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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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RESERVED ON –12.05. 2023
PRONOUNCED ON – 03.07.2023

+ **CRL.M.C. 1537/2023, CRL.M.A. 5860/2023**

SHIV KUMAR & ANR.

..... Petitioners

Through: Mr. Siddharth Aggarwal, Sr Adv.
 with Mr. Siddharth Luthra, Sr. Adv.
 with Mr. Karan Bharihoke, Mr. Harsh
 Yadav, Ms. Arshiya Ghose, Mr.
 Wattan Sharma, Mr. Ashish Batra,
 and Mr. Sarthak Sachdev, Advocates.

versus

STATE OF NCT OF DELHI & ANR.

..... Respondents

Through: Mr. Amit Sahni, APP for the State
 with Inspector Mehrab Alam,
 EOW/New Delhi
 Mr. Vijay Aggarwal, Mr. Divyanshu
 Bhardwaj, Mr. Pankush Goyal and
 Mr. Kartik Kaushik, Advocates for
 respondent no.2.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA



JUDGMENT

DINESH KUMAR SHARMA,J :

Overview

1. The present petition has been filed under Section 482 Cr.P.C. seeking quashing of FIR No. 7/2022 dated 18.01.2022 under sections 406/420 r/w 120B of IPC registered at PS EOW, Delhi.
2. The said FIR was lodged on the complaint of respondent No.2, Shivraj Krishna Gupta, against the petitioners, alleging therein, that the petitioners systematically conspired through wilful misrepresentations and duped the complainant to invest a substantial amount of Rs 16 crores approx. (along with assured returns/interest @ 12.5% p.a. till possession which was to be given by 31.07.2019), in a luxurious Golf Resort villa project in Goa undertaken by the petitioners through their company M/s Leading Hotels Limited. It was alleged that in February 2015, one Mr. Girish Sareen (CA and Financial Adviser & Funds arranger for the petitioners and their Group Companies) made false representations with respect to the said project and induced the complainant to entrust the petitioners with his money. The complainant alleged that he was assured by Mr. Girish that the project was in collaboration with a world renowned USA chain namely Four Seasons and that the petitioners also owned Asian Hotels (North) Ltd (the parent company of M/s Leading Hotels Limited) owning several luxurious hotel chains such as Hyatt Regency, New Delhi, and thus the project would be one of a kind and very safe to invest in. It was misrepresented to the complainant that for the project all the necessary



licenses, clearances and permissions to build the residential villas have been granted. The complainant trusting the petitioners and Mr. Girish paid Rs. 9,90,00,000/- towards the sale consideration of the villa. Subsequently, allotment letter and Builder buyer Agreement were made. Thereafter, in 2017 Mr. Girish approached the complainant on the pretext of shortage of funds to complete the project and sought an amount of Rs. 7.45 crores as short term loan @ 12.5% p.a. on the assurance of faster completion of the complainant's villa. Believing this, the complainant further paid Rs. 7.45 crores through his company BKG Corp. Ltd. as an Inter Corporate Deposit (ICD) vide cheques issued from January 2017 to August 2018. Out of the Rs. 7.45 crores an amount of Rs. 2.05 crores was returned, thereby leaving an outstanding balance of Rs. 5.40 crores in addition to Rs. 9,90,00,000. Thereafter the complainant learnt that no construction or development was taking place due to ongoing litigation before NGT. Complainant was given further reassurances that the project is proceeding well and in order to gain further confidence he was issued Cheques as security of the money along with part period interest cheques all dated between January 2021 & March 2021. The said cheques were deposited after apprising the petitioners, and were dishonoured with remark 'payment stopped/account closed'.

3. It was alleged that the intent to cheat was evident as the petitioners duped the complainant of his life savings under the false pretext of building World Class Villas despite knowing that the land on which the project was to be made was in litigation before NGT since 2014/ 2015, of which the undersigned was not aware. It was alleged that the business operandi of the petitioners was to control his parent Company Asian Hotels (North) Ltd through a web of Overseas Companies so that none of his personal assets in



India can be attached for his criminal activities committed here. It was alleged that thus the petitioners committed offences of cheating, criminal breach of trust and misappropriated funds. Basis the said allegations, the impugned FIR was lodged.

4. The main grounds of the petitioner for seeking the quashing of the present FIR are as follows:

- a) The FIR was registered with malice and ulterior motives, containing concocted and fabricated allegations while suppressing vital facts.
- b) The present dispute is purely contractual in nature, but it has been given a criminal colour to evade pending civil proceedings and browbeat the petitioners.
- c) The FIR fails to establish any cognizable offense. Additionally, charging both “criminal breach of trust” under Section 406 IPC and “cheating” under Section 420 IPC for the same transaction is contradictory.
- d) The complainant maliciously registered the FIR without disclosing the entire chain of events and without any inducement on the part of the petitioners, who always acted in good faith.

Background Facts

5. Briefly set out the facts as per the petition are that the petitioner No.1 at the relevant time was the MD of M/s Leading Hotels Limited, a private limited company with its registered office in New Delhi. Petitioner No. 2, the son of petitioner No.1, served as a Non-Executive Director.

6. The said company in the year 2011, initiated a luxurious Golf resort Project, thereby acquiring around 250 acres of land in Pernum Talukha, Goa



and made substantial investments for the purchase of the land and its construction. The company obtained various statutory approvals totaling 61 approvals from various authorities. The Company also entered into Agreements with Four Seasons Hotels Limited for providing advisory and resort management services. The said Agreements were executed on 07.10.2013. Thus, it has been contended that it was the company's endeavor to develop the said project from its very inception.

