Sr.No.202

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

**CRM-M-22889 of 2020(O&M)
Date of decision:26.11.2020**

Avinash Garg

... Petitioner(s)

versus

State of Punjab

... Respondent (s)

Coram: **Hon'ble Mr. Justice Jasgurpreet Singh Puri**

Present: Mr. Sandeep Jain, Advocate
for the petitioner.

Mr. P.S.Walia, Asst.AG, Punjab

Mr. Puneet Jindal, Sr. Advocate with
Mr. Kunal Mittal, Advocate
for the complainant.

Through Video Conference

Jasgurpreet Singh Puri, J.(Oral)

Present petition has been filed under Section 438 Cr.P.C seeking anticipatory bail in FIR No.8, dated 21.03.2020 registered under Sections 406, 120-B IPC at Police Station NRI, Ludhiana, District Ludhiana.

As per the allegations which have been made in the FIR, it was alleged by the complainant that their house was sold through the petitioner and one another co-accused who were doing the business of property dealing in the month of June, 2014 by taking an earnest money of Rs. 19,70,000/- and accused persons have taken a sum of Rs.2,20,000/- from them as broker by making fraud. It was mutually agreed with the borrower in the presence of both the accused persons to cancel the agreement to sell. In the month of

December, 2014 as agreed, the earnest money was to be repaid to the borrower and as such, out of the total earnest money he arranged the aforesaid amount and paid to the accused persons who being mediators assured that the said amount would be handed over to the borrower as and when received by them but due to the malafide intentions of both the accused they have neither handed over the amount to the borrower as promised nor given back to them and kept the said amount with them fully knowing that this huge amount does not belong to them and started blackmailing his parents. Having not received the amount the borrower filed a complaint against his parents with whom later on a compromise had been arrived at. Thereafter, the accused were putting off the matter on one pretext or the other and they have no legal right to keep his money and cheated upon him. Therefore, due to non-payment of the said amount to the concerned person they have been suffering mental as well as physical torture.

The aforesaid complaint was filed by complainant Vaibhav Sharma who is son of one Neena Sharma. The background which lead to the filing of the present case was that one agreement to sell was executed on 23.06.2014 between Neena Sharma mother of the complainant and Rajwinder Kaur in which Neena Sharma was the proposed seller and Rajwinder Kaur was the proposed purchaser. Thereafter, dispute had arisen between both the parties and Rajwinder Kaur filed an FIR No.108 dated 26.08.2016 registered under Section 420 IPC in which the present petitioner was also shown as an accused. Thereafter, even suit for specific performance was also filed by Rajwinder Kaur against Neena Sharma alleging breach of agreement for specific performance. In this civil suit an interim order was passed vide Annexure P2 dated 21.05.2017 restraining the defendants from alienating the suit property and thereafter, the matter was compromised between said Neena Sharma and Rajwinder Kaur and thereafter, the civil suit was dismissed as withdrawn on 27.07.2018. A perusal of Annexure P-5 would show that she stated that she does not want to pursue the present case as the matter has been compromised with the defendant and perusal of Annexure P-4 which was the statement of Rajwinder Kaur, also shows that she has received the full and final payment of the earnest money from the defendant. Thereafter, the property was sold by Neena Sharma to somebody else as the matter was compromised between them. The present accused who was the property dealer qua the aforesaid agreement to sell have been alleged to receive an amount of Rs.11,50,000/- over and above the commission of 1% regarding the agreement to sell dated 26.06.2014. So far as the aforesaid agreement to sell is concerned between the two parties i.e., the proposed seller and the proposed purchaser, they already compromised the matter and had stated in the Court that the entire earnest money had been received by the proposed purchaser. However, the dispute remained with regard to the money which was alleged to be given to the accused persons.

