Sr. No.249

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-21628-2018
Date of decision:31.08.2018

Joginder Pal

......Petititoner

versus

State of Punjab and another

.......Respondents

Coram: **HON'BLE MR. JUSTICE RAJBIR SEHRAWAT**

Present: Mr. Sanjiv Duggal, Advocate
for the petitioners.

Mr. Hitten Nehra, Addl.AG,Punjab.

Mr. Pershant Sareen, Advocate
for respondent No. 2.

Rajbir Sehrawat, J(Oral)

This petition under Section 482 of the Code of Criminal Procedure has been filed for quashing of FIR No.36 dated 18.03.2017 registered under Section 420 of the Indian Penal Code(for short 'the IPC'), at Police Station City Phagwara; and all the consequential proceedings arising therefrom.

The facts in the above said FIR are that the petitioner herein had entered into an agreement to sell dated 15.02.2016 for Rs.1,35,00,000/- for sale of one House measuring 16 Marla situated at Adarsh Nagar, Phagwara, District Kapurthala; with the complainant. As per the agreement to sell the target date fixed for execution of the sale deed was 30.12.2016. However, with the consent of the parties, the said date was extended to 30.03.2017. In the mean time, the complainant found that the house in question was already mortgaged with the Vijaya Bank, Phagwara Branch; for an amount of Rs.22 lakhs. The complainant approached the police with a plea that the petitioner had cheated him. So the instant FIR was registered against the petitioner. The entire basis of this FIR is that while in the agreement to sell the petitioner had represented to the complainant said that the properties are free from incumbrances, but subsequently it was found that the property was not free from incumbrances; as was recorded in the agreement to sell. Therefore, the FIR was got lodged by the complainant.

Learned counsel for the petitioner while arguing the case has submitted that of course it was written in the agreement to sell that the property was free from incumbrances, however, the date for execution of the sale deed was duly extended upto 30.03.2017; by the mutual consent of the parties and before the final target date fixed with the consent of the parties for execution of the sale deed, the entire amount of the loan was repaid to the bank on 22.03.2017. Therefore, the property was, in fact, free from incumbrances on the date fixed for execution of the sale deed. It is further contended by learned counsel that on the date fixed for execution of the sale deed, the petitioner had appeared before the Sub-Registrar but the complainant had not come present for getting the sale deed executed. Therefore, a notice dated 03.04.2017 was served upon the complainant to get the sale deed executed on or before 10.04.2017. However, despite that the complainant did not come present to get the sale deed executed. Therefore, it was the default on the part of the complainant in performance of the agreement. The petitioner has never backed out of the agreement as such. He is ready to execute the sale deed even now. It is further contended that as per the terms contained in the agreement to sell the earnest money paid by the complainant stands forfeited. It is only as a pressure tactics, to get the money back from the petitioner despite the same having been forfeited, that the present FIR has been got lodged by the complainant. Hence, it is contended that the entire process of setting in motion the criminal law; is abuse of the process of law/court. Therefore, the same should not be permitted to be continued. Hence the FIR deserves to be quashed.

On the other hand, learned counsel for the complainant has contended that the petitioner, in fact, had indulged in cheating the complainant. Once it is recorded in the agreement to sell that the property was free from incumbrances; and later on it is found that, in fact, there was incumbrances against the property, then it would show that the petitioner had an intention to cheat the complainant right from the beginning. Learned counsel has further contended that; in fact; the petitioner had not come present for execution of the sale deed on the original date, because he knew it fully well that the property was not free from incumbrances. Further it is contended by learned counsel for the complainant that the contention of learned counsel for the petitioner that the petitioner was present before the Court on the final date of execution of the sale deed i.e. on 30.03.2017, is not factually correct. In fact, it was the complainant; who was present before the Sub Registrar, whereas, the petitioner had not come present. Therefore, this would show that the intention to cheat was very much there.

In reply, learned counsel for the petitioner has pointed out that not only the petitioner had appeared before Sub-Registrar, the petitioner had even given notice to the complainant; on the same date; for getting the sale deed executed upto 10.04.2017. Learned counsel further submits that, in fact, the complainant had never been ready and willing to get the sale deed executed. The complainant has already filed a civil suit claiming back the earnest money, which already stands forfeited; because of the complainant not being ready and willing the sale deed executed.

The dispute regarding as to which of the parties was present for the execution of the sale deed and which was not, is no more relevant for the purpose of criminal case. The parties are already before the Civil Court since the complainant has filed a civil suit for recovery of the amount paid to the petitioner as an earnest money. It would be for the competent Civil Court to decide as to which party was at fault for not getting the sale deed executed. Accordingly, the fate of the earnest money would be decided by the Civil Court.

A perusal of the Order sheet of this case shows that the petitioner had made a statement before this Court on 21.05.2018 that he is ready even now to execute the sale deed on the basis of the agreement to sell dated 15.02.2016. The same offer has again been repeated by the counsel for the petitioner. But the counsel for the complainant has expressed the disinclination for getting the sale deed executed in favour of complainant.

Having heard the learned counsel for the parties and perusing the record, this Court finds that, of course, the petitioner had not disclosed the correct fact at the time of execution of the agreement to sell. He had given incorrect information at the time of execution of the agreement to sell qua the encumbrance upon the property. However, every incorrect fact mentioned in the agreement to sell would not tantamount having intention to cheat the vendee in a agreement to sell; unless the fact which is wrongly stated has the effect of frustrating the agreement itself. The fact remains that the parties had agreed for execution of the sale deed on a particular date. Whether the petitioner was ready and willing to execute the sale deed on the original date for execution of the sale deed; looses its significance for the simple reason that the parties had agreed for extension of the date fixed for execution of the sale deed. Ultimate date fixed for execution of the sale deed was 30.03.2017. However, it has come on record, and submitted by learned counsel for the petitioner, that on 27.03.2017 itself the entire loan amount; due to the bank was cleared by the petitioner. Consequent No Dues Certificate was also obtained from the bank; This would clarify the situation that merely because, at the initial stage, the correct fact was not disclosed by the petitioner would not make the intention of the petitioner to cheat the complainant. The property which was to be sold to the complainant was, in fact, free from incumbrance on the date when the sale deed was required to be executed. Therefore, the presence of dishonest intention on the part of the petitioner is excluded, *per se*.

Learned counsel for the complainant submits that, in fact, affidavit of the complainant showing appearance before the Sub Registrar is attested by the Sub Registrar himself, whereas, the affidavit sought to be relied upon the petitioner is, statedly, attested by a Notary Public. Therefore, it would show that on 30.03.2017 also the petitioner was not ready and willing to get the sale deed executed in favour of the complainant. However, as observed above, this point would be decided by the Civil Court in appropriate proceedings which are pending before it. In any case, this would not have any relevance qua the offence alleged under Section 420 IPC. This can, at the best, be a breach of contract, which may invite its consequences, as per the respective claims of the parties.

In view of the above, finding merit in the submissions made by learned counsel for the petitioner, the present petition is accepted. FIR No.36 dated 18.03.2017 registered under Section 420 of the Indian Penal Code, at Police Station City Phagwara, and all consequential proceedings arising therefrom, are ordered to be quashed.

However, it is made clear that no observation made herein above, shall affect the case of the respective parties, before the Civil Court, which is stated to be already pending before the Civil Court.

31st August, 2018 **[RAJBIR SEHRAWAT]**
JUDGE

Shivani Kaushik

Whether speaking/reasoned *Yes*
Whether Reportable *Yes*