7. Allegedly, sometime in the year 2015, Respondent No. 2 sought to invest monies through his Companies namely Victor Cables Corporation Limited as an Inter Corporate Deposit (ICD) at an annual interest of 12.5% p.a. payable monthly. At the relevant time, Respondent No. 2 was also issued cheques of the entire ICD amount along-with interest as security. The Agreement was valid for a period of one year with the sums refundable on demand.

8. The ICDs were advanced between 27.02.2015–02.03.2015 for a sum of Rs. 5,00,00,000/- (Rupees five crores only). Subsequently, an amount of Rs. 55,00,000/- was also extended as ICD on 25.06.2015. Interest was duly paid on the aforesaid amounts until the same were all repaid in August 2015.

9. Thereafter, in August, 2015, Respondent No. 2 wished to replace the ICD monies given by Victor Cables with his personal money and was desirous to book a villa in the aforesaid project in his favour. It has been averred that although a villa allotment letter was issued, the money was actually extended as a loan only. Respondent No. 2 was given post-dated cheques of the entire amounts as security and accordingly, an allotment letter dated 30.07.2015 was issued in favour of Respondent No.2. The Terms and Conditions of the allotment letter stipulated completion of the



Golf Resort by 31.07.2019, with a grace period of 12 months, subject to force majeure clause.

10. Subsequently, a letter dated 31.07.2015 was also issued to the Respondent No. 2 entitling him to an assured return @ 12.50% p.a. payable monthly subject to TDS deduction till 30.09.2016, which could be extended. Further, the said letter also stipulated that the agreement can be cancelled at the option of Respondent No. 2, subject to two month's cancellation notice in advance. However, respondent No. 2 voluntarily renewed the terms as contained in the said letter every year, thus making it a purely financial loan transaction.

11. Thereafter, from 26.05.2015 to 29.08.2015, the complainant further advanced an amount of Rs. 9.99 crores on assured returns @ 12.50% interest p.a. This amount too was refundable on demand and renewable at the option of the Complainant. The said amount was further secured by way of cheques. It has been contended that thus, in essence, the terms governing the ICD with Victor Cables were extended to the amounts extended by the Complainant personally as well. It has been contended that the said amount was extended as a loan and is evident from the fact that the amount was repaid/refunded to Victor Cables upon receipt of funds from Respondent No. 2. It has been also pointed out that Respondent No. 2 never met the Petitioners either before or after the amounts mentioned above were advanced or till such time the FIR was filed. There was no personal interaction whatsoever with the Respondent No. 2 at the time of the abovementioned transactions.

12. Further, on the amount of Rs. 9.90 crores, the Company paid an interest from September 2015 to July 2019 in terms of the understanding



arrived at between the parties. The total gross amount of interest paid by the Company was Rs. 4,92,63,961/-. The said amount was inclusive of the TDS amounting to Rs. 49,26,415/- which was duly deposited with the concerned authorities.

13. The fact that the said transaction was a in fact a loan is evident from the subsequent renewal letters dated 31.07.2015, 30.09.2016, 30.09.2017, 01.09.2018, 23.06.2020, 24.06.2020 & 01.09.2020. It is submitted that if there was indeed a villa purchase transaction there was no occasion to renew the terms on an annual basis or to secure the entire amount received by post-dated cheques which were given to Respondent No. 2 as evident from the annual renewal letters. Therefore the understanding between the parties very clearly was that if at any point in time the Respondent No. 2 wanted to withdraw the money, he was in a position to cancel the transaction at his own will and also to use the cheques to get his money back. The provision of the cheques for the entire amount of loan itself shows that there could be no intention to cheat at the inception.

14. Allegedly, from 01.10.2015 till 08.11.2017, the Respondent No. 2 being satisfied with the returns, further invested an amount of Rs. 7.5 crores as ICD through Victor Cables. The said amount was repaid in full by 24.01.2018 along with interest totalling to Rs. 73,87,843/- including TDS. It is submitted that the aforesaid refunds belie any intention to cheat, let alone since the inception. It is clear from the above that the Company made all the payments upon demand by Respondent No. 2, which clearly reflects that at no point, did the Company and/or its officials had any dishonest intentions to usurp the money of Respondent No. 2 as sought to be alleged in the FIR,



let alone any dishonest intention from the beginning to cheat upon Respondent No. 2.

15. Further, it has been alleged that the Respondent No. 2 being extremely satisfied with the high rate of interest and monthly continuous payments since 2014, started another ICD through another company of his namely BKG Corp Limited and advanced an amount of Rs. 7.55 crores from 16.01.2017 to 21.08.2018. The Company upon demand returned an amount of Rs. 2.15 crores from 27.03.2018 to 20.03.2019, thereby leaving an outstanding balance of Rs. 5.40 crores. Further, interest was also paid to BKG till February 2020 which amounted to Rs. 1,73,15,337/-.

16. Allegedly, for the project's development, Leading Hotels Ltd. obtained various approvals and permissions, completed the architectural work, and made progress in clearing the site and implementing certain infrastructure works. A 500 KVA transformer and live load connection had been installed on the site. Borewell works had been completed at the site. While, construction was in progress, the Bombay High Court imposed a stay on all construction works at the site, except for allowing to work on Experience Centre vide its order dated 12.07.2019 in PIL WP No. 32/2017 and PIL WP No. 518/2018. It is thus, in these circumstances that the Project came to a halt and could not be proceeded by the Company on account of various litigations including but not limited to stay order dated 12.07.2019. As a result of the aforesaid ongoing litigation, the development of the project suffered immensely.