Learned counsel for the petitioner has submitted that so far as the commission of 1% is concerned it came out to be Rs.20,000/- being 1% of the total consideration of Rs,20,00,000/- and the same amount they had received as a matter of right under the agreement because infact the agreement to sell was executed which however, failed subsequently and the parties already compromised and therefore, there can be no dispute with regard to the aforesaid 1% of the commission amount. He has further submitted that the allegations which have been made against the petitioner and the co-accused were that they also received an amount of Rs.11,50,000/- for the purpose of onward transmission to Rajwinder Kaur are baseless allegations and there is nothing to substantiate regarding the same. He has submitted that although the petitioner had received an amount of Rs.2,25,000/- only, the same has already been returned and so far the allegation pertaining the remaining amount is concerned, the same is allegedly given by way of cash and there is no evidence to support the same. He has further submitted that false allegations have been made against the petitioner in order to blackmail the petitioner in this regard. Learned counsel for the petitioner argued that at the most the matter was of civil nature and the complainant could have filed a civil suit against the petitioner in this regard. But now when the period of limitation for filing the civil suit is over, the present FIR has been lodged after about six years as the agreement to sell was executed in the year 2014 and the present FIR has been lodged in the year 2020. He has further submitted that it is a settled law that dispute of civil nature cannot be given a flavor of criminal nature just to by pass the provisions of law. He further submitted that instead of knocking the doors of civil court the complainant has misused and abused the process of law by lodging present complaint. He has further submitted that the police was also conniving with the complainant and therefore, he had filed the present anticipatory bail application before this Court and had undertaken to deposit an amount of Rs.2,25,000/- with the Investigating Officer. He has submitted that the same has already been deposited before the Investigating Officer in pursuance of undertaking given to this Court and the same will be subject to final out-come of the case.

Learned counsel for the petitioner has relied upon the judgment of this Court in ***CRM-M-34789 of 2020*** titled as ***Manjit Kaur vs. State of Punjab*** and ***CRM-M-16890 of 2020*** titled as ***Sohit Khosla and another vs. State of Punjab*** to contend that when matter is primarily of civil nature and relates to business and financial transactions the remedy before the aggrieved person was to file a civil suit and not to entangle the other party in criminal proceedings in order to put pressure for the purpose of settling of the financial dispute. He has further submitted that it is a case where there had been an abuse of the process of law and in pursuance of the orders of interim protection granted by this Court on 24.09.2020, he has aready joined investigation and fully co-operating with the investigation process. He has further submitted that the matter pertains to documentary evidence and all the documents have been submitted to the investigating officer and therefore, custodial investigation would be infringement of the right to liberty granted to the petitioner under the Constitution of India and has therefore, prayed for the grant of anticipatory bail.

On the other hand, learned State counsel has submitted that it is a case where the allegations are pertaining to breach of trust and remaining amount of Rs.7,25,000/- is yet to be recovered from the petitioner and other accused and therefore, custodial investigation would be required. He has referred to reply which has been filed by the State in which it has been stated that the co-accused namely, Rajinder Katyal has already joined investigation and it was during his examination it was revealed that the entire amount has been received by the present petitioner and that in compliance to the interim anticipatory order passed by this Court on 24.09.2020, the petitioner has deposited a sum of Rs.2,25,000/- with the Investigating Officer on 08.10.2020. Furthermore, during investigation it was learned that the petitioner was also cheated some other person who filed the complaint against the petitioner which is pending before the E.O.Wing and crime branch at Ludhiana as well as complaint under Section 138 of the Negotiable Instruments Act which is pending in the Court of Magistrate at Lucknow.

Learned Senior counsel appearing on behalf of the complainant has opposed the grant of anticipatory bail to the petitioner. He has submitted that the petitioner alongwith other co-accused were the property dealers and they were entitled to 1% of commission amount but they were paid Rs.11,50,000/- for the purpose of onward transmission of the earnest money to Rajwinder Kaur and when the agreement to sell had failed, they failed to return the same and therefore, they have committed a breach of trust and liable for criminal prosecution. He has further submitted that although compromise was effected between Neena Sharma and Rajwinder Kaur and civil case was also withdrawn and earlier FIR was also cancelled but the amount which was entrusted with the petitioner by the mother of the complainant for onward transmission to Rajwinder Kaur was not returned back and therefore, it constitutes an offence under Section 406 IPC. While referring to affidavit filed on behalf of complainant, learned Senior Counsel submitted that on various occasions the amount was given to the petitioner by different modes and therefore, the petitioner cannot wriggle out from the same and therefore has prayed for dismissal of the present petition.

Learned Senior counsel has further relied upon the judgments of the Hon'ble Supreme Court in ***Ram Narayan Popli vs. Central Bureau of Investigation (2002) 3 SCC 641***to contend that even mere repayment itself is not an indication of lack of dishonest intention and sometimes it so happened that with a view to create confidence the repayments are made so that for the future transactions the money can be dishonestly misappropriated and that it order to establish the charge of criminal breach of trust the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The main ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted if proved, may, in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. Further, learned Senior counsel has relied upon the judgment of Hon'ble Supreme Court rendered in ***R.Venkatakrishnan vs. Central Bureau of Investigation AIR 2010 Supreme Court 1812*** to contend the terms of Section 406 IPC are very wide and they applied to one who is in any manner entrusted with property or dominion over property. Prayer was made for dismissal of the present petition.

