

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL ANTICIPATORY BAIL APPLICATION NO.2059 OF 2018

1. Nellipparambil Karppan Bhupeshbabu,
Age 60 years, Occ.Business,

2. Smt.Preetha Bhupeshbabu, Age 55 years,
Occ. Service,
Both r/o.5th Floor, Real Tech Park,
Plot No.39/2, Sector 30-A, Vashi,
Navi Mumbai-400 703

Applicants

versus

The State of Maharashtra

Respondent

WITH

CRIMINAL APPLICATION NO.1236 OF 2018

Shashikant S. Kalel

Applicant

versus

The State of Maharashtra and others

Responden

Mr.Ashok P. Mundargi, Senior Advocate, with Mr.Nalawade,
Mr.Balakrishnan and Mahesh Deshpande for applicants.

Mr.A.R.Kapadnis, APP, for State.

Ms.Divya Parab I/by Sana Mujawar for intervenor.

Mr.A.N.Shahane, PSI, EOW-1, New Mumbai.

CORAM : PRAKASH D. NAIK, J.

DATE : 31st October 2018

PC :

1. This is an application for anticipatory bail. The applicant is apprehending arrest in connection with CR No.350 of 2018 registered with Vashi Police Station under Sections 406, 420 and 34 of Indian Penal Code and under Sections 3 and 13 of Maharashtra Ownership Flats (Regulation of Protection of Construction, Sale, Management and Transfer) Act, 1963.

2. The prosecution case is that the complainant had lodged the FIR alleging that in the year 2011 the complainant was intending to purchase house. She learnt that residential project named as Enkay Garden is under construction by reputed builders M/s.Enkay Castle. Accordingly she along with her husband visited office of Enkay Castle Group at Vashi and met the marketing manager of said project. They were shown the site at Survey No.89A, situated at Wavanje Gaon, Tal.Panvel. The project was of three phase. The construction was in progress. It was informed that booking of phase-I is complete and the complainant will have to book flat in phase-II. It is further stated that the owner and builder of the project is Bhupeshbabu and the director is his wife Preetha Bhupeshbabu. Accordingly the complainant and her husband booked flat and paid Rs.25,000/- by cheque on 15th October 2011 in the project Iris-I, Phase-2, Flat No.201. The agreed price for the flat was Rs.20,95,200/-. Subsequently the complainant paid Rs.3,94,040/- and Rs.3,00,000/- by cheque. The sale deed was registered on 15th January 2013 with the Sub Registrar's office, at Panvel. It was agreed that possession of the flat will be given in 2015. The complainant applied for home loan with State Bank of India and loan of Rs.18,70,735/- was sanctioned. The amount of Rs.15,71,400/- was credited into the account of developer. The total amount of Rs.19,90,440/- was paid to the developer. The project was not completed. Only structure of four floors was constructed. The reason for the slow progress as stated by the accused was on account of Naina Project. The complainant thereafter demanded the amount invested by them. However, the amount was not returned nor possession of the flat was given to the complainant. The complainant came to know that there

are 14 other flat owners who were deceived by the accused by accepting approximately Rs.Two crores eighty three lakhs. Hence, the FIR was lodged with the aforesaid police station.

3. Learned counsel for applicant submitted that the project could not be completed only on account of unforeseen circumstances. The construction was carried out and 85% work was also completed. However, on account of the circumstances which were beyond control of applicants, the project could not be completed. There was no intention to deceive the complainant and other purchasers of flats. It is further submitted that the applicants would complete the construction of project within short span of time. It is further submitted that the entire matter relates to documents and custodial interrogation of applicant is not necessary. It is submitted that on account of setting up of new planning authority, there was inordinate delay in planning and implementation. The amount which was invested by the purchasers of flats was utilized in completion of the project and hence there is no aspect of cheating of whatsoever nature as alleged by the complainant. The complainant has been awarded compensation by Maharera Authorities before whom she had filed the complaint. It is further submitted that when the project was sanctioned, the planning authority was Collector, Alibaug and as per sanctioned plans the applicant no.1 has constructed the entire project. In 2013, when the planning authority was changed from Collector-Alibaug to NAINA, they introduced number of new regulations including occupation certificate and a heavy premium which by no means can be put on to the developer as this will make the entire feasibility of the project unviable. It is submitted that the land in question was converted into a non-