17. However, the Complainant till 2020 never raised any objection qua any issues regarding the construction or development of the Villas as the real intention of the complainant was never to actually purchase a villa,



rather the sole intent behind the transaction was a loan transaction. There is not a single correspondence issued by the Complainant from 2015-2019 whereby he sought any information from the Company regarding the status or construction of the villa. Thus, it is clear that the Complainant did not ever invest in any villa contrary to the allegations made in the FIR.

18. Complainant last renewed the Agreement on 24.06.2020. Again, postdated cheques were issued as security. Qua these postdated cheques, S. 138 proceedings were initiated by the Complainant at Gurgaon. These proceedings qua P2 have been stayed by the Punjab and Haryana High Court vide order dated 26.07.2021 passed in CRM-M-28751-2021.

19. It has been averred that details of the ongoing litigation were duly disclosed by the company in the Director's Report, demonstrating transparency about the project's legal challenges. Despite this, certain financial and operational creditors initiated insolvency proceedings against the company before the National Company Law Tribunal (NCLT) bearing CP IB 1053 (PB)/2020, whereby, vide order dated 25.06.2021, the NCLT initiated Corporate Insolvency Resolution Process (CIRP) proceedings and appointed a Resolution Professional (RP) to manage the company's affairs, thereby suspending the Board of Directors. It has been averred that the complainant is a member of the Committee of Creditors (CoC), and his claims have been admitted by the Resolution Professional.

20. Moreover, the complainant in his email dated 13.05.2021 to Mr. Girish Sareen, stated and admitted that the petitioner No.1 - Mr. Jatia has neither returned the principal amount nor paid the interest. It further stated Rs. 15.5 Crores as the principal. It has been alleged that similar admission was made in the email dated 19.07.2021. However, what is pertinent to note



is that there was not even a whisper of any villa or cheating or criminal breach of trust from the complainant.

21. As pointed out above, since the financial position of the Company deteriorated due to the various litigations and the stay order which resulted in a complete halt of the development of the Project, as a result the Company was unable to pay any further interest. However, the Complainant persisted to renew the said Agreements and the last agreement between the Company and the Complainant was on 24.06.2020 in which post-dated cheques of Rs. 9.99 crores were given to the Complainant.

22. However, amidst the ongoing litigations and insolvency proceedings, in 2022, after many years, the complainant maliciously filed a complaint before the EOW, Delhi. It has been alleged that the said complaint was registered as an F.I.R, in less than two hours from its filing which is evident from the FIR itself, without conducting any preliminary enquiry, even though the present Complaint was in relation to a commercial transaction.

23. The Petitioners were issued a notice under Section 41-A of Cr.P.C. on 20.01.2022 whereby the petitioners were directed to comply with certain directions contained in the said notice. Another notice dated 22.01.2022 was issued seeking certain replies and records which were duly submitted vide reply dated 27.01.2022. Thereafter, Petitioners were again served with a 41-A, Cr.PC notice on 04.02.2022 seeking further information which was duly responded vide reply dated 09.02.2022. Further, notices were issued on 24.03.2022, 28.03.2022 and 07.06.2022. It is pertinent to mention that the Petitioners have been served with the above notices under Section 41-A CrPC directing them to comply with various directions contained therein on multiple occasions for reasons best known to the Investigating Agency.



Petitioners aver that the repeated notices directing to comply with the same directions is nothing but an abuse of the process of the law with the sole intent to intimidate the Petitioners at the instance of the Complainant.

24. The Chargesheet in the present case was filed on 10.08.2022 and allegedly the petitioners had no intimation of the same.

25. Thereafter the petitioners approached the Hon'ble Supreme Court vide W.P. (Crl) 71 of 2023 which was disposed of vide Order dated 24.02.2023 with the liberty to file appropriate proceedings before this Court within the time stipulated. Hence, the instant petition.

Submissions on behalf of the Petitioners

26. Sh. Siddharth Luthra, Sh. Siddharth Aggarwal, Ld.Sr. Advocates along with Sh. Karan Bharihoke Ld. Counsel for the petitioner submits there are material suppressions and malicious concealment of vital facts in the FIR which have intentionally and deliberately not been disclosed in order to give the present civil dispute a criminal colour and are as follows:

- a) Earlier investments made by Victor Cables through ICD's and return of the amount so invested along with interest by the Company;
- b) Payment of a total interest of Rs 1,73,15,337 between February 2017 to February 2020 by the Company to BKG Corp;
- c) Payment on Interest amounting to Rs 4,92,63,961 from September 2015 to July 2019 by the Company on the amount of Rs 9.99 Crores paid by the complainant towards purchase of the Villa;
- d) Proceedings us 138 of NIA initiated by respondent No.2 for same the amount of Rs. 9.99 Crores, wherein Punjab and Haryana HC vide Order dated 26.07.2021 in CRM-M-28751-2021 seeking



quashing of summons has stayed the proceedings qua Petitioner No. 2;

- e) Proceedings before the NCLT and the CoC wherein respondent No.2 and its company have submitted their claims which have been duly admitted.
- f) The date of completion of project with grace period in terms of the allotment letter was subject to force majeure. The present case was clearly a case of force majeure on account of the stay order of the Bombay High Court.
- g) The factum of Stay in further construction in the subject project by the Bombay High Court;
- h) The disclosure regarding the stay on construction in the Directors Report presented by the Company.
- i) The FIR has been maliciously registered by the complainant without disclosing the entire chain of events which would show the correct picture that there was no inducement by the petitioners whatsoever, who have always acted bona fide.

