

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

920 CRIMINAL WRIT PETITION NO.380 OF 2022

BABU DADASAHEB GAVHANE
VERSUS
SHAILESH GOPAL DAHAD AND ANOTHER

...
Advocate for Petitioner : Mr. Narwade Narayan B.
APP for Respondent No.2-State : Mr. B. V. Virdhe
...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 08-06-2022

ORDER JUDGMENT:

1. Rule. Rule made returnable forthwith. By consent, heard finally.
2. Present writ petition has been filed by the original accused for quashing the proceedings against him i.e. Regular Civil Suit No.420 of 2020 pending before the learned Judicial Magistrate First Class, Aurangabad, for the offence punishable under Section 406, 420 of the Indian Penal Code and also for setting aside the order dated 28-07-2021 regarding issuance of process against the petitioner.
3. Respondent No.1 is the original complainant. The notice issued to respondent No.1 was received by his father and the report says that the complainant had gone out of station and then the father accepted the notice, so also the server was allowed to contact respondent No.1

on mobile and thereby the intimation has been given about the notice. Since the notice has been served on the adult male member of the family of respondent No.1, it is good service. He has not appeared.

4. Heard learned Advocate for the petitioner as well as learned APP for respondent No.2.

5. It has been vehemently submitted on behalf of the petitioner that the complainant has filed the said private complaint Regular Criminal Case No.420 of 2020 before learned Judicial Magistrate First Class, Aurangabad with ulterior motive. Even if we take the contents of the FIR as it is, yet they would give rise at the most to a civil dispute and there is no question of any criminality involved in the same. The complainant has suppressed material facts and it appears that the order of issuance of process came to be passed by the learned Magistrate in absence of those facts which are material. The learned Advocate for the petitioner has taken this Court through the contents of the complaint, agreement of development entered into between complainant and the present petitioner on 20-05-2017, the irrevocable general power of attorney and the sale deeds as well as form No.6 effecting the mutation after the sale transactions in

respect of the property. It has been then submitted that in view of Clause No.9 and 14, the owner i.e. the present petitioner had the right to sale Flat No.1 to any third party and accordingly it has been sold by the petitioner. However, as regards Flat No.4 and 10 are concerned, there was a rider. The owner had received security deposit of Rs.60 lakh which was for the part of the performance of the contract, but while mutually understanding the parties agreed that the owner will get Flat No.1, 4 and 10 and then as regards Flats No.4 and 10 are concerned, it was decided that with the consent of the developer, the owner can sell those flats. However, he will have to give amount of Rs.32 lakh and 28 lakh respectively for Flats No.4 and 10 to the developer and then only there will not be any question of repayment of security deposit. However, further Clause No.14 stipulated that owner will have to repay the security deposit of Rs.60 lakh immediately after the completion of the construction and again a rider was given that if the owner fails, then the developer had the right to sell Flat No.4 and 10 to any third party to recover the deposit amount and no consent or NOC would be required from the owner. The occupancy certificate was issued on 07-10-2019, and thereafter, the developer has sold Flat No.4 on 24-06-2021 to one Dr. Vilas Wangikar and Dr. Shailaja Wangikar. Flat No.10 has been

sold to one Sham Naik. The sale deed between the developer and Wangikar would show that the consideration amount was Rs.16,10,000/-. This fact has been suppressed by the complainant from the learned Magistrate. When the developer has used his right under Clause No.14 of the development agreement, he could have insisted upon the performance of the contract only as per that agreement and not by way of a complaint. There is no question of any breach of trust or cheating by the petitioner/accused. The order of issuing process against the petitioner is wrong and illegal.

6. Reliance has been placed on the decision in *Hari Prasad chamera Vs. Bishun Kumar Surekha and Others*, reported in AIR 1974 SC 301, wherein it has been held that :-

“Even assuming prima facie all the allegations in the complaint to be true they merely amount to a breach of contract and could not give rise to criminal prosecution. There was nothing in the complaint to show that the respondents had dishonest or fraudulent intention at the time the appellant parted with the money nor did the complaint indicate that the respondents had induced the appellant to pay them the amount parted with. The appellant also did not allege the respondents making any representation to him for parting with the money. Mere fact that they did not abide by their commitment as to

starting of the business in complainant's name as agreed to would not fasten them with criminal liability."

