IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 972 OF 2021

Naresh Kumar Vallabhbhai Paghdal and Ors. … Applicants.
Versus
State of Maharashtra and Anr. … Respondents.

Mr. Vijendra Kumar Rai, for the Applicants.
Ms. D.S. Shinde, APP for the Respondent-State.
Mr. Rahul S. Kadam, for Respondent No.2.

CORAM : NITIN W. SAMBRE &
SHARMILA U. DESHMUKH, JJ.

DATE : June 08, 2023.

ORDER (Per : Sharmila U. Deshmukh, J.):

1. Heard.

2. By this application, the Applicants seek to quash and set aside Criminal Case No.420/PW/2022 pending before the learned Metropolitan Magistrate, 40th Court, Girgaon, Mumbai arising out of C.R.No.125 of 2021, registered with Malbar Hill Police Station, Mumbai for the offences punishable under Sections 406, 420 and 34 of the Indian Penal Code, 1860.

3. Heard Mr. Vijendra Kumar Rai, learned counsel appearing for the Applicants, Ms. D.S. Shinde, learned APP for the Respondent-State and Mr. Rahul S. Kadam, learned counsel appearing for Respondent No.2.

4. The contention of the Mr. Rai, learned counsel for the Applicants is that the allegations in the FIR are contrary to the factual position. He would contend that a friend of the applicants had taken financial assistance from the Respondent No.2-complainant and upon demand of security, for the purpose of assisting Applicants' friend, the Applicants have signed and executed the MoU-cum-Declaration by keeping their own shop as security, which MoU is now sought to be enforced. Upon refusal by the applicants, the FIR has been lodged. He would further contend that even if, the market value of the said property is considered, the shop in the same vicinity would fetch corers of rupees and it is improbable that the premises would be agreed to be sold for a meager sum of Rs.5,00,000/-. He points out that the FIR in question has been registered in the year 2021 whereas the alleged sale transaction is of the year 2015. He would urge that the Respondent No 2 and his family members are habitual offenders and have filed numerous criminal complaints against different

parties. He seeks application of the decision of the Apex Court in case of State of Haryana & Ors vs Bhajan Lal and Ors AIR 1992 SC 604.

5. Mr. Kadam, learned counsel appearing for the Respondent No.2 has pointed out the order of the Gujarat Real Estate Regulatory Authority, at Gandhinagar, directing the Applicants to execute the registered sale deed in respect of the subject premises within a period of 45 days. He would further submit that the findings of the RERA Authority would make it clear that there was sale transaction between the Applicant and the Respondent No.2 and even after receipt of the amount with an intention to cheat and deceive, the Petitioners have failed to deliver the possession of the property.

6. We have considered the submissions of the parties. Before proceeding further it will be apposite to refer to the decision of the Apex Court in the case of *State of Haryana vs. Bhajan Lal, 1992 SCC (Cri) 426*, wherein the categories of cases by way of illustration was given wherein the power under Section 482 of Cr.P.C could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice although the list is not exhaustive as under:

"(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 F.I.R. 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 malafide 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."

7. The contention of Mr. Rai is that the criminal proceeding is malafide proceeding as the transaction in question was a security transaction and as such falls within category (7) above. The FIR has been lodged for offences under Section 406, 420 and 34 of IPC. The allegation is the Respondent No 2 Complainant proposed to start a charitable physiotherapy clinic in Surat under the aegis of their charitable trust in the year 2015 and upon being informed of the proposed project of the Applicant No 1 known as "Mansarover Residency and Plaza" visited the site and in the meeting with Applicant No 1 was handed over the title clearance certificate. Subsequently the purchase price was fixed at Rs 5,00,000/, which was paid via cheque. It is alleged that an affidavit cum

declaration cum undertaking was executed between parties which did not mention about any encumbrance on the property and possession was to be handed over within period of 6 months. It is the allegation that as possession was not handed over in the year 2019 search was taken of the project wherein it was revealed that the property has been mortgaged with Union Bank of India for sum of Rs 50,00,000/. As such the FIR came to be lodged.

8. The execution of the Affidavit cum declaration cum undertaking dated 14th September, 2015 is not disputed. Prior to the execution of the declaration on 14th September, 2015 the Applicant No 3 as partner of SRK Group has issued allotment letter dated 10th September, 2015 in name of the Respondent No 2's wife confirming the receipt of the purchase price and allotment of Unit No E/6. Thee clauses of the affidavit set out that as the Respondent No 2 desired to run a charitable physiotherapy clinic for free treatment of poor or middle class persons/patients suffering from paralysis under the management of a family trust, special considered price of Rs.5,00,000/- is agreed upon for the sale of the said premises. In our opinion, this clause in the affidavit in reply-cum-undertaking sufficiently answers the

objection of the learned counsel for the Applicant, as regards the alleged under valuation of the property. The finding of the RERA Authority as regards the alleged loan transaction between the Respondent No 2 and the Applicant's friend has held the alleged loan amount given to the friend of the Applicant was already repaid and, as such, negated this submission of the learned counsel of the Applicant. The order of RERA holds that the terms of the agreement are binding upon the parties.

9. Assuming that the affidavit-cum-undertaking was only meant as a security for the alleged loan transaction between the Applicant and the respondent No.2, there is no answer to the question as to why sum of Rs 5,00,000/ was accepted from the Respondent No 2's wife and allotment letter issued. There is also no answer forthcoming as to why the sum of Rs 5,00,000/ was retained and not returned till the filing of the FIR. A submission is now made that the Applicants are ready to return the money, which cannot be accepted. The submissions which are raised before this Court enter into the realm of disputed questions and requires evidence to be led in the matter. Pertinently the RERA order is passed on 26th July, 2021 and having failed before RERA, the present proceedings are filed on 18th

October, 2021.

10. We are mindful of the fact that the present proceedings seek quashing of FIR alleging offences under Section 406 and 420 of IPC. The quashing is sought by seeking to apply the category (7) of the decision of the Apex Court in the case of State of Harayana & Ors vs Bhajan Lal & Ors. Considering the allegations in the FIR, we do not find that the proceedings in question are malafide or maliciously instituted. Considering the allegations, viz. the suppression of the fact of the property being mortgaged with the Union Bank of India and non-fulfillment of handing over of the property in spite of receipt of the entire consideration, *prima facie*, satisfies the ingredients of the provisions of Sections 406 and 420 of the IPC.

11. The entrustment of the money to the Applicants and subsequent misappropriation of the said amount contrary to the terms of the contract which was entered into between the parties, *prima facie*, constitutes the offence of criminal breach of trust. As regards the offence under section 420 of the IPC is concerned, the deception is *prima facie*, established by the allegations in the FIR inasmuch as, the Applicant induced the Respondent No.2 to part with valuation

consideration, knowingly while that the entire property was subject to an encumbrance with Union Bank of India and in spite of having received the consideration failed to hand over the possession of the property. In light of the above, the case in hand does not fall with any of the parameters, which have been laid down by the Apex Court in the case of **Bhajan Lal** (supra).

12. In view of the above, no case for indulgence is made out and the application stands dismissed.

13. Needless to state that the observations made herein above, are only for the purpose of adjudicating the present application for exercise of powers under Section 482 of the Code of Criminal Procedure, 1973 and the Trial Court is directed to decide the matter uninfluenced by the observations made herein.

[Sharmila U. Deshmukh, J.] **[Nitin W. Sambre, J.]**