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HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved for Order on : 20.09.2019

Order Passed on : 21/10/2019

W.P.(Cr.) No. 508 of 2017

1. Vaibhav Jain, S/o. Shri Vimalchand Jain, aged about 35 years, R/o. Choubey Colony, Saraswati Nagar, Raipur, District – Raipur (C.G.)
2. Varun Jain, S/o. Shri Vimalchand Jain, aged about 38 years, R/o. Choubey Colony, Saraswati Nagar, Raipur, District – Raipur (C.G.)
3. Vimal Jain, S/o. Shri Maniklal Jain, aged about 55 years, R/o. Choubey Colony, Saraswati Nagar, Raipur, District – Raipur (C.G.)

---- Petitioners

Versus

1. State of Chhattisgarh, Through : Its Secretary, Department of Home/Police, Mahanadi, Mantralaya, Police Station & Post – Rakhi, New Raipur, District – Raipur (C.G.)
2. Superintendent of Police, District – Raipur (C.G.)
3. Station House Officer, Police Station – Gol Bazar, Raipur, District – Raipur (C.G.)
4. Arjun Das Vaswani, S/o. Shri Ghanshyam Das Vaswani, aged about 50 years, R/o. Vaswani Niketan, Punjabi Colony, Katora Talab, Raipur, District – Raipur (C.G.)

-----Respondents

AND

W.P.(Cr.) No. 346 of 2018

Kamal Jain, S/o. Late Maniklal Jain, aged about 55 years, R/o. Choubey Colony, Saraswati Nagar, Raipur, District – Raipur (C.G.)

---- Petitioner

Versus

1. State of Chhattisgarh, Through : the Secretary, Ministry of Home, Mahanadi Bhawan, Mantralaya, Naya Raipur, District – Raipur (C.G.)
2. The Superintendent of Police, District – Raipur (C.G.)
3. The Station House Officer, Police Station – Gol Bazar, Raipur.
4. Arjun Das Vaswani, S/o. Shri Ghanshyam Das Vaswani, aged about 50 years, R/o. Vaswani Niketan, Punjabi Colony, Katora Talab, Raipur, District – Raipur (C.G.)

-----Respondents

For Petitioners (in W.P.Cr. No.508/2017)	: Mr. Kishore Bhaduri, Advocate with Mr. Sunny Agrawal, Advocate
For Petitioner (in W.P.Cr. No.346/2018)	: Mr. B.P. Sharma, Advocate with Mr. Hari Agrawal and Mr. Raza Ali, Advocates
For Respondent/State No.1 to 3	: Mr. Devendra Pratap Singh, Dy.A.G.
For Respondent No.4	: Mr. Sunil Otwani, Advocate with Mr. Akshay Uppal, Advocate

Hon'ble Shri Justice Rajendra Chandra Singh Samant

C A V ORDER

21/10/2019.

1. Both the petitions are heard and decided together by this common order as they are arising out of the same crime number and the incident.

2. These petitions have been brought praying for quashment of FIR No. 320/2017, lodged against the petitioners at Police Station Gol Bazar, Raipur, District – Raipur (C.G.) for commission of offence under Section 420, 34 of the Indian Penal Code,

3. Mr. Bhaduri appearing on behalf of the petitioners in W.P.(Cr.) No.508 of 2017 would submit that on plain reading of the FIR, no case is made out for commission of offence under Section 420 of the Indian Penal Code. The agreement that was executed between the petitioner No.1 and the wife of the respondent No.4 on 28.10.2016 very clearly shows that an advance amount of

Rs.10.19 lakh was paid to the petitioner No.1 for purchase of shops No. A-3/3, A-3/9 and there had been a clause that the purchaser has liberty to get the title of the petitioner No.1 searched. On the basis of this agreement, wife of the respondent No.4 was given authority by power of attorney, which was executed on the same day. Subsequent to which another agreement was executed between the petitioner No.1 and one Pranit Sundarani on 09.11.2016 for purchase of shops No.A-3/2 and A-3/10. Third agreement was executed between the petitioner No.1 and Smt. Asha Devi Sundari for purchase of shop No.A-3/4 and A-3/5. It was never suppressed by the petitioners that shopping complex was subject to mortgage with Reliance Commercial Finance Limited, regarding which accounts statements have been filed. The complainant/respondent No.4 has never made any payment to the remaining part of the consideration, therefore, his claim in this respect is totally false, on the contrary the petitioners have made refund of Rs.16.00 lakh to the respondent No.4.

4. It is submitted that the fact is this that the petitioners had only borrowed Rs.20.00 lakh from respondent No.4 and by way of security, the agreements were executed. The petitioners have made the refund to some extent and only Rs.8.00 lakh is remaining to be paid but the respondent No.4 is deliberately not receiving the same and making the false claim, regarding which a complaint was made to the police station – Golbazar by the

petitioner No.3, which has been enquired by the police and report was given vide Ex.P-8, which mentions that no case is made out regarding commission of cognizable offence. The petitioners are ready to make payment of the outstanding loan amount, therefore, it is prayed that FIR lodged against them be quashed.