27. Ld. Sr. Counsel for the petitioner submitted that the present FIR has been filed maliciously to give a purely civil and contractual dispute a criminal colour. Ld. Counsel submits that the Respondent No. 2 under the garb of criminal proceedings sought recovery proceedings against the petitioners by coercing them to recover amounts paid by them in the company under insolvency. A bare perusal of the present complaint/ FIR, and the facts as detailed above, is sufficient to reveal that the dispute is of a civil nature and resorting to criminal justice system to settle the same is gross abuse and misuse of the law.



28. It is further submitted that the Respondent No. 2 has already availed the civil remedy of filing a claim in the CIRP Process. The FIR in question is merely an attempt to intimidate the petitioners. Reliance has been placed on *Vijay Kumar Ghai v. State of WB*, (2022) 7 SCC 124, whereby, the Hon'ble Supreme Court *inter alia* observed as under:

“25. This Court has time and again cautioned about converting purely civil disputes into criminal cases. This Court in Indian Oil Corpn. [Indian Oil Corpn. V. NEPC India Ltd., (2006) 6 SCC 736: (2006) 3 SCC (Cri) 188] noticed the prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. The Court further observed that: (Indian Oil Corpn. case [Indian Oil Corpn. v. NEPC India Ltd., (2006) 6 SCC 736: (2006) 3 SCC (Cri) 188], SCC p. 749, para 13)

“13.... Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged.”

29. Reliance has also been placed on *Mitesh Kumar J. SHA v. The State of Karnataka*, 2021 SCC OnLine SC 976, whereby the Hon'ble Apex Court *inter alia* observed as under:

“47. Moreover, this Court has at innumerable instances expressed its disapproval for imparting criminal color to a civil dispute, made merely to take advantage of a relatively quick relief granted in a criminal case in contrast to a civil dispute. Such an exercise is nothing but an abuse of the process of law which must be discouraged in its entirety.”

30. Ld. Sr. Counsel submitted that in addition to the above pointed fallacies, it is also imperative to examine that none of the ingredients of the penal provisions invoked in the FIR have been made out or established.



31.Ld. Sr. Counsel submits that the offences under Sections 406 and 420 IPC cannot be charged together in the same transaction. Ld. Counsel to buttress this contention has invited the attention of this court to the judgement in **Wolfgang Reim & Ors v. State & Anr**, 2012 SCC OnLine Del 3341, whereby it was categorically held as under:

“27.The essential ingredients of the offence of criminal breach of trust are (1) entrustment with property or with any dominion over property and (2) dishonest misappropriation thereof. Partners of the firm do not hold property in trust for each other.....In order to establish 'entrustment of dominion' over property to an accused person the mere existence of that person's dominion over the property is not enough. It must be further shown that his dominion was the result of entrustment.

34. Further, a person cannot be charged with the offence of cheating and criminal breach of trust simultaneously for the same transaction because for the offence of cheating, it is a prerequisite that dishonest intention must exist at the inception of any transaction whereas in case of criminal breach of trust, there must exist a relationship between the parties whereby one party entrusts another with property as per law, therefore, for commission of criminal breach of trust, the dishonest intention comes later, i.e, after obtaining dominion over the property by the accused person whereas for commission of cheating, dishonest intention of the accused has to be present at the inception of the transaction.”

32. Ld. Sr. Counsel submits that the transaction was purely a loan and further submits that even for the sake of argument if it be taken as a villa purchase, the delay in the project was caused due to Stay Orders passed in judicial proceedings which were beyond the control of the petitioners and fell within the ambit of force majeure. The factums of



orders were duly disclosed in the Directors Report of the Company every year. Hence, it cannot be said that the petitioners had an intention to cheat since the inception. In fact, refunds and payment of interest were made regularly coupled with the fact that various approvals were procured by the company, highlights the very efforts made by the Company and belies any intention to cheat.

33.Ld. Sr. Counsel refers to the seminal judgement in *State of Haryana v. Bhajal Lal & Ors.*, AIR 1992 SC 81, whereby the Hon'ble Apex Court highlighted the following illustrative categories wherein the power under Section 482 of the Cr.P.C. ought to be exercised by the High Courts to prevent the abuse of process of law and to secure the ends of justice:

“102.(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)....

(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) ...

(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) ...

(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.”

34. Ld. Senior Counsel submits that the present case is squarely covered by the above illustrations contained in 1, 3, 5 & 7 of ***Bhajan Lal*** (supra) and that the continuation of the impugned criminal proceedings would be an abuse of the process of law. Thus, the petitioner seeks quashing of the present FIR.

35. With respect to the effect of the chargesheet being filed, Ld. Counsel for the petitioner submits that the Chargesheet in the present case was filed on 10.08.2022 and the petitioners had no knowledge of the same. Ld. Senior Counsel relies on the judgement in ***Anand Kumar Mohatta v. State (NCT of Delhi)***, (2019) 11 SCC 706, and submits that there is no bar to quash the proceedings even after the charge sheet has been filed.

36. Ld. Senior Counsel submits that the FIR alleges that the Petitioners had induced Respondent No. 2 through one Mr. Girish Sarin who acted as their agent. Ld. Senior Counsel submitted that however Girish Sarin has not even been charge-sheeted. Ld. Senior Counsel submits that the Petitioners have never met Respondent No. 2, before filing of the FIR. Given the same, the offence of neither 420, nor 406 can be read with 120B and the FIR must be quashed on this ground alone.