In *Nageshwar Prasad Singh alias Sinha Vs. narayan Singh and another*, reported in 1999 Cri. L. J. 598 it has been held that :-

"In case of agreement for sale of property when part of consideration is paid as earnest money, possession was also delivered to the complainant as per sale deed and then the complainant was not performing his part of the contract, then he had filed suit for specific performance before the civil Court. Under such circumstance, the liability, if any, arising by breach of contract is civil in nature and not criminal. Criminal proceedings are liable to be quashed."

In *Md. Ibrahim and Ors. Vs. State of Bihar and Anr.*, reported in 2010 AIR SCW 405, it has been held that :-

"13. Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows : (i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission : (ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or

omit if he were not so deceived; and (iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property. To constitute an offence under Section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived (i) to deliver any property to any person, or (ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security)."

"16. The Penal Code however defines 'fraudulently' an adjective form of the word 'fraud', in Section 25, as follows : "A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise". The term "fraudulently" is mostly used with the term "dishonestly" which is defined in Section 24 as follows : "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing "dishonestly". To 'defraud' or do something fraudulently is not by itself made an offence under the Penal Code, but various acts when done fraudulently (or fraudulently and dishonestly) are made offences."

In Trilok Singh and others Vs. Satya Deo Tripathi, reported in

1980 Cri. L.J. 822, it has been held that :-

“When it was found that the purchase of truck under hire-purchase agreement had default clause, and then seizure of truck, on default by financier the purchaser launching criminal prosecution against financier. It would be the dispute purely of civil in nature and criminal proceeding initiated was an abuse of process of the Court and deserved to be quashed.”

7. Perusal of the complaint filed by respondent No.1 would show that initially he has stated that the accused is the owner of Plot No.26 in Gut No.44 situated at village Satara in Aurangabad. There was development agreement in respect of the said plot between them on 20-05-2017. He paid amount of Rs.60 lakh by cheque to the owner which was to be treated as a security deposit and to be repaid by the owner/accused on the date of occupancy certificate/completion certificate is issued by Municipality Council authorities. Thereafter, he has pleaded about the stipulations in respect of Flat No.7 in Manas Residency and Flats No.1, 4 and 10 in the building to be developed under the said development agreement. He has also stated that he has taken loan from the bank for the development. The occupancy certificate was issued by the Municipal Council Authorities on 07-10-2019. Thereafter,

according to the complainant he had asked the accused to return the security deposit, and thereafter, two notices were issued, however the accused did not repay that amount. He states that accused had already sold Flat No.1 on 26-08-2019. It is then stated that the complainant came to know about the criminal breach of trust by the accused by not returning the money and cheating with him by selling the flat. According to him he has suffered financial loss and then he says that the accused has committed offence under Section 406 and 420 of IPC.

8. After recording the verification, the learned Magistrate had perused the complaint verification and documents which were produced on record and then issued the process under Section 406 and 420 of IPC against the present petitioner by order dated 28-07-2021 which is under challenge in this petition.

9. It can be seen from the list of documents which was produced along with the complaint by the complainant that he has not attached the sale deed which he has executed with Dr. Wangikar on 24-06-2021. Copy of the said sale deed has been produced by the petitioner and it clearly shows that though it is stated that it is executed by the present petitioner Babu Dadasaheb Gavhane, yet it

is through his GPA holder S. A. Builders and Developers, through its partner Mr. Shailesh Gopal Dahad, that means in fact it is executed by the complainant and not by the present accused. The development agreement stipulates in paragraph No.9 as regards the flats are concerned that Flat No.1, 4 and 10 have been given to the owner i.e. the accused. The petitioner/accused is not disputing that he has received the security deposit amount of Rs.60 lakh, and therefore, what has been stipulated in *Paragraph No.9* is important which runs thus :-

"9.....

It is also mutually decided that the owner is entitled to sell his share in the constructed area i.e. flat no.1, 4, 10 to any third party that the developer will not give possession and consent to sell the flat no.10 and flat no.4 unless the owner repays the security deposit of Rs.60,00,000/- (Rs. Sixty lakh only) to the developer which is paid at the time of execution of this development agreement.

Whereas it may be considered that if the owner repays Rs.32,00,000/- (Rs. Thirty two lakhs only) at the time of sell of flat no.4 and Rs.28,00,000/- (Rs. Twenty lakhs only) at the time of sell of flat No.10 to the developer as return of the security deposit and then the developer will give consent or NOC to sell these flats

respectively.

However the owner can sell of the flat no.1 to any third party at cost which he deems fit without any consent or NOC from the developer.”