5. Mr. B.P. Sharma, Advocate appearing on behalf of the petitioner – Kamal Jain in W.P.(Cr.) No.346 of 2018 would submit that the respondent No.4 has lodged totally false FIR. The name of the petitioners is not reflected in the complaint given and the FIR Lodged and only on the basis of the opinion given by the Deputy Director Prosecution, the case is being investigated against this petitioner. This petitioner is neither party to the agreement nor he has received any benefits from the same. Apart from that the petitioner is not the owner or the holder of the property in dispute, therefore, he is totally unconnected in the case. Hence, lodging of FIR against him and the investigation that is being made is totally abuse of process of law. Therefore, it is prayed that the FIR lodged against the petitioner be quashed..

6. State counsel appearing on behalf of the respondents No.1 to 3 opposes the petitions and the grounds made in this respect. It is submitted that despite the fact that all the shops, regarding which sale agreements were entered into were mortgaged with Reliance Commercial Finance Limited in the year 2011 against the loan amount of Rs.7.00 Crore. An opinion was sought from

the Deputy Director Public Prosecution, Raipur, against which, opinion was given by the Deputy Director, Public Prosecution that it is a case of execution of agreement for sale suppressing the material facts regarding the charge over property, therefore, the commission of offence of cheating is made out. It is submitted that investigation in this case is still going on, therefore, it is too early to conclude that no offence has been committed by the petitioners. Placing reliance on the judgment of Supreme Court in case of ***State of Andhra Pradesh Vs. Golconda Linga Swamy***, reported in ***(2014) 6 SCC 522***, and in case of ***State of Haryana Vs. Bhajan Lal***, reported in ***AIR 1992 SC 604***, it is submitted that the petitions are without any substance and also premature, therefore, it may be dismissed.

7. Mr. Otwani, appearing on behalf of the respondent No.4 submits that the agreement dated 28.10.2016 and 09.11.2016 and other agreement, no where discloses that the shops agreed for sale by the petitioners were mortgaged. The Bank has proceeded against the petitioners under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, it can not be said that the petitioners were not aware of the mortgage of the subject matter of sale. Copy of the order dated 19.02.2018 passed by the Collector, District Magistrate, Raipur in proceeding under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has been filed along with the reply, which shows that shops which were

subject matter of this agreement have been given in possession to the Bank. Therefore, all the time bank had lien on the property, regarding which, the petitioners made misrepresentation to the respondent No.4 and entered into an agreement by receiving an advance amount and other consideration amount, because of which the respondent No.4 has been cheated by the petitioners. Replying to the enquiry made by the police and report submitted vide Ex.P-8, it is submitted that it was not a fair enquiry and before the completion of that inquiry on 17.10.2017, the FIR was already lodged on 08.10.2017. Placing reliance on the judgment Supreme Court in case of ***M. Krishnan Vs. Vijay Singh & Another,*** reported in ***(2001) 8 SCC 645***, it is submitted that only because civil remedy is available, a ground can not be made for quashment of FIR. It is not a case, in which the respondent No.4 had option to file civil suit for specific performance of contract for the reason that the property was already mortgaged with bank. Therefore, it is clear case of cheating by misrepresentation and causing loss to the respondent No.4/complainant.

8. In reply, Mr. Bhaduri appearing on behalf of the petitioners in W.P. (Cr.) No. 508 of 2017 would submit that even the mortgaged property can be transferred with charge. The respondent No.4 had opportunity to verify the title of the property in agreement, which he did not avail. It is a case of caveatemptor, therefore, the buyer had to be careful and alert and had to make enquires. Placing reliance on the judgment of Supreme Court in case of

Prof. R.K. Vijayasarthy and Another Vs. Sudha Seetharam and another reported in ***2019 SCC Online SC 208*** it is submitted that there is no substance to show that the petitioners were entrusted the property and they have dishonestly misappropriated the same in violation of any direction of law. Therefore, no case is made out under the definition of Section 415 of I.P..C. Reliance has also been placed on the judgment of Supreme Court in case of ***Satishchandra Ratanlal Shah Vs. State of Gujarat & Another***, in ***Criminal Appeal No.9/2019, decided on 03.01.2019***, in which it is held that there had been a civil suit for seeking recovery of loan amount, mere inability of the party to return the loan amount can not give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. It is prayed that petition be allowed.

9. I have heard the learned counsel for the parties and perused the documents placed on record.

10. FIR has been lodged by the respondent No.4 stating that complainant is proprietor of one mobile shop. He had acquaintance with the petitioners. In the year 2014, the petitioner No.3 had borrowed Rs.25.00 lakh and petitioner No.2 had borrowed Rs.20.00 lakh from him. As the petitioners could not make refund of the borrowed money, then on the request made by the respondent No.4, the petitioner No.3 gave a proposal to

purchase the shops A-3/3, 3/9, 3/2, 3/10, 3/4, 3/5 and 3/6 situated in the first floor of Ravi Bhawan, which were held in the name of the petitioner No.1. Total price of the shops were agreed at Rs.2.87 Crore. Adjusting the borrowed amount of Rs.45.00 lakh, the complainant made payment of remaining amount in the month of October, 2016. Despite continued requests to the petitioners, they did not show any intention to execute the sale deed. Thereafter, the respondent No.4 came to know that title papers of the shops were in possession of the Reliance Commercial Finance Limited, and the shops were under mortgage. He has alleged that this fact was concealed from him and despite the reason that the property was already mortgaged with the Bank, whole consideration amount has been received by the petitioners in fraudulent manner. Therefore, he felt compelled to lodged FIR.

