

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITIONS NO.10 & 11 OF 2021****CRIMINAL WRIT PETITION NO.10 OF 2021**

ENG. SHELDON S. MARTINS

... PETITIONER

Versus

STATE OF GOA, THR. THE
PUBLIC PROSECUTOR AND
3 ORS.

... RESPONDENTS

AND**CRIMINAL WRIT PETITION NO.11 OF 2021**

NEESHA VARELA

... PETITIONER

Versus

STATE OF GOA, THR. THE
PUBLIC PROSECUTOR AND
3 ORS.

... RESPONDENTS

Mr. T. Vaz, Advocate for the Petitioners.

Mr. Pravin Faldessai, Additional Public Prosecutor for the
Respondents No.1 & 2.Mr. Nigel Da Costa Frias, Advocate for the Respondents No.3 &
4.**Coram :- M.S. Sonak &
Smt. M. S. Jawalkar, JJ.****Reserved on :- 12th July 2021
Pronounced on :- 19th July, 2021****JUDGMENT : (*Per Smt. M.S. Jawalkar, J.*)**

Heard Mr. T. Vaz, learned Counsel for the petitioners,
Mr. Pravin Faldessai, learned Additional Public Prosecutor for
the respondents No.1 & 2, and Mr. Nigel Da Costa Frias,

learned Counsel for respondents No.3 & 4.

2. Rule. The rule is made returnable forthwith with the consent of and at the request of the learned Counsel appearing for the parties. Learned Counsel appearing for the respective respondents waive service.

3. We dispose of the above petitions by a common order, as the prayer in both the petitions relate to quashing and setting aside of FIR No.167/2019, registered at Panaji Police Station, for the offenses punishable under Sections 406 and 420 read with Section 34 of IPC.

4. The petitioners have filed the present Criminal Writ Petitions under Article 226 and 227 of the Constitution of India and also Section 482 of the Criminal Procedure Code for quashing of an FIR No.167/2019.

5. It is the case of the petitioner that the petitioner, through the partnership firm, executed Agreement of Sale with respondent no.3 and his wife and respondent no.4 and his wife, for purchase of two apartments, having super built-up area and handed over the possessions of the flats to the respective purchasers. The petitioner, by writing emails and reminders to

respondents no.3 & 4, called upon them to execute Deed of Sale, but the said respondents failed to reply or come forward to execute the Deed of Sale. It is further the case of the petitioner that the said respondents approached National Consumer Disputes Redressal Commission (NCDRC) with grievances that are the subject matter of FIR in question. On 13.12.2018, respondents no.3 & 4 filed a complaint against the petitioner upon which respondent no.2 registered FIR No.167/2019 under Sections 406 & 420 read with Section 34 of IPC.

6. It was alleged by respondents no.3 & 4, in the said complaint dated 13.12.2018, that actually the flat bearing no.B-402 sold to respondent no.3 had 112.72 sq. mts., whereas the Agreement for Sale dated 27.03.2015 stated that an area of 119.58 sq. mt. has been sold to respondent no.3 for which he has paid a sum of ₹1,12,13,918/-. Similarly, respondent no.4 has been sold one flat bearing no.G-402 with a built-up area of 111.73 sq. mts. and a built-up area of 115.41 sq. mts. for another flat bearing no.G-401, whereas the Agreement for Sale mentions an area of 118.05 of one flat and an area of 122.43 sq. mts. of another flat, for which he has paid 1,51,36,231/-. Also, an amount of ₹7,00,000/- was paid in cash on 13.03.2015, by respondent no.3, towards the logistics fee to the petitioner and

the petitioner has denied receiving the said amount and also refused to issue a receipt. It is also alleged in the complaint that both respondents no.3 & 4 were sold an open terrace on the rooftop for which they have paid an amount of ₹5,00,000/- and ₹3,00,000/-, respectively to the petitioner, which has now become common terrace for all the residents of the building.

7. Respondents no.3 & 4 have alleged that though they have paid valuable consideration to the developer for the premises purchased, it is revealed to them that they have been cheated and fraud has been played on them by the developer and his wife, who have misappropriated their money and have thus committed criminal breach of trust. Accordingly, the said FIR was registered against the petitioners.

8. The learned counsel for the petitioner submitted that on perusal of the complaint and other documents, it can be seen that the dispute is civil and not criminal and no ingredients of cheating are made out by the respondents. The learned Counsel for the petitioner has explained two important concepts of Civil Engineering/Architecture namely, 'built up area' and 'super built-up area' and submitted that the Agreements for Sale executed by respondents no.3 & 4 were for the 'super built-up area' and not for the 'built-up area'. The

learned Counsel for the petitioner has admitted receiving an amount of ₹7,00,000/-, receipt of which is placed on record. The learned counsel for the petitioner, thus, prays that the petition be allowed and FIR be quashed.

