IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CRIMINAL APPELLATE SIDE

ANTICIPATORY BAIL APPLICATION NO.872 OF 2017

01 Hemant Jagdish Ashar
of Mumbai, Indian Inhabitant,
aged 56 years, Director of
Prikar Properties Private Limited,
having its office at 266,
AnandSmruti, Deodhar Road,
Matunga (C.R.),
Mumbai: 400 019.

02 Neeta Hemant Ashar,
of Mumbai, Indian Inhabitant,
aged 48 years, a Director of
Prikar Properties Private Limited,
having its office at 266,
AnandSmruti, Deodhar Road,
Matunga (C.R.),
Mumbai 400 019.Applicant

Versus

01 State of Maharashtra,
through Economic Offence Wing,
General Cheating Unit-II,
Office of the Commissioner of
Police, Old Building, Ground floor,
Crawford Market,
Mumbai-400 001.

02 Vimal Jayant Soni,
adult, Indian Inhabitant,
aged years, Occ: Business,
having address at 2004,
'B' Wing, Bhavya Heights,
Katrak Road, Wadala (West),
Mumbai-31. Respondents

Mr.Girish Godbole, Counsel along with Mr.Anupam Surve, advocate i/by Chitnis & Co. for applicants.
Mr.A.A.Palkar, A.P.P. for Respondent No.1-State.
Mr.Aabad H.H. Ponda, advocate i/by Mr.Ashish Raghuvanshi, advocate for Respondent No.2.

CORAM : NITIN W. SAMBRE, J.
DATE : 16th January, 2019.

P.C. :

The applicants before this Court, who are husband and wife, are seeking pre-arrest bail in Crime No.67/16, registered with Economic Offence Wing, General Cheating Unit-II, Commissioner of Police, Mumbai, at the behest of complainant i.e. Respondent No.2 – Vimal Jayant Soni, for an offence punishable under Sections 406, 420, 120-B of the Indian Penal Code.

2 The complainant i.e. Respondent No.2, who claims to be a business woman, alleged that the present applicants, through M/s Prikar Properties, are owners of Plot No.666, TPS 4, Mahim Division, Verr Savarkar Marg, Shivaji Park, Dadar (West), Mumbai. On the said plot of land, an unfinished structure was standing, which was promised to be sold by the applicants to the complainant.

3 It is the case of the prosecution that, in January 2013, through one Estate Broker Mr.Thakkar, the complainant approached the applicants for purchase of aforesaid property by acquiring all the shares of M/s Prikar Properties Private Limited, who was owning the property, for consideration of Rs.21 crores. It is claimed that present applicant no.1, on April 24, 2013,

forwarded relevant papers for processing the loan case. In the transaction in question, it was agreed that Rs.75 lakhs will be paid as an advance and accordingly, said amount of Rs.75 lakhs was paid in between April 17, 2013 to July 06, 2013.

4 The property in question since was mortgaged with Indiabulls Housing Finance Ltd,, vide Memorandum of Understanding (for short, "MOU") dated July 08, 2013, executed between the applicants, being Directors of M/s Prikar Properties Private Limited and the Complainant, it was agreed by the applicants that they shall obtain Occupancy certificate, Clearance certificate from PWD and will carry out the construction of toilet in common area within a period of three months. It was also agreed by the applicants on behalf of M/s Prikar Properties Private Limited that in case if the work is not executed, an amount of Rs. 75,00,000/- was to be returned with 12% interest. Respondent No. 2, who is owner of a company viz., Photoquip India Limited, has agreed to pay Rs.21 Crores within three months and in case of any difficulty, extension of two months was provided. It was agreed that out of amount of Rs. 21,00,00,000/-, amount of Rs. 5,00,00,000/- will be spent on the purchase of equity capital and Rs. 15,25,00,000/- will be spent towards purchase of 2000 shares of Prikar Properties. It was agreed that in case, if the amount of Rs. 21,00,00,000/- is not paid by Respondent No. 2, advance of Rs. 75,00,000/- will be forfeited. It is the case of Respondent No. 2 that the terms were changed mutually between the applicants and complainant and, it was agreed that an amount of Rs. 50,00,000/- will be returned by Prikar Properties to the complainant. It is further claimed that total amount of Rs.

2,21,00,000/- was paid by the complainant to the applicants, particularly to applicant no. 2 between the period 02.12.2011 to 28.03.2014. Second MOU came to be executed on 05.02.2014 by reducing the price to Rs. 16 crores, which was agreed to be paid within three months from the date of MOU. It was agreed that in case, if the terms of the MOU were not honoured, advance amount of Rs. 2.21 crores paid to the applicants was to be forfeited.

5 It is claimed that Respondent No. 2, pursuant to first MOU, took possession of the property and spent Rs.5,00,00,000/- on interior and exterior and completed construction in the year 2014. According to the complainant, applicants cancelled the deal on 09.09.2014 and further threatened the complainant with false implication in the offence in question.

