

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

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WRIT PETITION NO.3123 OF 2018

1. Mohini Arun Sawant,	]	
Age : 49 years, Occ: Working	]	
	]	
2. Sayli Arun Sawant	]	
Age : 26 years, Occ:Working,	]	
	]	
3. Arun Arjun Sawant	]	
Age:60 years, Occ:Working,	]	
All residing at B-204, Swaroop	]	
Nagar CHS, Next to Jeena House,	]	
Om Nagar, J.B. Nagar, Andheri (East),	]	
Mumbai – 400 059	]	
	]	
4. Shakil Ahmed Khan	]	
Age 47 Yrs, Occ : Business,	]	
Muslim, Indian Inhabitant	]	
Resident of Maratha Sahakar Niwas,	]	
Room No.D-10/11, Mohili Village,	]	
Sakinaka, Andheri East,	]	
Mumbai-400072	]	Petitioners.

Vs.

1. The State of Maharashtra	]	
(at the instance of Sr.Inspector of	]	
police, MIDC Police Station, Andheri	]	
(E),Mumbai-400093.	]	
	]	
2. Mumbai Police Commissioner.	]	
C.P. Office, Crawford Market,	]	
Fort, Mumbai-400 001.	]	
	]	
3. The Secretary of Home Department	]	
State of Maharashtra, Mantralaya,	]	
Mumbai.	]	
	]	
4. Farooqui Izaz Ul Hak	]	
Presently residing at 2014/16,	]	

Haroon Manzil, 'B' Block,	]	
3 rd Floor, New Mill Road,	]	
Kurla (West), Mumbai-400 070	]	
	]	
5. Zahir Shaikh	]	
Having office at Shalimar Enterprises,	]	
Kadamwadi, Marol Pipe Line,	]	
Andheri, Kurla Road, Andheri (E),	]	
Mumbai - 400 059	]	
	]	
6. Mr. M.G.Singhal	]	
Asst.General Manager,	]	
Union Bank of India, Asset Recovery	]	
Branch	]	
	]	
7. General Manager,	]	
Union Bank of India,	]	
Both Respondent No.6 & 7	]	
Having address at :	]	
Union Bank of India, M.S.Marg	]	
Branch, 2 nd Floor, 66/80, Mumbai	]	
Samachar Marg, Dalal Street,	]	
Mumbai - 400 023.	]	Respondents.

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Mr. Prakash N. Wagh Advocate for the petitioners.

Mr. J. P. Yagnik, APP for State.

Ms Rebecca Gonsalvez, Advocate for respondent no.4.

Ms Sumedha Sawant, Advocate i/b Mainesh Amin for respondents no.6 and 7.

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**CORAM : Nitin W. Sambre
& R.N.Laddha, JJ.**

DATE : 11 July, 2023.

JUDGMENT (PER NITIN. W. SAMBRE, J):

1. Prayer in this petition is for quashing of the FIR and

consequential charge-sheet in Crime No.198 of 2018 for offences punishable u/Ss. 452, 454, 457, 380, 506(2) r/w 34 of the Indian Penal Code (for short 'IPC').

2. Prosecution story in brief is, respondent no.4 allegedly purchased the property at Kadamwadi, bearing flat No.302, third floor, Shalimar Apartment, Marol Pipeline, Kurla-Andheri road, Andheri (E), Mumbai, admeasuring 525 sq.ft. from the respondent no.5 proprietor of Zaheer Shaikh Associates, vide registered Sale Deed dated 16.3.2017. According to him, he remained in settled lawful possession of the said property. The petitioners have dispossessed him from the said property on 21.4.2018 which has resulted into registration of aforesaid offence.

