

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

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WRIT PETITION NO.504 OF 2022

Mohamed Irfan Burhan Shaikh & Anr.

..Petitioners

Versus

The State of Maharashtra & Anr.

..Respondents

Mr. Sandeep S. Sharma, for the Petitioners.

Mr. J. P. Yagnik, APP for the Respondent/State.

Mr. Anees Shaikh, for the Respondent No.2.

CORAM : NITIN W. SAMBRE &
R. N. LADDHA, JJ.

RESERVED ON : 5th JULY, 2023
PRONOUNCED ON : 7th SEPTEMBER, 2023

PC. (Per Nitin W. Sambre, J.)

1. By this Criminal Writ Petition under Article 226 of the Constitution of India r/w Section 482 of the Criminal Procedure Code, the petitioners are seeking quashing of FIR being Crime No.396 of 2021 registered with Mira Road Police Station and consequential charge-sheet filed against them for an offence punishable under Sections 420, 406, 34 of IPC.

2. The facts necessary for deciding the present petition are as under :-

Petitioner No.1 is a son of petitioner No.2. The petitioner No.2 was married to one Burhan Shaikh.

3. Petitioners are owners of land old Survey No.468, New Survey No.144 and land old Survey No.470, New Survey No.117 Hissa No.1 admeasuring 266.72 sq.mtrs. It was agreed between the petitioners and the respondent No.2 to rent out 2158 sq.ft. of area as is claimed in the FIR. It is claimed that accordingly online rent agreement was entered into and registered on 10th August, 2021.

4. The respondent No.2/complainant accordingly started the work of construction of factory shed in the name and style as Wood Factory Interior and More. It is claimed that after the construction work was over, by 5th September, 2021, for which the respondent No.2 has spent an amount of Rs.13,61,900/-, the officials of the Mira Bhayandar Municipal Corporation informed that the structure constructed on the said area is illegal, as same can be done on an area of 306 sq.mtrs. hence construction carried out on remaining area is illegal. Accordingly, officials of the Municipal Corporation demolished the structure and has caused loss to the respondent No.2. As such, it is alleged by the respondent No.2 that out of the total land of 2158 sq.ft., only 306 sq.ft. is approved for construction to be carried out on the said land. By misrepresenting deposit of Rs.2,00,000/- was accepted and monthly rent of Rs.20,000/- for the entire area was made to agree. That being so, offence of cheating and criminal breach of trust is committed by the petitioners.

5. Contention of counsel for the petitioners while making

out a case for quashing is, the demolition by the Municipal Corporation of the illegal construction of the respondent No.2 has led to the filing of the FIR. According to counsel for the petitioners, the registered leave and licence agreement was executed on 10th August, 2021 in which the respondent No.2 as reflected in the Schedule-I was permitted to use plot of land plus building. According to him, constructed portion being non residential unit, land plus building out of old Survey No.468 having built up area of 2158 sq.ft. is situated on the ground floor. According to him, the petitioners never promised and handed over any illegal construction to the respondent No.2 as could be inferred from the recitals in the aforesaid leave and licence agreement. The rights of the parties i.e. petitioners can be crystallized from the aforesaid leave and licence agreement. The counsel as such would urge that on the land in question, it is an admitted position that 2158 sq.ft. of built up area was available and which was permitted to be used by the petitioners. Counsel for the petitioners as such urge that there is no element of criminal breach of trust or cheating. Hence independent offence cannot be inferred punishable under Section 34 of the IPC.

6. While countering aforesaid submissions, Mr. Anees Shaikh, learned counsel for the respondent No.2 would urge that the petitioners have promised and leased out land to the extent of 266.72 sq.mtrs. According to him, since the petitioners have no authority to rent out the open space and since the permission for construction was not obtained, the respondent No.2 had suffered

loss of around Rs.15,00,000/- as structure erected by him was demolished. He would as such urge that the prosecution is justified in invoking provisions of Sections 406, 420 r/w 34 of IPC.

7. We have appreciated the aforesaid submissions.

8. The charge-sheeting of the petitioners for the offence punishable under Sections 406, 420 r/w 34 of IPC can be borne out of the record. The said registration of offence is based on the fact that the respondent No.2 paid an amount of Rs.2,00,000/- as deposit and agreed to pay an amount of Rs.20,000/- per month towards the licence fees. The said amount was agreed to be paid as against the permission granted by the petitioners to occupy 2158 sq.ft. of built up area as is reflected in the leave and licence agreement executed and registered between the parties on 10th August, 2021. The recitals in the said leave and licence agreement if perused in the backdrop of Schedule I, which reads thus :-

“All that constructed portion being Non-Residential unit bearing Land+Building/Shed No.OLD SURVEY NO.468 Built-up: 2158 Square Feet, situated on the - Floor of a Building known as ‘-’ standing on the plot of land bearing Survey Number : NEW SURVEY NO.144, Road: MIRA BHAYANDER ROAD, Location: MIRA ROAD EAST THANE-401107, of Village: Navaghar, situated within the revenue limits of Tahsil Thane and Dist. Thane and situated within the limits of Mira-Bhayander Municipal Corporation.

