainant alleges that he purchased Gala No.10 admeasuring 278.81 square meters from accused No.1 for a consideration of Rs.15,70,000/-. He was put in possession of the said gala. He let out the same to one M/s. Simba Toys India Private Limited on leave and licence.

4 On 28th June, 2016, one Sahebrao Deshmukh Cooperative Bank Limited, Andheri, Mumbai, pasted a demand notice on the shutter of this gala. The complainant rushed to the bank and made enquiry. He came to know that accused No.1 sold the said gala to accused Nos.2 and 3 / applicants before us under

a registered sale deed. The accused No.2 obtained a loan from the bank. That is how the accused No.1 cheated the complainant.

5 Like the complainant, the accused No.1 also cheated four to five persons in collusion with accused Nos.2 and 3. Even the bank was allegedly involved in this act of these persons.

6 The petitioners version in paragraph 3 is that several such galas were purchased under registered sale deeds and of various dates. The present petitioners have paid a huge sum as claimed in paragraph 4. The possession of the said galas was taken and how that was obtained has also been set out. It is stated that at the time of sanctioning of credit facilities, the original sale deeds were submitted along with the relevant documents to the bank. That is how the bank, being satisfied with the genuineness and *bona fides* of the petitioners / applicants, disbursed the loan amount.

7 The amount was disbursed from 2012 to March, 2015, but the applicants suffered a set back in the business. There was also a heart ailment of the applicant No.1. That is how

the bank's dues could not be cleared. That is how it issued the notice styled as demand notice and pasted the same on the outer door of the galas.

8 The fraud was perpetrated by the accused No.1 even on the petitioners. They have paid certain amounts and that is why the accused No.1 offered to pay the sums by post-dated cheques. They were also issued. With that amount, the petitioners were desirous of settling the claim of the bank.

9 It is in these circumstances, it is alleged that even the original complainant had affirmed an affidavit by which he had agreed to settle the matter. A copy of this affidavit is Annexure F to this petition.

10 We have noted from these allegations that the submission of Mr. Mundargi appearing for the petitioners is that this is essentially a civil dispute. There is no element of criminality in the same. The petitioners approached the Session Court twice by filing applications seeking anticipatory bail, but they were withdrawn. The Criminal Application No.599 of 2017

with some additional grounds and documents seeking anticipatory bail filed once again in the Sessions Court on 4th March, 2017. However, that was rejected on 9th March, 2017. Then, Criminal Application No.454 of 2017 was filed in this Court on 14th March, 2017. On 15th March, 2017, when the matter was placed, the learned APP objected to the grant of any relief in favour of the petitioners before us on the ground that a non-bailable warrant was issued for the petitioners / applicants appearance by the concerned criminal court.

11 It is in these circumstances that the anticipatory bail application was not pursued. Then matter was placed before the trial Court and the petitioners applied by appearing before it and requested to cancel the non-bailable warrant.

12 Thus, alleging that the petitioners are harassed for a purely civil dispute, this petition under section 482 of the Criminal Procedure Code is filed.

13 On such a petition, the petitioners sought relief, but this Court was not satisfied and directed the Registrar Judicial-1

of this Court to obtain a copy of this petition and forward it to the learned Judicial Magistrate, First Class, 2nd Court at Bhiwandi. He was directed to submit a report in the light of what is observed in paragraph 16 of the writ petition. Paragraph 16 of this writ petition reads thus :

> *"16 The petitioners state and submit that on 16.03.2017 tries to appear before the ld. Trial court for cancellation of Non Bailable Warrant issued against the petitioners, in morning session the petitioner gave application for 'taken on Board' before the ld. Trial court, thereby the advocate of petitioner informed about the order of the Hon'ble Court, as the order was not uploaded the advocate undertake to produce the copy of order in afternoon session. And the advocate furnished a copy of order in second session after going through the order the ld. Trial court across the bar conveyed that the present Non bailable warrant issued under section 73 of criminal procedure code, 1973 and in any event if the present application of cancellation of non bailable warrant is pressed then court will pass reasoned order and in eventually trial court take the custody of the petitioners and if at all Investigating Officer prays for police remand, trial court grant same. After the leave of court the court not taken on record on these things and returned back the application for Taken on board. Hereto annexed and marked as Exhibit "L" collectively are the copies of Application taken on board, application for cancellation of non bailable warrant."*

14 A perusal of the same with the assistance of Mr. Mundargi would reveal that the essential grievance there is about issuance of the non-bailable warrant. The grievance is that the

warrant was issued without complying with the legal provisions and without recording necessary satisfaction. The legality and validity of the non-bailable warrant is also put in issue in this writ petition.