3. Submissions of learned Counsel for the petitioners are, aforesaid property was in distress as the same was mortgaged with the Union Bank of India who has taken out the proceedings under the Secularization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act'). The petitioners is a auction purchaser of the said property based on registered Sale-deed dated 07.04.2018 and the Sale Certificate dated 01.03.2018 issued under Rule 9(6) of the Security Interest (Enforcement) Rules 2002. It is

the case of the petitioners that they were put in possession of the flat as could be inferred from the recitals of the said documents viz. sale deed and sale certificate executed by a nationalized Bank. According to learned Counsel for the petitioners, once the Bank in exercise of powers under the SARFAESI Act attached, auctioned and executed a sale-deed in favour of the petitioners with possession, the petitioners ought not to have been booked and prosecuted for the offence punishable u/s 452, 454, 457, 380, 506(2) r/w 34 of IPC. So as to substantiate his contentions, reliance is placed on the sale certificate so also the recitals in the sale-deed dated 07.04.2018 particularly about possession being handed over by the Respondent No. 7 - Nationalized Bank to him.

4. Aforesaid contentions are resisted by the learned APP, so also, learned Counsel for respondent no.4. Respondent no.4/Complainant claims that the title stood vested in his favour by virtue of Memorandum of Understanding dated 13.06.2016. According to the learned Counsel for Respondent no.4, the respondent no.5 has executed an Agreement of Sale of the flat in question in his favour on 16.03.2017 which was registered with the office of the Sub-Registrar, Andheri (Mumbai). It is further claimed, that the Supplementary Agreement was also registered

in continuation of aforesaid Agreement of Sale, on 8.5.2017. As such, it is claimed that respondent no.4 has perfected his title by virtue of aforesaid title-deeds by virtue of which he remained in lawful possession of the same. It is urged that settled possession of respondent no.4 is upset by the petitioners by taking recourse to illegal mode as could be gathered from the observations made in the bail application so also, in the order of the learned Magistrate passed during remand proceedings.

5. The learned APP submits that since from the very narration of FIR which discloses a cognizable offence cognizance was taken, investigation was carried out. As during investigation recovery is made, witness having mentioned about the offence being committed by the petitioners all of them came to be charge-sheeted.

6. We have appreciated aforesaid submissions.

7. As far as claim of vesting of lawful title and possession in favour of Respondent no.4, from respondent no.5 under the Memorandum of Understanding dated 13.06.2016, registered Agreement of Sale dated 16.3.2017 and Supplementary Agreement dated 8.5.2017 is concerned, the fact remains that it was well within the knowledge of the respondent no.5 that the property in question was mortgaged with respondent no.7 Bank.

Once the said fact was within the knowledge of respondents no.4 and 5 that the property was mortgaged with respondent no.7, before transferring the title in its favour, it was incumbent on the part of respondent no.5 to redeem the mortgage and equally it was duty of respondent no.4 to ascertain the clear title.

8. It is the case of the respondent no.4 that even if, his title is defective, once he is in settled possession, same cannot be upset by the very alleged criminal act taken recourse to by the petitioners. If we appreciate the said submissions, respondent no.4 has brought on record the report made of title search. The fact remains that respondent no.4 never bothered to get the title verified from the Union Bank of India. Respondent no.7 having noticed that the assets were in distress hence has taken lawful recourse to SARFAESI Act and have auctioned the property. The auction was never objected to by respondents no.4 or 5. Accordingly, sale certificate and sale deed dated 01.03.2018 and 07.04.2018 respectively, came to be executed in favour of the petitioners which contains recitals of handing over possession of the property in question, to the petitioners.

9. Hence, it has to be observed that for payment of valid consideration lawful title stood vested in the Petitioner pursuant to proceeding against Respondent No.5 under the SARFAESI

Act.

10. In the case in hand, the Petitioners are seeking quashing of the offence which is punishable under Section 452 - house-trespass after preparation for hurt, assault or wrongful restraint, Section 454 - lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment, Section 457- lurking house-trespass or house-breaking by night in order to commit offence punishable for the imprisonment, Section 380- theft in dwelling house, Section 506(2)-criminal intimidation with a threat or cause death due to grievous hurt.