11. There is no denial regarding execution of agreement between the parties. The claim made by the respondent No.4 regarding making whole payment of consideration amount is still under investigation. The submission on behalf of the petitioners that they have borrowed Rs.20.00 lakh and had partially refunded the same is not an undisputed fact, which needs investigation. Similarly, the claim made by the complainant also needs investigation.

12. The petitioners themselves have not denied that at the time when they entered into an agreement for sale of the shops with respondent No.4 and others, the same shops were mortgaged with the Reliance Commercial Finance Limited. On perusal of the agreements, it is found that there is no where mentioned that the property is mortgaged with the Reliance Commercial Finance Limited. Only for the reason that one clause was included in the agreement that purchaser has liberty to enquire into the title of the seller by itself could not exonerate the responsibility of the seller i.e. the petitioners. According to Section 55 of the Transfer of Property Act, seller is bound to disclose to the buyer any material defect in the property and to discharge all encumbrances on the property before the same is transferred to the purchaser. In this case, the petitioners firstly suppressed the fact of encumbrance upon the property and agreed for sale and secondly they had never intended to discharge the said encumbrances because of which, the property has been taken in possession by the Bank under the provision of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Therefore, during the pendency of the investigation and also on the basis of the fact which has present in this case it can not be said or concluded that it is a case probably of civil nature and the act on the part of the petitioners (in W.P.(Cr.) No.508 of 2017) does not fall under the definition of Section 405 and Section 415 of the Indian Penal Code.

Therefore, I am of this opinion that this petition (W.P.(Cr.) No.508 of 2017) is without any substance.

13. With respect to the W.P.(Cr.) No. 346 of 2018, on perusal of the copy of the FIR and the written complaint given, it is found that there is no mention of the name of this petitioner (in W.P.(Cr.) No.346 of 2018) in the statement given by the respondent No.4 to the Police. He has stated that in the month of February, 2016, he was shown the shops by Vimal Jain and at that time, this petitioner was in his company and thereafter, the sale of shops were negotiated in presence of this petitioner. Thereafter he has also made a statement that he had approached this petitioner and others for getting the sale deed executed and also he has stated that he has been cheated by this petitioner and others. It is only on this basis that Deputy Director, Prosecution has given his opinion that the statement of the respondent No.4 shows the involvement of the petitioner – Kamal Jain.

14. On over all consideration on the facts and circumstances of the case it is found that this petitioner was present only on one occasion with Vaibhav Jain (petitioner No.1 in W.P.(Cr.) No.508 of 2017), when the shops were shown to the respondent No.4 and some negotiation were made in his presence, however, in the agreement that has been executed, this petitioner is not one of the party neither he is a witness to the same. Neither there is such statement that this petitioner influenced or gave any

inducement to the respondent No.4. The recipient of the amount advanced at the time of the agreement, is the vendor of the property and not this petitioner. Further the claim of the respondent No.4 that he has made complete payment of consideration to Vimal Jain, Vaibhav Jain and Varun Jain (petitioners in W.P.(Cr.) No.508 of 2017) and there is no mention that he had made any payment to this petitioner. Apart from that it is not the case that this petitioner had any title over the subject matter of the sale agreement.

15. Only for the reason that this petitioner was approached by the respondent No.4 making prayer to get the sale deed executed would not show that this petitioner was having any capacity to get the sale deed registered in favour of the respondent No.4. Any denial made by the petitioner to get the sale deed executed can not involve him as an accused in this case for the same reason that this petitioner had no authority to execute the sale deed. Therefore, on the basis of the contents of the written complaint, FIR and the statement given by the complainant - Arjun Das Vaswani, it is found that there is nothing to show that this petitioner was a party to the transaction, which is alleged to be fraudulent. Hence, in such a case, the guidelines laid down in case of ***State of Haryana Vs. Bhajan Lal (supra)*** on which basis it is found that the registration of FIR and investigation against this petitioner is totally an abuse of process of law.

16. Hence, after due consideration and in view of the discussion made herein above, this Court is inclined to allow this petition. Accordingly, the petition (W.P.(Cr.) No.346 of 2018) is allowed. The FIR No. 320/2017, lodged against the petitioner at Police Station Gol Bazar, Raipur, District – Raipur (C.G.) for commission of offence under Section 420, 34 of the Indian Penal Code is hereby quashed.

17. On the basis of the finding in W.P.(Cr.) No.508 of 2017, the petition is found without any substance or merit, hence it is dismissed.

Sd/-
(Rajendra Chandra Singh Samant)
Judge

Balram