9. Learned Counsel for the petitioner has relied on **Vunna Visali V/s. State of A.P. & Anr., 2001 SCC Online AP 1541**, in support of his contention that sleeping partners cannot be prosecuted. Reference was made to para 9, thus :

“9. It is, therefore, necessary to add an emphatic note of caution in this regard. More often it is common that some of the partners of a firm may not even be knowing of what is going on day to day in the firm. There may be partners better known as sleeping partners who are not required to take part in the business of the firm. There may be ladies and minors who were admitted for the benefit of partnership. They may not know anything about the business of the firm. It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub-section (1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof, no partner could be convicted. We, therefore, reject the contention urged by counsel for the State.”

10. Learned Counsel has also relied on **Dalip Kaur & Ors. V/s. Jagnar Singh & Anr., (2009) 14 SCC 696** and

referred to para 8, which reads thus :

8. Sections 405 and 415 of the Indian Penal Code defining 'criminal breach of trust' and 'cheating' respectively read as under:

"405 - Criminal breach of trust.-Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

"415. Cheating--Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'."

An offence of cheating would be constituted when the accused has fraudulent or dishonest intention at the time of making promise or representation. A pure and simple breach of contract does not constitute an offence of cheating.

11. Learned Additional Public Prosecutor for the respondents no.1 & 2 submits that even if the matter is of civil nature that may be having criminal implications.

12. Learned Counsel, Shri Nigel Da Costa Frias, for respondents no.3 & 4 submits that material collected during the investigation, forming part of the charge sheet, does establish

the commission of offences punishable under Section 406 & 420 read with Section 34 of IPC. It was also submitted by the learned Counsel that they were given possession of incomplete apartments with very poor quality of construction and numerous un-rectifiable flaws. He also submits that the petitioner has charged respondents no.3 & 4 for the open spaces - terraces, but the said open spaces have been used as common terraces.

13. To support his contentions, learned Counsel for respondents no.3 & 4 has relied on ***Priti Saraf & Anr. V/s. State of NCT of Delhi & Anr. (Criminal Appeal No(S).296 of 2021)***. Reliance is made particularly to paras 33 & 34.

“33. We have perused the pleadings of the parties, the complaint/FIR/charge-sheet and orders of the Courts below and have taken into consideration the material on record. After hearing learned counsel for the parties, we are satisfied that the issue involved in the matter under consideration is not a case in which the criminal trial should have been short-circuited. The High Court was not justified in quashing the criminal proceedings in exercise of its inherent jurisdiction. The High Court has primarily adverted on two circumstances, (i) that it was a case of termination of agreement to sell on account of an alleged breach of the contract and (ii) the fact that the arbitral proceedings have been initiated at the instance of the appellants. Both the alleged circumstances noticed by the High Court, in our view, are unsustainable in law. The facts narrated in the present complaint/FIR/charge-sheet indeed reveal the commercial transaction but that is hardly a reason for holding that the offence of cheating would elude from such transaction. In fact, many a times, offence of cheating is committed in the course

of commercial transactions and the illustrations have been set out under Sections 415, 418 and 420 IPC. Similar observations have been made by this Court in Trisuns Chemical Industry Vs. Rajesh Agarwal and Ors.(supra) :-

*“9. We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases as indicated in **State of Haryana v. Bhajan Lal** [1992 Supp (1) SCC 335]”*

34. So far as initiation of arbitral proceedings is concerned, there is no correlation with the criminal proceedings. That apart, the High Court has not even looked into the charge-sheet filed against 2nd respondent which was on record to reach at the conclusion that any criminal offence as stated is prima facie being made out and veracity of it indeed be examined in the course of criminal trial.”

14. We have considered the rival contentions of the parties, which now fall for our determination.

15. Complaint is registered on 05.07.2019, whereas respondents no.3 & 4 got knowledge of alleged fraud on

25.04.2014, on their getting possession. There is no explanation at all for the huge delay of 5 years. Moreover, it also appears that the respondents herein had already approached National Consumer Disputes Redressal Commission (NCDRC) vide Case No.CC/529/2018 and CC/811/2020, for their grievances. Given this pending proceedings before the National Consumer Disputes Redressal Commission (NCDRC) and considering the documents on record the dispute is of a predominantly civil profile. It also appears that agreements are of 'super built-up area', whereas the respondents are claiming 'built-up area'. It is common knowledge that a 'super built-up area' is different than a 'built-up area'. It is not disputed by the respondents that respondent no.4 executed Agreement for Sale on 11.01.2012 and respondent no.3 executed Agreement for Sale on 27.03.2015. What is complained of is only confusion of respondents, and there are no ingredients of the offence of cheating.