6 Shri Godbole, learned counsel for the applicants, submits that perusal of the contents of the FIR depicts that the offence is based on the terms of the contract entered into viz., MOU dated 08.07.2013 and Second MOU dated 02.05.2014. He would then urge that since the dispute is based on contractual obligation, custodial interrogation of the applicants is not warranted. He would also submit that, based on the terms of the MOUs, a suit for specific performance is already pending being Suit No. 818/2014, initiated on 15.09.2014. According to Shri Godbole, on 15.09.2014, notice of forfeiture of amount of advance was already issued and the suit for specific performance is based on second MOU dated 02.05.2014. He would then urge that on 01.08.2014, a third MOU alleged to have been executed between the parties. Shri Godbole then would urge that the alleged offence

is based on documents and therefore, there is no need of custodial interrogation. He would then invite attention of this Court to the order dated 17.09.2014 passed by the Court (Coram : S.C. Gupte, J.) in Notice of Motion No. 2121/2014 in Suit (L) No. 889/2014. (Vimal J. Soni Vs. Prikar Properties Private Limited). According to Shri Godbole, once the Civil Court is seized of the matter, the need of custodial interrogation is not warranted. The Civil Court will dwell upon the rights of the parties *qua* the properties. He would also invite attention of this Court to the order dated 29.10.2014 passed by the Division Bench in Appeal no. 578/2014 and Appeal (L) No.651 of 2014, preferred against the order dated 17.09.2014. According to him, the Division Bench has observed that, it cannot be inferred that Respondent No. 2 - Complainant is in possession of the property as same can be gone into at the stage of final decision in the suit. He would then urge that the Civil Court has not granted any injunction protecting the possession, however, restrained the present applicants from transferring, selling, assigning or encumbering or otherwise in any manner alienating or creating any third party rights in the suit property or parting with the possession thereof, which sufficiently protects interest of Respondent No. 2 – complainant. He would then invite attention of this Court to the date of filing of the FIR and submits that, it was after the suit was initiated by Respondent No. 2, the complaint came to be filed. According to him, applicants have attended the investigating agency 17 times pursuant to the ad-interim protection and that being so, the applicants are entitled for confirmation of protection in the event of their arrest.

7 The learned Assistant Public Prosecutor, while countering the aforesaid contentions submits that, the Court may pass an appropriate order in the matter particularly, having regard to the pendency of the suit, investment of Rs. 5 crores by Respondent No. 2, forfeiture of amount of Rs. 2.21 crores by the applicants. She would urge that the present applicants had not discharged their obligation under the agreements by not producing the occupancy certificate.

8 *Per contra*, Shri Ponda, learned counsel for Respondent No. 2 – complainant, submits that the applicants have cheated the complainant by fraudulent inducement by willful misrepresentation. According to him, since inception of the transaction in question, the fraudulent or dishonest intention can be inferred from the contentions narrated. He would then urge that the applicants have taken disadvantage of old friendship of 46 years reposing faith in each other. He would invite attention of this Court to the payments made time and again by the complainant, the conditions of the MOU honoured by the complainant by carrying out developments of the property which was in stale condition. According to him, there is serious dispute about the signature of the party on the enclosures annexed with second MOU. He would also give details as regards the amount spent on the development and furnishing and encashment of loan. He has also tried to point out as to the mode and manner in which emails were sent so as to demonstrate criminal intention of the applicants.

9 In the aforesaid background, he would submit that, the prayer of the applicants is liable to be rejected.

10 Having considered the rival contentions, what is noticed is applicants and Respondent No. 2 alleged to have entered into three MOUs/agreements dated 08.07.2013, 02.05.2014 and 01.08.2014. Based on MOU dated 02.05.2014, Respondent No. 2 initiated Suit No. 889/2014 alleging breach of terms of MOU and sought specific performance. This Court, while dealing with the prayer for grant of injunction, vide order dated 17.09.2014, has placed an embargo on the rights of the present applicants in the matter of dealing with the property in question, in relation to which, the MOUs were executed. However, this Court, has found that *prima facie*, it cannot be inferred that Respondent No. 2 – Complainant was in possession of the suit property. The order of grant of injunction was subject matter of challenge at the behest of the applicants so also Respondent No. 2 – complainant in Appeal no. 578/2014 and Appeal (L) No. 651/2014, which were dismissed on 29.10.2014.

11 Perusal of the claim put forth in the plaint for grant of specific performance, interim orders passed by the learned Single Judge on the issue of injunction, *prima facie* takes this Court to the conclusion that the issue involved in the offence in question appears to be of a civil nature. The competent Civil Court has already dwelled upon rights of the applicant and Respondent no. 2. The entire offence alleged against the applicants is based on documentary evidence and the documents to that effect are very much available.

12 As far as payment of amount viz. Rs. 2.21 crores and recovery of the same is concerned, the competent Civil Court can pass an appropriate order in the suit which is lodged at the behest of Respondent No. 2 – complainant.

13 In the aforesaid background, it cannot be *prima facie* inferred that custodial interrogation of the applicants is warranted.

14 Apart from above, since 2017 there is ad-interim protection in favour of the applicants and they have appeared before the Investigating Officer. That being so, the contention of Respondent no. 2 – complainant that fraudulent inducement, willful misrepresentation and dishonest intention of the applicants can be inferred from the record available and as such custodial interrogation is warranted, cannot be accepted.

15 In that view of the matter, instant application stands allowed. In the event of arrest of the applicants in Crime No. 67/2016 for the offence punishable under Sections 406, 420 r/w 120-B of the Indian Penal Code, they shall be released on PR bond of Rs. 1,00,000/- (One Lac only) with one or more sureties in the like amount. Applicants shall not tamper with the evidence or influence the witnesses. The applicants shall attend the Investigating Officer as and when directed.

NITIN W. SAMBRE
JUDGE

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