37. Ld. Senior Counsel for the petitioner vehemently contests the legal propositions raised by the respondent No.2 and submits that the present petition does not pray for partial quashing of the FIR as alleged and seeks quashing of the entire FIR qua the Petitioners, which is permissible, given that the company M/s Leading Hotels Ltd is already underway CIRP proceedings. Ld. Senior Counsel submits that even part quashing of an FIR



is allowed. Reliance has been placed on *Lovely Salhotra v. State (NCT of Delhi)*, (2018) 12 SCC 391, wherein it was *inter alia* held as under:

“3. We have taken into account the facts of the matter in question as it appears to us that no cognizable offence is made out against the appellants herein. The High Court was wrong in holding that the FIR cannot be quashed in part and it ought to have appreciated the fact that the appellants herein cannot be allowed to suffer on the basis of the complaint filed by Respondent 2 herein only on the ground that the investigation against co-accused is still pending.”

38. Reliance has been further placed on the judgement of this Court dated 14.02.2023 in W.P.(CRL) 2247/2021 titled *Tamanna Batra & Anr. vs State & Anr.* which has reiterated the above legal position on partial quashing of an FIR.

39. Ld. Senior Counsel for the petitioner further submits that the witness statements and documents relied on in the chargesheet, is of no relevance to case at hand, in as much as the Court at this stage is not to conduct a mini trial. On the face of FIR and chargesheet, no offences have been made out.

40. Ld. Senior Counsel for the petitioner submits that the judgement relied by the complainant/respondent No.2 titled *State of Bihar v. PP Sharma*, 1992 Supp. 1 SCC 222 is misplaced, as the same does not preclude this Court from exercising jurisdiction where in the face of the FIR/Complaint, the ingredients of the offences are not disclosed and it is apparent that the complaint/FIR is mala fide, frivolous and vexatious.

41. Ld. Senior Counsel further submits that the judgement in *Neeharika Infrastructure v. State of Maharashtra*, AIR 20201 SC 1918, referred by the Complainant is also of no avail. The said case was confined to the contours of issue with regard to passing of interim orders qua investigation.



In fact, the said case supports Petitioners, in so far as it upholds the plenitude of power possessed by High Court u/s 482.

42. The filing of WP (Crl.) No. 750/2023 by the Complainant has no bearing on the present case. It has been submitted that in fact, the said petition, *inter alia*, prays for further investigation by R1/EOW in FIR No.7/2022, as the Complainant himself is not happy with the same.

43. Ld. Counsel further submits that the contents of the application under Section 340 filed by Complainant in the present matter, merely reiterate the contents of their reply to the petition to somehow contend that the Petitioners have made a false statement. However, no ingredient for the invocation of Section 340 has been made out by the Complainant/R2, and the said application deserves to be dismissed outrightly.

Submissions on behalf of the Respondent No.1/State

44. Ld. Addl. PP for the State submitted that there were cognizable offences made out in the FIR and after thorough investigation the chargesheet has been filed. Therefore, the present petition is liable to be dismissed. Ld. Addl. PP has additionally adopted the arguments made by the Ld. Counsel for the respondent No.2.

Submissions on behalf of the Respondent No.2/Complainant

45. Sh. Vijay Aggarwal Ld. Counsel for the respondent No. 2 raised a preliminary objection with respect to the date of the petition vis a vis the date of the accompanying affidavits stating that the petition was dated 02.03.2023 whereas the affidavits were dated 01.03.2023. Ld. Counsel submits that it is thus clear that there was no accompanying petition/application to the affidavit on the date of attestation of the affidavit



dated 01.03.2023, implying that the said affidavit may also contain false averments.

46. Ld. Counsel submits that the complainant aggrieved of the misdeeds of Petitioners and M/s Leading Hotels Ltd., filed a Criminal complaint dated 28.12.2021 against them at EOW, Delhi, and after due enquiry, the present FIR No. 7/2022 dated 18.01.2022 came to be lodged and subsequently a Chargesheet dated 10.08.2022 was filed.

47. Ld. Counsel submits that the present petition is being filed seeking to quash FIR No. 7/2022 at a stage when pertinently the investigating agency after carrying out thorough investigation has already filed the charge sheet qua the petitioners, and now matter is pending for consideration on cognizance/further proceedings.

48. It has been submitted that the Chargesheet has also been filed against M/s Leading Hotels Ltd., which is under IRP, and since there are certain grave allegations against it, the present FIR cannot be quashed without making the company a party to the present petition. It is trite that the FIR is with respect to an offence, cognizance u/s 190 CrPC is taken of an offence, however summoning is of the offenders. Thus, M/s Leading Hotels Ltd. ought to be made a party to the present Petition.

49. Ld. Counsel further submits that vide order dated 13.04.2023 this Court directed the Registry to supply the copy of the chargesheet in digital format, however, only limited material was brought before this court containing only Vol I of the chargesheet, instead of the entire chargesheet which contained several key material evidences collected during investigation including but not only limited to Witness statements, Various agreements, Copy of minutes of meeting of Board of Directors etc.



50. Sh. Vijay Aggarwal submitted that the petitioners have concealed material information from this Court and have played fraud and the same has been revealed during investigation conducted by Respondent No.1. It has been submitted that the land upon which the Villa is to be constructed is mortgaged with Yes Bank, and the same has not been disclosed to the Respondent No.2.