15 However, we are not inclined to deviate from the main grievance and that is the dispute being purely civil in nature, the criminal proceedings are an abuse of the process of the Court. The complaint / FIR read as a whole does not disclose commission of any offence.

16 We are not concerned with the issuance of a non-bailable warrant and whether that was issued after necessary compliance with the legal provisions. If, for any reason, that warrant has not been issued after complying with the legal provisions, nothing prevented the petitioners from applying for its cancellation. Indeed, such a cancellation has been prayed. There is an application filed in writing seeking such a relief. We, therefore, do not pursue that part of the grievance of the petitioners.

17 We have perused ground Nos.1 to 6 of the petition and we find that they do not raise any plea enabling us to invoke the inherent powers of this Court.

18 We have perused a copy of the FIR which is at page 15 of the paper-book. A legible copy of the same is available from page 21-A onwards. The complainant Anant Kachare Mitkar has, in this statement, stated that he is residing at Bhiwandi. He is residing with his family. He was working in M/s. Raymond Limited and has now retired from the services. He has a gala in village Poorna and from the income derived therefrom, he has been meeting all the family expenses.

19 He has stated that there is a person called Nagesh Dighaskar in Poorna village. He has an immovable property and claims to own it. That Nagesh Dighaskar and his family has developed this property, but for developing it, the family had approached M/s. V.A. Developers. One Vikas Anil Singh was concerned and connected with M/s. V.A Developers. Sixty percent of the contribution was made by them. Forty percent was from the Dighaskar family. Together, they decided to develop the

property and construct godowns. That is how on a reading of that registered document, Mr. Anant Mitkar is supposed to have approached V.A. Developers through the owner Vikas Anil Singh on 30th August, 2011. He evinced interest in acquiring one of the godowns. The consideration was agreed. Thereupon, an agreement has been executed and duly registered. The complainant claims that he is in possession of this gala. He has also paid the property taxes in relation thereto. He has also acquired necessary documents evidencing his possession from the Gram Panchayat, Poorna. He relies upon the extracts in the Property Card/Register and the amounts paid by several cheques for acquisition of the said gala.

20 He then says that he has executed a leave and licence agreement with M/s. Simba Toys India Private Limited and has put that party in possession. Even that written agreement of leave and licence is duly registered.

21 However, he found that on 28th August, 2016, there was an attachment warrant and which was pasted on the outer door of the gala which was in possession of the licencee. He found

that the same records the claim of Sahebrao Deshmukh Cooperative Bank, Main Branch, Saki Naka, Andheri, Mumbai. The bank claims that it has to recover a sum of Rs.2,91,48,212/-. The said bank was approached by the complainant and after he approached the bank, it was revealed to him that this very gala was sold on 22nd May, 2012, to Rajat Suresh Agarwal. Rajat Suresh Agarwal has mortgaged this property, the very gala in favour of the bank and obtained a huge loan. That is how Vikas Anil Singh is supposed to have cheated him. The said complainant says that he is not the only victim, but he has set out illustrations of several other persons with whom the very arrangement entered into with him was made, amounts obtained and even they have been cheated. It is on these allegations, but insofar as his debt is concerned that the complainant alleges that V.A. Developers has not only cheated him but another gentleman by the name Kailas Asaram Rajgadhia. The very property which was sold to the complainant by M/s. V.A. Developers has been sold to Suresh Gangaram Agarwal and Rajat Suresh Agarwal. Together with V.A. Developers and Vikas Anil Singh, even these two persons have colluded and connived to cheat him. Though there was an earlier document registered, they have purported to transfer the very property to the complainant. They have not disclosed the deal and transaction with the bank. The specific allegations are that the very property was registered in the name of Suresh Gangaram Agarwal. Suresh and Rajat have not obtained any title documents or certificate. Yet, they have purported to mortgage this property in favour of the bank and obtained a loan. That loan was not repaid. However, the bank sanctioned and disbursed the loan amount without ascertaining from the Registration Office and the statutory records, the true position.