16. There are emails and also receipt of ₹7,00,000/- placed on record by the petitioner which was given long back on 10.08.2016. Therefore, there is no substance in claiming that no receipt was given for the amount of ₹7,00,000/-. The allegations contained in FIR, even if taken as correct, do not disclose the ingredients of the alleged offence of cheating and

disclose only a predominantly civil dispute. The offence of cheating would be constituted when the accused has fraudulent or dishonest intention at the time of making a promise or representation. A clear and simple breach of contract does not constitute an offence of cheating. Admittedly, these issues are taken up before the National Consumer Disputes Redressal Commission (NCDRC) and there is no verdict on the issue that whether the area as specified as 'super built-up area' is correct or not.

17. The case of **Priti Saraf & Anr.** (supra), relied upon the learned Counsel for the respondents no.3 & 4, is differentiable on facts. In the said matter, the owner of the property hatched a conspiracy with broker Ashok Kumar to cheat and defraud the appellants and to further misappropriate the amount paid by the complainant as part of the Deed, knowing that there is legal liability payable to the Bank of ₹18.00 crores given the mortgage of the property. The intention of the respondent-owner of the property from the very inception to cheat and deceive the complainant was made out from the facts. However, in the present matter, no such case is made out. The respondents allege cheating and fraud almost five years after the agreement and much after steps were taken in civil or consumer proceedings. Therefore these proceedings

being launched to exert undue pressure in the civil proceedings cannot be ruled out. The scope and ambit of the inherent jurisdiction of the High Court under Section 482 CrPC have been examined in the judgment of this Court in ***State of Haryana and Others Vs. Bhajan Lal and Others*** (*supra*).

The relevant paragraph being;

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

18. These principles throw light on the circumstances and the situation which is to be kept in mind when the High Court exercises its inherent powers under Section 482 of Cr.P.C.

19. In our considered opinion, the present criminal proceedings are not bonafide, in the sense that they are to exert undue pressure on the Petitioners in their civil proceedings. The ulterior motive of wreaking vengeance because the respondents are dissatisfied on account of what they regard as a breach of contractual terms also cannot be ruled out. Even if the allegations in the FIR are taken at their

face value and accepted in their entirety, they do not *prima facie*, constitute any offence or make out a case against the accused. The fraudulent and dishonest intention must exist from the very inception when the promise or representation was made.

20. There is, *prima facie*, material in the form of emails showing that the petitioner had called upon respondents no.3 & 4 calling upon them to register the Deed of Sale, so also, there is an acknowledgment of receipt ₹7,00,000/-. The most important fact is that it is not the case that the builder has misrepresented in agreement for selling 'built up area' and, in fact, ultimately the said 'built up area' is treated as 'super built-up area' due to which less area is received by the complainants. Knowing well that the agreement is for 'super built-up area' parties entered into an agreement and merely because of confusion of complainants with the 'built-up area' and 'super built-up area' there cannot be a criminal prosecution. In the Agreement for Sale itself, admittedly, there is a mention of 'super built-up area' and, in view thereof, 'built-up area' can be less than the 'super built-up area'. So far as the selling of terrace is concerned, there is no material on record to show that when, where and how the amount was paid by the complainants to the builder. These are disputed questions to be decided by the appropriate forum and cannot be the basis for

prosecution.

21. Moreover, this dispute is pending before the legal forum available to the complainant/respondents no.3 & 4. So also, no offence is shown under Sections 406 and 420 read with Section 34 of IPC. Accordingly, FIR is liable to be quashed so also criminal proceedings pending before JMFC, Panaji are required to be closed or quashed. Accordingly, we pass the following order :

O R D E R

- (i) Both the petitions are allowed.
- (ii) Rule is made absolute in the aforesaid terms.
- (iii) The FIR bearing no.167/2019, registered at Panaji Police Station, for the offences under Section 406 and 420 read with Section 34 of IPC, is hereby quashed and set aside.
- (iv) Consequently, criminal proceedings pending before the learned Judicial Magistrate First Class, Panaji, in IPC/38/2020/A are also closed.
- (v) The observations in this judgment and order are only in the context of quashing of criminal proceedings and therefore nothing here may affect or influence the civil or consumer disputes pending between the parties.

SMT. M. S. JAWALKAR, J.

M. S. SONAK, J.

NH

NITI K

HALDANKAR

Digitally signed by NITI K
HALDANKAR
Date: 2021.07.19 14:53:55 +05'30'