51. Ld. Counsel further submitted that during investigation the reply from the Sarpanch, Village Panchayat Querim, Tiracol, Pernem, Goa was obtained which stated that construction license issued to M/s Leading Hotels Limited was granted for carrying out the construction of one sample executive villa and one sample 4-bedroom villa which lapsed in 2019 and thereafter the same was not renewed. Ld. Counsel submitted that in the letter dated 24.06.2020 issued by M/s Leading Hotels Ltd. in reference to the allotment of villa that the amount paid by the Respondent no.2 is for the purchase consideration of the villa, and not any loan as stated by the Petitioners.

52. Ld. counsel submits that the Petitioners have not come with clean hands before this Court and have played fraud by making false averments in their Petition, and for which the Respondent No.2 has preferred an application u/s 482 /w 340 CrPC r/w 195 IPC before this Court for offences committed by Petitioners for giving false statements/documents/concealment of material facts. It has been submitted that application under section 340 Cr.P.C. be decided first. Reliance has been placed on *MCD vs. State*, (2005) 4 SCC 605 and *Union of India v. Haresh V. Milani* WP (ST.) No. 4899 of 2017.



53. Ld. Counsel for the respondent submits that the petitioner(s) are deliberately trying to give a colour of pure civil litigation to safeguard themselves from the punishment and imposition of fine which are actually purely criminal act (s).

54. Sh. Vijay Aggarwal submitted that the pleas taken by the petitioners have already formed part of the record and were considered by the Respondent No. 1/EOW and after thorough investigation the role of Petitioners have been detailed in the Chargesheet.

55. Moreover, it has been argued that the FIR cannot be quashed once the chargesheet has been filed. Ld. Counsel relies on the judgements in ***M.L. Bhat Vs. M.K. Pandita & Ors.***, 2002 SCC Online SC 1300, and ***State of Bihar and Another Versus P. P. Sharma, IAS and Another***, 1992 Supp (I) SCC 222.

56. Ld. Counsel submits that the present petition is not maintainable as the Chargesheet has been filed by the Respondent No. 1/EOW, and the prayer made by the Petitioners is only to the extent of seeking quashing of the present FIR.

57. Ld. Counsel submits that this court cannot act like an investigating agency and nor can exercise the powers like an appellate court. Ld. Counsel has invited the attention of this court to ***Dinesh Bhai Chandubhai Patel vs. State of Gujarat***, (2018) 3 SCC 104.

58. Ld. Counsel further argues that the test laid down in ***Neeharika Infrastructure Pvt. Ltd. vs State of Maharashtra and Ors.*** CrI. Appeal No. 330 of 2021 (supra) and ***State of Bihar and Anr. vs PP Sharma, IAS and Anr.*** (supra) must be satisfied and the power of the quashing should be exercised sparingly and with circumspection.



59. Ld. Counsel thus pleads that the allegations raised in the FIR have been thoroughly investigated and has been culminated into the chargesheet wherein offence w/s 120B/420/406 IPC have been found to be committed by the Petitioners and M/s Leading Hotels Ltd. Hence, the Accused persons need to be tried by the court of law, and therefore the present Petition is premature and is nothing but abuse of the process of law which is liable to be dismissed.

Findings & Analysis

60. In the present case it has been alleged that Complainant was induced by petitioners to purchase a Villa in the Goa Project. It is further alleged that complainant was assured guaranteed return of 12.5% till date of possession. Allegedly, the Complainant, acting upon inducement, paid an amount of Rs. 9.99 Crores in 2015, however, till date, possession has not been handed over. It is further alleged, that the Complainant was induced to invest in Inter Corporate Deposit (ICD) by the petitioners wherein he was assured high rate of interest. Complainant's company. BKG Corp Ltd invested Rs 7.55 Crores. Out of this an amount of Rs 2.05 Crores was returned leaving a balance of Rs 5.40 Crores. Based on the aforesaid allegations, it is the case of the Complainant that the petitioners have allegedly cheated the complainant and have allegedly criminally misappropriated the amounts advanced by the Complainant.

61. The machinery of the criminal justice system should not be wielded as an instrument of intimidation and harassment. Apparently, present dispute pertained to Loan transactions thereby being of a civil commercial nature. The present FIR was lodged in 2022 i.e., after seven years as the offence is stated to have been committed in 2015.



62. In a recent judgement in ***R. Nagender Yadav v. State of Telangana***, (2023) 2 SCC 195, the Hon'ble Apex Court propounded the law on 482 Cr.P.C. and *inter alia* held:

“19. While exercising its jurisdiction under Section 482CrPC, the High Court has to be conscious that this power is to be exercised sparingly and only for the purpose of prevention of abuse of the process of the court or otherwise to secure the ends of justice. Whether a complaint discloses a criminal offence or not, depends upon the nature of the act alleged thereunder. Whether the essential ingredients of a criminal offence are present or not, has to be judged by the High Court. A complaint disclosing civil transaction may also have a criminal texture. But the High Court must see whether the dispute which is in substance of a civil nature is given a cloak of a criminal offence. In such a situation, if civil remedy is available and is in fact adopted, as has happened in the case on hand, the High Court should have quashed the criminal proceeding to prevent abuse of process of court.”

63. In the recent past there has been a growing trend in lodging of frivolous FIR's by giving civil disputes the garb of criminal matters in order to harass and intimidate the accused. It is settled law that to remedy the fate of lodging such frivolous FIR's and setting the criminal justice into motion, this Court under its inherent power under section 482 CrPC quash such FIR's in justifiable cases in order to prevent the abuse of the process of the courts or to secure the ends of justice.