22 It is in these circumstances that the developer and the subsequent purchasers have been accused by the complainant of colluding and conniving to cheat him and others. Upon such an allegation, the FIR has been registered. Thus, there are specific allegations of the complainant having been made to part with a huge sum by assuring and promising him from the inception that a immovable property will be transferred in his favour. The sellers / lenders have a clear title and authority to sell it. That there are no encumbrances on the same. *Prima facie*, the accused have suppressed from the complainant all prior deals. That

accused No.1 had purported to sell the very property to accused Nos.2 and 3. This prior deal was suppressed by the three, namely, accused Nos.1, 2 and 3 from the complainant though they were aware of it. Even the accused No.4 – bank assisted them in this act is the *prima facie* case.

23 The writ petition itself discloses as to how several attempts have been made to apply for anticipatory bail. Those attempts have not been pursued. In the last attempt made, the anticipatory bail application was rejected. An attempt was made to obtain anticipatory bail from this Court, but having found that there was already a non-bailable warrant issued as the petitioners were not available for investigation and interrogation by the Police that the said anticipatory bail application was withdrawn. Later on, the record reveals that the petitioners applied to the trial Magistrate in writing and sought to cancel the non-bailable warrant. We inquired from the learned advocate for the petitioners as to why this application, copy of which is at pages 563 and 564 to the paper-book, has not been pursued. That is filed on 16th March, 2017. Time was sought by Mr. Mundargi to take instructions. We had clearly indicated that when this Court

passed an order on the criminal anticipatory bail application No.454 of 2017 on 15th March, 2017, copy of which is Annexure-K page 560 of the paper-book, this Court has recorded that there was a non-bailable warrant issued. Suresh Gangaram Agarwal and another, who are the petitioners before us were the very applicants in that anticipatory bail application. The non-bailable warrant has been issued against them in Crime No.380 of 2016. Once this non-bailable warrant was issued, this Court was not inclined to consider the application under section 438 of the Criminal Procedure Code.

24 We have found from a reading of this Court's order that this anticipatory bail application was withdrawn on 15th March, 2017 and on 16th March, 2017, an application has been made seeking to cancel the non-bailable warrant. That application was not pursued and now a request is made to quash the criminal proceedings themselves.

25 Having noted the rival contentions, we are of the view that this Court's inherent powers cannot be exercised to quash the criminal proceedings. The dispute, as projected, is not purely

of civil nature. It is not a case of pure breach of a contract, but the allegations are *prima facie* a systematic fraud on the part of the accused in seeking to transfer the very same immovable properties to several purchasers, obtaining moneys from them, getting the documents registered, but without disclosing the prior deals and transactions and later on mortgaging the very property in favour of the bank. Together with the bank all of them are accused of having cheated not only the complainant, but several such purchasers. We cannot presume and by the version of the petitioners themselves that this is a purely civil dispute. At this stage, we cannot accept their arguments that all deals and transactions are in writing and evidenced by registered instruments, hence the contents thereof are known to the public at large and yet the property was dealt with by the complainant and others with open eyes. This is at best a version in defence and which can always be raised. Nothing prevents the accused from approaching the competent court and seek all reliefs when investigations are over and a charge-sheet is filed. Today, we cannot presume that each of the persons named by the complainant would be arrayed as accused. As is rightly observed, the journey in criminal law is from "suspect" to "accused" and "accused" to "a convict". That is long enough for people like the petitioners to interject it, but in accordance with law.

26 In view of these observations and equally the conduct of the petitioners, this is not a fit case for exercising our inherent powers and writ jurisdiction. The writ petition is devoid of merits and is dismissed.

PRAKASH D. NAIK, J. ***S.C. DHARMADHIKARI, J.***