S.No.101

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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CRM-M-3277 of 2019 (O&M)
Date of Decision:26.03.2019

Kamal Kumar and others .....Petitioners

Vs.

State of Punjab .....Respondent

CORAM:- HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present:- Mr. Ashish Verma, Advocate
for the petitioners.
Mr. P.S. Walia, AAG, Punjab.
Mr. Nitin Thatai, Advocate
for the complainant.

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Rajbir Sehrawat, J.(Oral)

The present petition has been filed by the petitioners for grant of anticipatory bail in case FIR No.201 dated 18.12.2018 registered under Sections 420/120-B IPC at Police Station Division No.3, Ludhiana.

Notice of motion.

On asking of the Court, Mr. P.S. Walia, AAG, Punjab, accepts notice on behalf of the State. Mr. Nitin Thatai, Advocate accepts notice on behalf of the complainant.

Learned counsel for the petitioners has supplied copies of the paper book to opposite counsel in Court today itself.

The allegations against the petitioners are that they entered into an agreement with the complainant to sell a house for an amount of Rs.2.25 crores. The petitioners received Rs.35 lakhs as earnest money on 24.09.2015. Thereafter, another amount of Rs.40 lakhs, including Rs.5 lakhs through a demand draft, was obtained by the petitioners. A written agreement was duly executed in this regard in which even the wife of petitioner No.1 was a witness. It was written in the agreement that the said property was free from encumbrances. The date of execution of the sale deed was fixed for 26.02.2016. Accordingly, even a legal notice was given by the complainant to the petitioners to come present to the Office of Sub Registrar for execution of the sale deed. However, the petitioners did not come present to execute the sale deed. The complainant kept on waiting in the office of Sub Registrar, Ludhiana since morning till evening on 26.02.2016. Feeling apprehensive about the matter, when the complainant tried to find more details of the property, then he came to know the house in question was already mortgaged with the Bank and that the petitioners had not deposited the money with the Bank. Despite that in the agreement to sell, the petitioners represented that the house was free from encumbrances. Not only this, due to default of the petitioners, the Bank had even sold the house further to one Rohit Shahi. All these facts were not disclosed to the complainant. Thereafter, neither the money was being returned by the petitioners nor the complainant would get the house. Hence, the FIR was got lodged.

Arguing the case of the petitioners, learned counsel for the petitioners has submitted that the complainant was well aware of the fact that the property was mortgaged with the Bank. Therefore, no fraud can be said to have been committed upon the complainant. It is further contended that the petitioners have never executed the alleged agreement to sell. It is also submitted that the complainant never issued any legal notice to the petitioners for getting the sale deed executed nor have they filed any suit for specific performance. After expiry of the limitation period for filing suit for specific performance, the complainant had approached the Police to harass the petitioners. It is further submitted that the complainant has not placed on record any document to show that he was having this much amount available with him, which is alleged to have been paid to the petitioners. It is further submitted that the complainant even pressurised the petitioners through the Police to swear affidavit owning the liability towards the complainant.

On the other hand, learned counsel for the complainant has submitted that the agreement in question was duly entered into by the petitioners on the stamp paper purchased by them only. Not only this, to instill confidence in the complainant qua the agreement in question, even the wife of the petitioner No.1 was made a witness to the same. The agreement to sell contains the details of the payments made to the petitioners, which were duly acknowledged by the petitioners by putting their signatures thereupon separately. Still further, it is submitted that it is factually incorrect that no notice was served upon the petitioners. The notice dated 19.02.2016 was duly sent to them. Even the argument that the FIR has been got lodged after expiry of limitation of filing suit for specific suit is factually incorrect, because the limitation for filing the suit for specific performance was upto February, 2019 whereas the FIR was got registered on 18.12.2018. Still further, it is submitted that the complainant has, in fact, filed suit for specific performance, by availing a separate remedy. It is also submitted that by no means, the affidavits submitted by the petitioners can be branded to be sworn under pressure because they themselves have gone to the Notary, where, even their photographs on said affidavits were duly taken by the Notary Public, directly on the stamp papers, and the same are present on the said affidavits. In these affidavits, the petitioners have reiterated their responsibility to make the payment to the complainant. Still further, it is submitted that although the petitioners tried to impeach the sanctity of these affidavits by making false complaint qua their validity, with the Police, but it is worth noticing that the said complaint is not by either of the petitioners, who had sworn these affidavits. The same is by petitioner No.2, who had not even sworn any affidavit. The persons who have sworn the affidavits have not even filed any complaint to allege any pressure in swearing those affidavits.

Of course, the accused as a citizen also has a right to life and liberty; as guaranteed by the Constitution of India. However, this right can very well be curtailed in accordance with the procedure established by law. In case of criminal investigation, the normal procedure prescribed for curtailing the right to life and liberty, as prescribed under Cr.P.C; is that the Investigating Officer can arrest the accused even without warrant. Therefore, to ensure that an innocent person is not unduly harassed by the Investigating Agency, an extra-ordinary power has been conferred upon the Courts under Section 438 Cr.P.C. However, this power is so extra-ordinary that it is not even available in some part of the country qua all the offences and under some special statutes qua some specified offences this power is not available even throughout the country. Hence, this power has to be exercised by the Courts with due circumspection. This power can be exercised by the Courts only when the facts and circumstances of the case lead, predominantly, towards the ex-facie innocence of the accused, coupled with the fact that the investigation of the case would not be unduly hampered by grant of protection to the accused.

A perusal of the facts of the present case would show that the petitioners have duly executed an agreement to sell, which contained the recital that the property in question was free from encumbrance. The money is also recorded to have been received by the petitioners. One of the transaction of payment of the money to the petitioners, mentioned in the said agreement happens to be even through the demand draft. Although the petitioners have now tried to deny the factum of having received the money, but the documents placed on record also testify that the petitioners have been making the payments to the Bank under the orders of the DRT, on the dates and of the amounts which correspond to the dates and amounts of giving of money by the complainant to the petitioners. The documents placed on record also show that for making the payment of money under the orders of the DRT, the petitioners first deposited the amount in their account and on the same day, the payment was made as per the order of the DRT, by getting the drafts prepared This duly reflects the receipt of money by the petitioners from the source, not explained by them. On the contrary, the petitioners' assertion duly correspond to these dates and amounts.

Although the petitioners have now tried to disown the agreement to sell, as well as the affidavits executed by them, however, their assertion is, (i) qua the agreement to sell - that it is fabricated on blank signed papers (ii) qua the affidavits – that the same were made to be sworn under the pressure of the Police. However, even perusal of these documents would prima-facie exclude the facts, either that the agreement to sell has been fabricated on blank signed papers or that affidavits have been sworn under pressure from the Police. Hence, prima-facie, the case of the complainant seems to be correctly incriminating the petitioners in the crime.

Accordingly, this Court does not find any mitigating circumstances, indicating any, ex-facie, innocence of the petitioners qua the allegations levelled against them. Hence ,this Court finds itself unable to exercise its power under Section 438 Cr.P.C for granting the petitioners a concession of anticipatory bail. Still further, this Court is of the considered opinion that if the petitioners are granted anticipatory bail at this stage, then the Police would not be able to carry out a free and fair investigation in the case. The factual gamut of the case is such that, to unearth true dimensions of the crime, the Police may require even the custodial interrogation of the petitioners.

Hence, finding no merit in the petition, the same is dismissed.

March 26, 2019 **(RAJBIR SEHRAWAT)**
renu **JUDGE**

Whether Speaking/reasoned Yes/No
Whether Reportable Yes/No