10. It is to be noted that by having a stipulation that if owner repays Rs.32 lakh at the time of sale of Flat No.4 and Rs.28 lakh at the time of sale of Flat No.10 to the developer as return of the security deposit, then developer was bound to give consent or NOC to sell those flats by the owner to any third party. That means, the restriction was in respect of the sale of Flats No.4 and 10 only, because the further part that the owner can sell Flat No.1 to any third party at a cost which he deems fit without any consent or NOC from the developer, was never objected by the complainant. Though he says that the said flat came to be sold by the accused on 26-08-2019 i.e even prior to the issuance of completion certificate, yet that would be the matter between the owner i.e. the present petitioner and the said purchaser. In consonance with the above said stipulation we will have to further read *Paragraph No.14* of which runs thus :-

“14. That the owner should repay the security deposit of Rs.60,00,000/- (Rs.Sixty lakh only) immediately after completion of the said construction. If the OWNER fails

to repay the deposit amount of Rs.60,00,000/- within 2 months after obtaining completion certificate of the building. The DEVELOPER can sell the two flats as : flat no.10 and flat no.04 of the owner to any third party by fixing the price he deems fit at that time to recover the deposit amount. NO CONSENT OR NOC will be required by the OWNER to sell the same flats at that time. And the OWNER will have to pay balance amount if any after sell of the same flats to complete the deposit amount."

The developer was interested in getting his security deposit back immediately after the completion of the construction. The parties agreed even on the point that when the owner fails to repay that deposit. After the completion of the construction, that amount was to be repaid within two months of the completion certificate.

11. As aforesaid, the completion certificate was issued on 07-10-2019. The complainant has stated that orally as well as by issuing notice he had asked the owner to repay the said amount, but the owner has not repaid that amount. Clause No.14 of the development agreement takes care of the said situation. It is, therefore, stated that the developer can sell the two flats i.e. Flats No.10 and 4 to any third party by fixing the price the price he deems fit to recover the deposit amount. In that event no consent or NOC

would be required from the owner and if the consideration amount fetched is less than Rs.60 lakh, then the said clause says that the owner will have to pay balance amount, if any, after sale of same flats to complete the deposit amount. Now it has been brought on record that Flat No.4 has been sold for a consideration of Rs.16 lakh to Dr. Wangikar. It also appears that Flat No.10 has been sold to Sham Naik, however, the petitioner herein has not produced the said sale deed between the complainant and Sham Naik. Even if we consider that the consideration that would have been received by the sale of Flat No.10 is less than the expected amount and together with the consideration of Flat No.4 and 10, the amount is less than Rs.60 lakh. The stipulation in agreement paragraph No.14 would be applicable and then the owner would be liable to pay the balance, if any, that would be under the Civil Law, for that purpose Criminal action is unjustified. There is total suppression of execution of sale deeds of Flats No.4 and 10 by the complainant in his complaint. Flat No.4 was sold on 24-06-2021. The complaint came to be filed on 20-02-2020. That means, during the pendency of the case complainant has sold the said flat. The verification has been recorded on 26-07-2021 as per the case history from the case status. It appears that even at the time of verification, the

complainant has not disclose that he has sold the flats and then the order regarding issuance of process has been passed on 28-07-2021. Even if we brushed aside the incident of sale of flats by the developer, yet from the terms of the agreement it can be seen that the dispute was of civil in nature, there is no criminality involved in the same. Though by way of trust the amount of Rs.60 lakh was given to the owner i.e. the present petitioner, with so many terms, including the clauses in respect of default, it cannot be said that retention of the said amount with the accused would amount to criminal breach of trust within the preview of Section 406 of IPC. That can also be not considered as a defrauding act on the part of the accused. The ingredients of the offence of cheating which have been explained in *Md. Ibrahim and Ors. Vs. State of Bihar and Anr. (Supra)* are not made out in this case.

12. In view of the above said reasons when there is suppression of facts as well as the fact that the development agreement itself is taking care of the interest of both the parties and giving rise for the specific performance or recovery to the other side, the action of issuing process by the learned Magistrate is wrong. Since the ingredients of the offence under Section 406 as well as Section 420

of IPC are not made out, certainly the proceedings deserve to be quashed. An accused under these stipulations where the remedy is civil in nature, cannot be asked to face the trial, and therefore, the petition deserves to be allowed.

13. Rule is made absolute in terms of prayer Clause 'B'. Writ petition stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.