11. We have already discussed hereinabove that the Petitioners were put in lawful possession of the property in question they being bonafide purchasers of the property under the SARFAESI Act. There is a presumption under the provision of the SARFAESI Act that the Petitioners' possession is lawful and in such an eventuality the burden shifts on the Respondents/Complainants to demonstrate that inspite of the possession being handed over by Nationalized Bank in auction process under the SARFAESI Act to the Petitioners, the Respondents continued in possession of the same. Rather we have discussed that the claim put forth by the Respondents

speaks of the defective title.

12. As far as offence of theft is concerned, it is specifically stated by the Respondent No. 4/Complainant in the FIR that he has purchased the property from Jahir Shaikh vide registered deed dated 16/03/2017. He has claimed that he is in the business of supplying manpower to overseas companies. According to him, he was using the aforesaid premises for the office purpose at which he has employed Elien James and Vikram More. He further claims that on 23/04/2018 when his employees reported for work, they were obstructed by the Petitioner No. 4-Shakil by issuing threats to kill i.e. offence under section 506(2).

13. According to him, when he went to the place, he could see around six people, who ran away from the spot. Upon inquiry with the society watchman, he was informed that the Petitioner No. 4-Shakil alongwith other accused persons including ladies broke open the lock of the aforesaid property and kept the goods in the property on the 7th floor. As such, according to him the goods which were stored on the fourth floor went missing.

14. In response to the prayer of the Petitioners for quashing, the Respondent No. 4-Farooqui has filed Affidavit stating that he has received back the possession of the flat in question with all the articles in it. The Respondent No. 4 has given no objections

for release of the Petitioners on bail whereas Petitioner No. 4-Shakil was released on pre-arrest bail.

15. If we appreciate the very essence of the offence alleged against the Petitioners punishable u/s. 380 for constituting the offence of theft there must be an intention to take dishonestly some movable property from the possession of others with an dishonest intention of having wrongful gain and wrongful loss to other persons. The fact remains that the complaint was lodged by the Respondent No. 4 alleging that he came to know from the watchman of the building that his belongings were kept on 7th floor. In that view of the matter, it cannot be said that the Petitioners had any intention to commit an offence of theft as defined u/s. 378 of the IPC as the entire belongings of the Respondent No. 4 were kept on the 7th floor. Hence, wrongful loss to Respondent/Complainant and gain to the Petitioners cannot be inferred out of alleged act of theft. Similarly, if we consider the claim of the Petitioners that the ingredients of Section 452 - house-trespass after preparation for hurt, assault or wrongful restraint, Section 454 - lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment, Section 457-lurking house-trespass or house-breaking by night in order to commit offence punishable for the

imprisonment what can be noticed is the Respondent No. 4/Complainant himself in the FIR has not stated that the incident of house trespass or house-breaking has occurred in the night and that being so the ingredients of the Section 457 cannot be inferred. Apart from above, the element of house-trespass or house-breaking will not be applicable to the Petitioners they being lawful purchaser of the property under the SARFAESI Act and were put in possession of the same by the officers of the Nationalized Bank. As such, the very ingredients of sections 452, 454, 457 of the IPC cannot be inferred against the Petitioners. The Respondent No. 4/Complainant himself has claimed that the police have put him in possession of the aforesaid property in question during the course of the investigation.

16. In the aforesaid background, it cannot be said that the Petitioners had any intention to grab the property as their title to the property appears to be lawful which is derived only after payment of consideration to respondent no.7-Bank i.e. after having purchased the property in auction under SARFAESI Act. Once the Petitioners becomes the lawful owner of aforesaid property and having noticed that Respondent No.4 had purchased the property from respondent no.5 without

ascertaining clear title to the same, it cannot be said that the petitioners had any criminal intention to commit an offence of criminal trespass.

17. In this background, we deem it appropriate to allow the petition thereby quashing the offence so also the charge-sheet against the petitioners.

18. It is clarified that quashing of offence and chargesheet will not come in way of rival parties to claim their right before the competent Civil Court.

[R.N.Laddha, J.]

[Nitin W. Sambre, J.]