I have heard the learned counsel for the parties and perused the available record.

The primary dispute which has come in the present case was that an agreement to sell was executed between Neena Sharma who is the mother of the complainant and one Rajwinder Kaur in the year, 2014. The petitioner and other co-accused were the commission agents who are entitled to receive 1% of commission brokerage which came to Rs.20,000/-. Thereafter, the dispute arose between Neena Sharma and Rajwinder Kaur and even FIR under Section 420 IPC was also lodged which was ultimately cancelled by the police. Thereafter, even civil suit for specific performance was filed by Rajwinder Kaur against Neena Sharma and thereafter, compromise took place between them and the civil suit was dismissed as withdrawn on 27.07.2018 vide Annexure P-5. A perusal of Annexure P-4 which is a statement of Rajwinder Kaur shows that she stated that she has compromised the matter with the defendant and has received full and final payment of earnest money from the defendant and she does not want to pursue the present case and the same may be dismissed as withdrawn. Thereafter, in view of the statement suffered by Rajwinder Kaur, the suit was dismissed as withdrawn on 27.07.2018 vide Anneuxre P-5. Vide Annexure P-6, property was even sold to some other person. So far as the dispute between the aforesaid Rajwinder Kaur and Neena Sharma is concerned, it has come on record that the earnest money has already been returned and therefore, the matter was compromised. However, the bone of contention in the present case was that the petitioner alongwith the co-accused had although received an amount of Rs.11,50,000/- from Neena Sharma for onward transmission to Rajwinder Kaur when the agreement failed and the matter was settled but the petitioner and the other co-accused retained the said amount and did not sent it to Rajwinder Kaur. Vide Annexure P-4 in the statement of Rajwinder Kaur, she has stated that she has received full and final payment of earnest money from the defendant which according to learned counsel for the petitioner is sufficient enough to show that the allegations against the petitioner are false.

Agreement was executed in the year 2014 but the present FIR has been lodged in the year, 2020. The matter was compromised between Neena Sharma and Rajwinder Kaur in the year, 2018. However, there is no justification coming forward from the complainant that instead of filing an appropriate suit, the present FIR has been lodged after lapse of six years. Learned Senior counsel appearing on behalf of the complainant submitted that infact the present complaint was filed to the police in the year 2018 but FIR has been registered in the year, 2020.

The next issue which needs consideration would be as to whether there is any evidence pertaining to the entrustment of Rs.11,50,000/- to the accused or not. As per the submissions of learned counsel for the parties an amount of Rs.2,25,000/- was transferred in the name of the petitioner and the remaining amount was given in cash and for the cash amount there is no evidence available on record at this stage. During the pendency of present case, the petitioner has deposited an amount of Rs.2,25,000/- with the Investigating Officer but has also submitted that although he had repaid Rs.2,25,000/- to Neena Sharma but since he has been falsely implicated in the present case and his personal liberty is involved, he has deposited an amount of Rs.2,25,000/- with the Investigating Officer. The submission made by learned counsel for the petitioner that the ingredient of Section 406 IPC with regard to entrustment is not fulfilled because there is no evidence to show at all that the remaining amount of Rs.7,25,000/- was entrusted by the mother of the complainant to the petitioner and it was allegedly made in cash does carry weight. Furthermore, submission made by learned counsel for the petitioner that subject matter of the present case was at the most of civil nature also carries weight. The complainant instead of invoking civil remedy has chosen to set criminal law into motion for the purpose of recovery of money.

The judgments relied upon by learned counsel for the complainant lay down law with regard to the ingredients of dishonest intention and entrustment under Section 406 IPC. However, in the facts and circumstances of the present case at this stage, the learned counsel for the complainant has not been able to show any document or evidence as to how entrustment of the remaining amount of Rs.7,25,000/- was made.

Therefore, considering the totality and circumstances of the present case, I deem it fit and appropriate to allow the present petition as custodial interrogation would not be required. It is directed that in case the petitioner is required to be arrested then he shall be released on bail subject to furnishing adequate personal/surety bonds to the satisfaction of the Investigating Officer. It is further directed that the petitioner shall abide by all the conditions which have been provided under Section 438(2) Cr.P.C and he shall fully co-operate with the Investigating process.

However, anything observed hereinabove shall not be treated as an expression of opinion on the merits of the case and is meant only for the purpose of decision of present petition.

26th November, 2020 **[JASGURPREET SINGH PURI]**
Shivani Kaushik **JUDGE**

Whether speaking/reasoned *Yes/No*
Whether Reportable Yes/No