agricultural status (NA) in the year 1992. When the NA status was granted to the present land the rule of land was Gaothan and Pada land was considered as one and the same and the eligible FSI was of 1 for which the permissions were already given by Collector and Town Planning, Raigad and accordingly applicants had constructed the buildings. Land was purchased after NA was done in 2007 and at that time consideration was paid to the land owners based on prevailing law. The applicants submitted proposal to new planning authority for amendment permission for approval. The proposal was rejected on 10th October 2016. Appeal was preferred against said decision which was decided on 22nd August 2017 directing that status of IFSI to project be restored. Hence, there was delay in completion of project. The applicants have co-operated with the investigation. During pendency of their application before Sessions Court, interim protection was granted which was extended till 10th October 2018 after rejection of application. All documents are submitted to investigating officer. Learned counsel for applicant relied upon several documents in support of his submission. He also pointed out the photographs of actual constructions carried out by the applicant. It is submitted that on perusal of the photographs it is evident that substantial construction was carried out and it's matter of time that the construction would be completed after obtaining requisite permissions from the concerned authorities. It is submitted that taking complainant's case as it is, there is no element of cheating and the case u/s 420 of IPC is not made out.

4. Learned APP submitted that during the course of investigation it is revealed that several other persons had deposited money towards purchase of flat premises and their statements were

recorded. It is submitted that the promises were made in 2011 and the purported construction is going on since then. The accused have not fulfilled the promises made to the purchasers of flats. Huge amount is collected by the accused towards sale of flats and the accused had failed to complete the construction within stipulated time as promised in the agreements. It is submitted that construction was to be completed within a span of two years in accordance with the agreements executed with the purchasers. It is submitted that there are about 33 buildings and 300 flats in the project Enkay Garden. All the flats were booked and sale deeds were executed. However, not a single person has been handed over possession of the flat. It is further submitted that whatever construction was carried out has become old and found neglected. The construction of fourth floor is complete. There is no provision of water or drainage facility. No work of flooring, plumbing, electrification is carried out. It is also noted that due to rain the construction conducted by the accused had developed cracks. Although 80% work is apparently completed, it is in aforesaid condition. It is submitted that the accused had carried out excessive construction which was beyond the FSI permitted to them. The said fact is noticed by CIDCO (Naina). Accused were directed to comply with the permissions. It is therefore submitted that unauthorized construction was carried out by accused. It is submitted that the accused had mortgaged about 77 flats with the bank and obtained loan of Rs.4,57,70,000/- from the bank. The bank has also initiated action for non payment of loan obtained by the accused. Learned counsel for applicants, however, submitted that 77 flats were mortgaged initially and subsequently after clearance of loan, no dues certificate was issued by the bank. Learned APP further submitted that one more case is registered

against the applicant for the offence u/s 415, 420, 464, 465, 467, 468, 471 of IPC vide CR No.114 of 2016 registered with Panvel Police Station. Learned counsel for applicant, however, submitted that the applicants were granted anticipatory bail by this Court in respect of said FIR vide order dated 16th March 2017 passed in Anticipatory Bail Application No.58 of 2017. Learned APP further submitted that merely on account of photographs produced by the applicant, it cannot be said that they have fulfilled the promises. The investigating officer has during investigation visited the place of construction and has noted the present status of the building constructed by the accused. It is therefore submitted that no case for grant of anticipatory bail is made out. Learned APP further submitted that amongst those 77 flats which was mortgaged with the bank, flat which was booked by the complainant was also mortgaged by the applicants. It is submitted that custodial interrogation of the applicants is necessary.