64. Thus, applying the above principles to present case, makes it manifestly clear that the present dispute is predominantly of a civil commercial nature and has been given the garb of criminal case by filing of the present FIR.



65. There is force in the contentions of Ld. Senior counsel for the petitioners that certain facts reveal a malafide intention to give a criminal colour to a purely civil commercial dispute. The fact that amount invested through earlier ICD's of Victor Cables were duly returned along with interest. It is also a matter of record that payment of a total interest of Rs. 1,73,15,337/- was duly made between February 2017 to February 2020 by the Company to BKG Corp . It is also relevant to note that the payment on Interest amounting to Rs 4,92,63,961 from September 2015 to July 2019 was made by the Company on the amount of Rs 9.99 Crores paid by the complainant which shows there was no intention to cheat at any time.

66. It is also pertinent to mention that there is an admission of claims of complainant and BKG as a financial creditor in the CIRP which reflects that this is a purely civil dispute. Since the company itself has been placed under moratorium, the present FIR can be said to be an abuse of process of law as civil proceedings are already ongoing between the parties prior to the registration of the present FIR.

67. A perusal of the detailed reply of the respondent No.2 reveals that the earlier monies deposited time to time by the respondent were duly paid back. The content of the reply corroborates the case of the petitioner. It can be seen that on same day the complainant deposited the money the money was paid back to Victor Cables. It is the case that earlier Victor Cable had invested the money, however the complainant wanted this money to be substituted from his personal account. Thus on the same the money was paid.

68. Moreover, at the time when the deposits were made, cheques were issued simultaneously as security which means there was no malafide on the



part of the petitioners. The general trend is that interest is not paid against allotment letters. However in the present case, interest was regularly paid till 2019, which implies that the present transaction is indeed a loan transaction. Moreover, the respondent No. 2 in his communications never enquired or asked regarding the development, progress or possession of the villa and only enquired about return/ repayment of the principal amount along with interest accrued thereon. Thus taking into account the totality of the facts, the present dispute seems to be civil in nature and has been deliberately given a criminal colour. With respect to the allegation that the land of the subject property was mortgaged to YES Bank and this fact was not apprised to the complainant it is pertinent to note that the very terms and conditions of the Allotment authorised the company to raise finance/loan from banks.

Clause 16 of the Terms provides as under:

“16. That the Applicant hereby authorizes and permits the Company to raise finance/loan from any financial institutions/banks by way of mortgage from any financial institutions/banks by way of mortgage/ charge/securitisation of receivables of the said Luxury Villa subject to the Said Luxury Villa being free of any encumbrances at the time of execution of Lease Deed in favour of the Applicant and the company shall disclose to the Bank/Institution in respect of number of villa booked and amount collected therefrom and it would not affect the right of the applicant to raise loan against booking of villa under this application.”

69. In the Reply dated 09.02.2022 of the petitioners to the 41A notice it was stated that the company Leading Hotels Limited made disclosures of all loans taken by the Company, including the loans from Yes Bank Ltd., in its Balance Sheets and Audited accounts in the relevant years.



70. These transactions denote that the petitioners were engaging in fund raising activities in order to complete and develop the project, which again reflects no malice or intention to cheat or defraud on the part of the petitioners. Further, the order passed by the Bombay High Court granting stay was in 2019 which again shows lack of malice since inception of the project.

71. With respect to the contention that the present petition only seeks quashing of the FIR and not the chargesheet, despite filing of the chargesheet and that no subsequent application has been filed seeking amendment of the prayer is a mere technicality. This Court does not agree with the contention raised by the respondent No.2 to the effect that the petition is liable to be dismissed on this ground as this is a mere technical defect and the Courts must not weigh into hyper technicalities which can always be rectified and cured. The procedure is the hand maiden of Justice and abuse of the process of the Court cannot be allowed to be perpetuated merely on some technical flaws.

72. Admittedly, the petitioners and the complainant never personally met or interacted. As per the complainant's own version one Mr. Girish induced him, if at all, to invest in the said project. The money along with interest were regularly repaid. Monies were returned, along with interest as well as postdated cheques were issued as security. The correspondences of the complainant itself states that the principal amount and interest amount have not been returned, hence the said transaction can be said to be in the nature of a loan transaction.

73. It is pertinent to mention the fact that the said transaction was in fact a loan is evident from the subsequent renewal letters dated 31.07.2015,



30.09.2016, 30.09.2017, 01.09.2018, 23.06.2020, 24.06.2020 & 01.09.2020. Ld. Sr. Counsel for petitioner submitted if there was indeed a villa purchase transaction there was no occasion to renew the terms on an annual basis or to secure the entire amount received by post-dated cheques which were given to Respondent No. 2 as evident from the annual renewal letters. Therefore the understanding between the parties very clearly was that if at any point in time the Respondent No. 2 wanted to withdraw the money, he was in a position to cancel the transaction at his own will and also to use the cheques to get his money back. The provision of the cheques for the entire amount of loan itself shows that there could be no intention to cheat at the inception.

74. The Hon'ble Supreme Court in ***Prof R K Vijayasarathy & Anr vs. Sudha Seetharam & Anr***, CrI A No. 238/ 2019 arising from SLP (CRL) No. 1434/2018 while quashing the proceedings inter alia held as under:

“11. The High Court, in the exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure, is required to examine whether the averments in the complaint constitute the ingredients necessary for an offence alleged under the Penal Code. If the averments taken on their face do not constitute the ingredients necessary for the offence, the criminal proceedings may be quashed under Section 482. A criminal proceeding can be quashed where the allegations made in the complaint do not disclose the commission of an offence under the Penal Code. The complaint must be examined as a whole, without evaluating the merits of the allegations. Though the law does not require that the complaint reproduce the legal ingredients of the offence verbatim, the complaint must contain the basic facts necessary for making out an offence under the Penal Code.”

