IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Criminal Misc.No.M-7489 of 2017 (O&M)
Date of decision : 26.04.2018

Kavita Devi

... Petitioner

Versus

State of Haryana

... Respondent

CORAM: HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

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Present: Mr. Parminder Singh, Advocate
for the petitioner.

Mr. Ashok Muthreja, DAG, Haryana.

Mr.P.K.Rohilla, Advocate
for the complainant.

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RAJ SHEKHAR ATTRI, J.(Oral)

The petitioner has preferred the instant petition under Section 438 Cr.P.C. For grant of anticipatory bail in case FIR No.954 dated 11.11.2017, registered under Sections 406, 420, 506 IPC at Police Station Civil Lines Karnal, District Karnal.

It is the case of the prosecution that the petitioner executed an agreement to sell dated 25.09.2014 with the complainant for the sale of a plot for a total sum of Rs.24,00,000/- (twenty four lacs). It is specifically mentioned in the body of the agreement that the petitioner has received Rs.11,00,000/- as earnest money. However, a separate note is also given by her in the said agreement to the effect that she has received Rs.11,00,000/- in the presence of both the witnesses. The agreement is also signed by Randhir Singh, complainant. It was agreed that the sale deed shall be executed on 25.11.2014. The said agreement to sell was also witnessed by the husband of petitioner namely Pawan Kumar as well as another witness Bajinder.

It is further the case of the complainant that in order to cheat the complainant, the petitioner has sold out the same plot to Smt. Shikha Lamba for a lesser sale consideration of Rs.14,20,000/- only vide sale deed dated 31.10.2014 (Annexure P-3).

According to the complainant, the petitioner has misappropriated Rs.11,00,000/- by cheated her and also committed the breach of trust. On her statement, the FIR was registered.

I have heard learned counsel for the petitioner, learned State counsel as well as learned counsel for complainant and have gone through the record.

Learned counsel for the petitioner has contended that the the matter is of civil nature; that the complainant failed to prove if she was ready and willing to perform the part of the agreement to sell (Annexure P-2); that the said contract was cancelled that is why original agreement to sell is not produced and FIR has been wrongly registered.

On the other hand, learned State counsel as well as learned counsel for complainant have contended that the original document is in possession of the petitioner; that the earnest money in the hands of the petitioner was an entrustment/trust and she had dominion over the same but she failed to return the same with malafide intention rather she has sold out the said plot to some other person solely to commit cheating and breach of trust and that the subsequent vendee Smt. Shikha Lamba is a conspirator.

This court has given its thoughtful consideration to the rival contentions.

A bare perusal of the agreement to sell dated 25.09.2014 transpires that the petitioner Smt. Kavita in the presence of her husband Pawan Kumar and another witness Bajinder has received Rs.11,00,000/- as earnest money and remaining amount of Rs.13,00,000/- was to be received by her on the day of execution of sale deed i.e. 25.11.2014. But before the said date, she further sold off the said plot vide sale deed dated 31.10.2014 to Smt. Shikha Lamba for a lesser amount of Rs.14,20,000/-.

Under Section 55 (6) (b) of Transfer of Property Act, the earnest money in the hands of seller is a charge. Thus, it amounts to an entrustment. Hon'ble Supreme Court in case ***Delhi Development Authority vs. Skipper Construction Co. (P) Ltd. AIR 2000 SC 573*** has observed as under:-

> *"29. These points depend upon the effect of the provisions in Sub-clause (6) of Section 55 of the Transfer of Property Act. That Section starts with the words "in the absence of a contract to the contrary", and reads thus (insofar as it is material for our purpose) :*
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> *"Section 55(6)(b) : The buyer is entitled -*
>
> *(a) ....*
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> *(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money property (properly ?) paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission."*
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> *It is plain from the above provision that, in the absence of a contract to the contrary, the buyer will have charge on the seller's interest in the property which is the subject matter of the sale agreement insofar as the purchase money and interest on such amount are concerned, unless*

the buyer has improperly declined to accept delivery. The charge is available against the seller and all persons claiming under him. This charge in favour of the buyer is the converse of the seller's charge Section 55(4)(b). The buyer's charge under this Section is a statutory charge and differs from a contractual charge which a buyer may be entitled to claim under a separate contract ***(Chettiar Firm v. Chettiar, AIR 1941 P.C. 47).*** *No charge is available unless the agreement is genuine* ***(T.N. Hardas v. Babulal, AIR 1973 Supreme Court 1363).*** *As pointed out in Mulla's Commentary on Transfer of Property Act, 8th Ed. (P. 411), the charge on the property under Section 55(6)(b) is enforceable not only against the seller but against all persons claiming under him. Before the amending Act of 1929, the words 'with notice of payment' occurred after the words "all the persons claiming under him". These words were omitted as they allowed a transferee without notice to escape. After the Amendment of 1929, notice to the purchaser has now become irrelevant.*