5. I have gone through the documents annexed to the application, the compilation of documents produced by the advocate for applicants and investigation papers tendered by learned APP. It is noted that the complainant had booked the flat in the year 2011. Several other purchasers had also booked the flats. The complainant has referred to names of 14 persons having booked the flats. According to complainant, the accused had collected the amount of about Rs.Two crores Eighty Three lakhs. It is alleged that 95% amount towards consideration was deposited with accused. The purchasers had obtained loan from bank and they are required to pay installments of loan. The amount collected by accused has been utilized allegedly for different purpose. In accordance with the

agreement, possession of the flat was to be handed over to the complainant within two years. The investigating officer has noted that about 16 persons have come forward alleging that similar promises were made to them and the same were not fulfilled by the applicants. Their statements are recorded during the course of investigation. Learned counsel for applicants during the course of arguments has stated that the purchasers had made statement before RERA Authorities that they are interested in possession of the flat premises. Learned APP has, however, stated that there are about 330 purchasers of flats and they had obtained loan while booking the flats and they are required to pay the installments of the loan obtained by them and therefore, immediate possession ought to have been given to the flat purchasers. It is noted that the agreements were executed in 2011 onwards and the project is stalled. According to the applicants, the project could not be proceeded on account of unforeseen circumstances or due to change in new planning authority. Learned APP pointed out that the construction was carried out in excess of permissible FSI and and therefore authorities had directed the applicants to obtain necessary permissions and since same were not granted, the construction could not proceed further. According to learned counsel for applicants, construction was carried out in accordance with the permission which was granted and for the additional construction for the balance FSI. According to prosecution on supervising Enkay Garden project it was noticed that excessive construction was carried out i.e. beyond permissible 1 FSI construction permission granted by District Collector, Raigad. Similarly, it was also noticed that construction is not carried out in accordance with approved plans. The investigating officer has gathered information from Chief Planning Authority, CIDCO (Naina),

CBD Belapur, that the said authority had not stalled the project, nor taken any objection to permission granted by District Collector. However, it was noticed that excessive construction/unauthorized construction was carried out beyond prescribed permission by District Collector and hence Naina has directed the developer to comply with requisite documents/permissions. The accused had not complied with any such requisitions. Thus it is the prosecution case that accused had carried out unauthorized construction. It is also allegedly revealed during investigation that accused had collected huge amount from flat purchasers towards service tax and investigation in that regard is going on.

6. It is noted that Enkay Castle is a proprietorship firm and Gumasta license is issued in the name of said firm. According to the advocate for applicants, applicant no.1 is the proprietor. Primary role is played by applicant no.1. Applicant no.2 is wife of applicant no.1. Considering the aforesaid circumstances, I do not find that case for anticipatory bail is made out as far as applicant no.1 is concerned and his application is required to be rejected. However, considering the role of applicant no.2 and she being lady and wife of applicant no.1, reliefs as prayed in this application deserves to be granted to applicant no.2. Intervention application viz Criminal Application No.1236 of 2018 is allowed and disposed off.

7. Hence, I pass following order :

ORDER

(i) Criminal Anticipatory Bail Application No.2059 of 2018 qua applicant no.1 stands rejected;

- (ii) Criminal Anticipatory Bail Application No.2059 of 2018 qua applicant no.2 is allowed and disposed off;
- (iii) In the event of arrest of applicant no.2 in connection with CR No.350 of 2018 registered at Vashi Police Station, she be released on bail on furnishing PR bond in the sum of Rs.25,000/- with one or more sureties in the like amount;
- (iv) The applicant no.2 shall report the investigating officer of Vashi Police Station as and when called for;
- (v) Criminal Anticipatory Bail Application No.2059 of 2018 is disposed off.

8. At this stage learned advocate for applicants prays for stay of the operation of this order. This is an anticipatory bail application. During pendency of this application interim relief was not granted to applicants. The prayer for stay of this order cannot be granted. Hence, the request is rejected.

(PRAKASH D. NAIK, J.)

MST