75. There are increasing instances where frivolous FIRs are being filed by one of the parties to initiate criminal proceedings against the opposite one,



solely to harass or intimidate them. However, this practice has been deprecated by the Supreme Court of India time and again in a catena of judgements.

76. It is settled proposition that for establishing the offence of cheating, the complainant is required to show in the FIR that the accused had fraudulent or dishonest intention at the time of making promise or representation. It is also settled proposition that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. It is pertinent to mention that even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code, 1860 can be made out. Thus, criminal proceedings shall not be encouraged when it is found to be malafide or otherwise an abuse of the process of the court.

77. In *Sushil Sethi v. The State of Arunachal Pradesh*, (2020) 3 SCC 240, it was *inter alia* held that when a dispute between the parties constitute only a civil wrong and not a criminal wrong, courts should not permit a person to be harassed.

78. The contention of the Ld. Counsel of respondent No.2 that as chargesheet has already been filed and hence the FIR should not be quashed, lacks merit and is untenable. It is trite law that an FIR or any proceedings can be quashed at any stage provided this court feels the justifiable reasons for doing so and can quash even an FIR even after filing of the chargesheet. Further with respect to the contention that the prayer has not been amended



to quash the chargesheet again has no substance, as if, the FIR itself is quashed, all the consequent proceedings emanating therefrom will de facto be impugned. It is the bounden duty of the Court to exercise its inherent jurisdiction under 482 Cr.PC in order to prevent the abuse of the process of the court or to secure the ends of justice.

79. The Karnataka High Court in Crl. P. 8947/2018 titled ***Sri G Anjana Reddy and Anr. vs. State by Jeevan Bheemnagar Police Station*** held that:

“25. Having given our anxious consideration, we are of the view that assuming that there is a security deposit of rupees one crore and that he has misappropriated the dispute between the two parties can only be a civil dispute.

26.The Court noticed a growing trend in business circles to convert purely civil dispute into criminal cases.

27. We find it strange that the complainant has not made any attempt for the recovery of the money of rupees one crore except by filing this criminal complaint. This action appears to be mala fide and unsustainable.

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“30. It is necessary here to remember the words of this Court in State of Karnataka v. L. Muniswamy [State of Karnataka v. L. Muniswamy, (1977) 2 SCC 699 : 1977 SCC (Cri) 404] which read as follows : (SCC p. 703, para 7)

“7. ... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding 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 saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or



persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice.”

80. Section 482 Cr.P.C. confers jurisdiction upon the High Court to issue directions to prevent abuse of the process of any court or otherwise to secure the ends of the justice. It is a settled proposition that the power under Section 482 Cr.P.C. is to be exercised sparingly only to prevent the abuse of process of the court or otherwise to secure the ends of the justice. The power under Section 482 Cr.P.C. is the inherent power and there cannot be any inflexible route which may govern the exercise of inherent jurisdiction. However though the powers possessed by the High Court under Section 482 Cr.P.C. are very wide but the same has to be exercised with caution. In the present case as has been discussed in details the parties were already having commercial transactions. The complainant had advanced loans to the company of the petitioners. The loans were being repaid alongwith the interest. Allegedly in 2015 there was a cross-entry of money transaction and at that time an allotment letter was issued.
81. The case of the complainant is that he paid the money against the allotment of a Vila whereas the case of the petitioner is that it was a money transaction and complainant got the allotment letter issued only to secure his interest. It is a matter of record and not disputed by the complainant that along with the allotment letter another letter was issued regarding payment of interest with an option to the complainant to terminate the contract with a notice. The issuance of such letter from time



to time and payment of interest undisputedly shows that it was a money transaction. Be that as it may be on the face of it no criminality appears to have been done on the part of the petitioners. It is also pertinent to mention that the Complaint was made after much delay of around 7 years. This court is of the considerate view that this is a fit case where power under Section 482 is to be exercised as criminal colour has been given to a civil dispute. There is always a thin line between civil and criminal remedies in the disputes arising out of commercial transactions. It is correct that FIR is not an encyclopedia and need not contain all the facts. But the High Court in its inherent jurisdiction has to appreciate the facts in totality to reach on a conclusion. The opinion of the court would certainly depend on the factual matrix of each case. It is also pertinent to mention that every breach of terms and conditions of the contract cannot be termed as an offence. It is also relevant to note that the petitioners were never arrested in this case. The perusal of the charge-sheet indicates that IO did not conduct any investigation on the pleas taken by the petitioner vide their reply dated 09.02.2022 submitted to IO. It is also pertinent to mention that though the complaint as per FIR bears the date of 28.12.2021 but the same was received at police station on 18.01.2022 at 15:05 hrs. and the FIR was lodged at 16:54 hrs. The period of offence as per FIR is 01.01.2015 to 31.12.2015 which indicates towards inordinate delay.

82. Apparently the FIR was lodged after filing of the complaints under Section 138 of NI Act and proceedings were initiated before NCLT. The factum of litigations were in public domain as having been declared in Director's report.



83. In view of the discussions made herein above, FIR No. 7/22 dated 18.01.2022 under sections 406/420 r/w 120B of IPC registered at PS EOW, Delhi and all the proceedings emanating there from are quashed.

DINESH KUMAR SHARMA, J

JULY 03, 2023/AR