IN WITNESS WHEREOF the parties hereto have set and

subscribed their respective signatures by way of putting thumb impression electronic signature hereto in the presence of witness, who are identifying the executants, on the day, month and year first above written.”

Aforesaid sufficiently establishes that what was permitted to be occupied by the respondent No.2 was the constructed portion being non-residential unit on land Survey No.468 having built up area of 2158 sq.ft. at village Navaghar.

9. As such, it cannot be said that the petitioners at any point of time have made to understand the respondent No.2 that they have permitted or made to understand the respondent No.2 that the constructed area of more than 2158 sq.ft. is given to the respondent No.2 to be used for the commercial purpose and have also charged rent for the same.

10. As is rightly claimed by the counsel for the petitioners that the *inter se* relationship of licensor and licensee can be inferred from the recitals of the aforesaid leave and licence agreement dated 10th August, 2021.

11. In this background, what can be noticed is, the petitioners have never promised the respondent No.2 that he is being made to understand or he was promised and provided constructed area of more than 2158 sq.ft in land old Survey No.468, New Survey No.144, old Survey No.470, New Survey No.117.

12. In this background, if we appreciate the very ingredients of Section 406 of the IPC, same provides for the punishment for criminal breach of trust. Section 405 of the IPC defines criminal breach of trust i.e. in case if a person, whoever entrusts the property, or having dominion over the property, dishonestly misappropriates or converts such property to his own use or dishonestly uses or disposes of that property in violation of any direction of law, or of any legal contract, express or implied, which such person has made touching the discharge of such trust, or willfully suffers any other person so to do, alleged to have committed criminal breach of trust.

13. What was agreed to rent out by virtue of leave and licence agreement is built up area of 2158 sq.ft. The fact that the said area of 2158 sq.ft. on the plot owned by the petitioners having sanction construction is duly admitted by the respondent No.2. As such, it cannot be said that the petitioners by their conduct have caused distrust thereby making the respondent No.2 suffer monetarily. As such, necessary ingredients of Section 406 of IPC cannot be inferred from the charge-sheet or the contents of the FIR.

14. As far as the ingredients of Section 420 of IPC are concerned, the petitioners at no point of time induced the respondent No.2 to deposit an amount of Rs.2,00,000/- towards security deposit and pay an amount of Rs.20,000/- per month with an inducement or delivering of the property other than built up area of 2158 sq.ft. and as such, offence of cheating cannot be inferred

against the petitioners in view of recitals and Schedule-I to the registered leave and licence agreement dated 10th August, 2021. The contents of Leave and Licence agreement speaks of the licence being granted for said built up area. As such, the very ingredients of Section 420 of the IPC cannot be inferred against the petitioners. Once it is inferred that the ingredients of offence under Section 406 and 420 of the IPC cannot be inferred against the petitioners, the offence under Section 34 of the IPC cannot be attracted in the facts of the case in hand.

15. The contention of respondent No.2 that the conduct of the petitioners has caused financial loss and damage to him. It shall be open to the respondent No.2 to initiate civil proceedings for recovery of such damage and compensation which shall be decided in accordance with law based on his contention of breach of contract.

16. The fact remains that in the aforesaid background, there is remote chance of the conviction of the petitioners in the offence alleged and the continuation of the criminal prosecution will cause extreme injustice to the petitioners/accused persons. The improbability of the offence alleged against the petitioners can be inferred from the leave and licence agreement dated 10th August, 2021. As such, support is drawn from the judgment of Supreme Court in the matter of ***State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.*** reported in ***AIR 1992 SC 604.***

17. The Apex Court in the matter of ***Vineet Kumar Vs. State of Uttar Pradesh & Anr.*** reported in ***(2017)13 SCC 369***, had an occasion to consider the scope of 482 of the CrPC and the eventualities in which the same can be taken recourse to. The Apex Court has held that if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed, the powers can be exercised. Similarly, in the above referred judgment ***State of Haryana Vs. Bhajan Lal*** reported in ***1992 Supp. (1) SCC 335***, the Apex Court has held that even if the allegations in the First Information Report are taken at its face value and accepted in their entirety do not *prima-facie* constitute any offence, powers of quashing can be exercised. In the case in hand, as from the aforesaid discussion, it can be inferred that even if the case of the respondent/complainant is accepted as it is, still it cannot be said that the offence can be said to have been constituted against the petitioners.

18. That being so, in our opinion, even if what has been stated in the charge-sheet and FIR is accepted, still no offence is made out against the petitioners as could be inferred from the leave and licence agreement dated 10th August, 2021. That being so, the present writ petition stands allowed in terms of prayer clause (A).

[R. N. LADDHA, J.]

[NITIN W. SAMBRE, J.]