30. When the property upon which the charge gets converted into another form, the buyer will be entitled to proceed against the substituted security. This is a general principle of law and Section 73 of the Transfer of Property Act is only an example of the said principle. The above principle has been applied to enforce mortgage on substituted securities (see ***Braham Deo Prasad v. Tara Chand, (1913) 411.A.45 PC*** *and* ***Muniappa v. Subbaiah, AIR 1917 Madras 880).*** *The same principle which is applicable to mortgages applies to cases of statutory charge under Section 55(6)(b). If immovable property is charged and is converted into another property or money, then the charge will fasten on the property or money into which the subject matter of the agreement is converted.*

31. The above sub-section of Section 55 also makes it clear that the buyer is entitled to interest on the amount of purchase money paid. Interest is payable from the date of payment of the purchase money to the seller till date of delivery of property to the purchaser or till the execution of the sale deed, whichever is earlier. Points 1 and 2 are decided accordingly in favour of the buyers.

In this view of the matter, an amount of Rs.11,00,000/-, as earnest money, was an entrustment in the hands of the petitioner and the complainant has a charge against the complainant.

The petitioner has unilaterly rescinded the contract by selling out the same plot by way of sale deed dated 30.10.2014 (Annexure P-3) to

Smt. Shikha Lamba. The petitioner received Rs.14,20,000/- from Shikha Lamba and it was her prime duty to return the earnest money alongwith interest to the complainant.

The offer was given by this Court to the petitioner to pay minimum half of the earnest money but it has been flatly refused. The petitioner has duped off a huge amount of Rs.11,00,000/- from the complainant.

Otherwise also, the second sale deed dated 31.10.2014 in favour of Smt. Shikha Lamba appears to be a sham transaction. Vide agreement to sell, the petitioner agreed to sell the plot in question for a sum of Rs.24,00,000/- and she received Rs.11,00,000/- and has to receive Rs.13,00,000/- more. The sale deed dated 31.10.2014 has been executed only for a sum of Rs.14,20,000/-. It is not believable that a person, who is selling a plot for a sum of Rs.24,00,000/- will subsequently sell the same for lesser amount of Rs.14,20,000/-.

The petitioner was having a fraudulent intention from the very inception. Infact, she has committed fraud with the complainant in connivance with the second purchaser.

All the subsequent conducts are prima facie sufficient to indicate that intention of the petitioner was fraudulent and dishonest since its inception and in connivance with the subsequent purchaser, she has tried to deprive the complainant and cause wrongful loss to the complainant and deprived him from his rightful enjoyment of the plot. These circumstances clearly satisfy the commission of cheating to the complainant in connivance with the second purchaser, as defined in Section 415 of the Indian Penal Code punishable under Section 420 of the Indian Penal Code.

During the pendency of appeal, learned counsel for the petitioner has placed on record an application submitted by the petitioner to the police on 03.01.2018 alleging therein that the complainant has obtained signatures of her husband. The said application was enquired by the police and found to be false. However, agreement in question had been executed by the petitioner and not by her husband.

Learned counsel for the petitioner also placed on record a copy of the private complaint No.11 dated 21.03.2018, under Sections 376, 506 IPC read with Section 7 of the Protection of Children from Sexual Offences Act which is pending for 27.04.2018 in a Court at Karnal. This complaint has been filed during the pendency of the instant petition. This Court will refrain from making any observation or comment upon the same lest it may prejudice the case either of the parties.

In this case, the investigating agency wants to recover Rs.11,00,000/- and also the original agreement to sell from the petitioner. To the mind of this Court, the custodial interrogation of the petitioner is necessary.

The remedy of anticipatory bail is extraordinary and should be used in exceptional cases. The Hon'ble Supreme Court in ***Siddharam Satlingappa Mhetre vs. State of Maharashtra and others 2011 AIR (SC) 312*** pleased to issue the following parameters:-

> *"122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail :*
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> *i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;*
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> *ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment*

on conviction by a Court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or the other offences.

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

Keeping in view the facts in totality, this Court is of the view that the petitioner is not entitled to the concession of anticipatory bail.

Accordingly, the instant petition stands dismissed.

(RAJ SHEKHAR ATTRI)
JUDGE

26.04.2018
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Whether speaking/reasoned Yes/No
Whether reportable Yes/No