



Neutral Citation Number 2023:DHC:4028

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

% *Order pronounced on :30.05.2023*

+ **CRL.M.C. 1900/2018**

GOPAL JOHARI

..... Petitioner

Through: Mr. J. Sai Deepak, Mr. Varun Dewan,
Mr. Pranav Krishna, Mr. Abvinash
Sharma, Mr. R. Abhishek and Mr.
Harsh, Advocates.

versus

THE STATE GOVT OF NCT OF DELHI & ORS

..... Respondents

Through: Ms. Rachna Agrawal, Advocate for
R-2 and 3.
Mr. Rohit Priya Ranjan, Mr. Sanket
Mishra and Ms. Srishti Sonkar,
Advocates for R-4 & 5.

+ **CRL.M.C. 1923/2018**

GOPAL JOHARI

..... Petitioner

Through: Mr. J. Sai Deepak, Mr. Varun Dewan,
Mr. Pranav Krishna, Mr. Abvinash
Sharma, Mr. R. Abhishek and Mr.
Harsh, Advocates.

versus

STATE (NCT OF DELHI) & ORS

..... Respondents

Through: Mr. Rohit Priya Ranjan, Mr. Sanket
Mishra and Ms. Srishti Sonkar,
Advocates for R-2 & 3.

CORAM:

HON'BLE MR. JUSTICE TALWANT SINGH

Talwant Singh, J.:

1. The petitions mentioned above had challenged a common order dated 01.12.2017 passed by learned Additional Sessions Judge, South District in

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Criminal Revision Petition Nos. 8451/2016 and 8442/2016. These petitions were disposed of by this Court on 24.02.2023. Thereafter the applicant/petitioner moved Crl.M.A.12586/2023 in Crl.M.C.1900/2018 and Crl.M.A. 12587/2023 in Crl.M.C. 1923/2018 praying as follows:-

“It is, therefore, humbly prayed that this Hon’ble Court may graciously be pleased to: -

A. Allow the present Application for modification, and modify Order dt. 24.02.2023 passed by this Hon’ble Court in terms of para 6 of the present Application;

B. Pass such other order and/or directions as this Hon’ble Court may kindly deem fit and proper in the facts and circumstances of the case in favour of the petitioner”.

1.1 In brief history, the petitioner/applicants had mentioned as under:-

“1. The humble petitioner had filed Criminal Misc. Petitions being CRL. MC. 1900/2018 and CRL. MC. 1923/2018 against the composite Judgment and Order dt. 01.12.2017 passed by Learned Special Judge (PC Act) CBI-01, South), Saket Courts, New Delhi in Criminal Revision No. 8451 of 2016 and Criminal Revision No. 8442 of 2016, whereby the Revisional Court dismissed Revision Petition No. 8451/2016 filed by the Petitioner challenging the non-summoning of respondents Dinesh Kumar Garg and Smt. Chitra Garg, and also, allowed Revision Petition No. 8442/2016 filed by respondents Anup Diwan and Dr. Arun Srivastava, setting aside their summoning order.

*2. The said two petitions were disposed of by a common order dated 24.02.2023, certified copy whereof is annexed herewith and marked as **Annexure-A/1**. In Order dt. 24.02.2023, it was observed by the Hon’ble Court as under:*

*“ **Para 1.** Learned counsel for the petitioner in both the petitions, after some lengthy arguments, submits under instructions of the petitioner, who is present in person, that he does not intend to press the present petitions and same may be allowed to be dismissed as withdrawn, **with liberty to initiate proceedings under Section 423 IPC against the respondents.***

Para 4.** Learned counsel for the petitioner further submits that the respondents are liable to be prosecuted under Section 423 IPC **but this Section was never been invoked before the learned Metropolitan Magistrate or before the Court of learned Sessions

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Judge, where the revision petitions were pending and he is raising this point for the first time before this Court.”

“Para 8. Oder dated 01.12.2017 passed by Learned Special Judge (P.C. Act) CBI-01, South, Saket Court New Delhi in Crl. Rev. P. 8451/2016 and Crl. Rev. P. No.8442/2016 has become final, as challenge to the same has been withdrawn.”

“Para 9. Leave and liberty is granted to the petitioners to pursue the civil suit already pending before this Court, and also to take any steps under Section 423 IPC, if not already agitated before learned Metropolitan Magistrate or learned Additional Sessions Judge, at any point of time. It is made clear that this Court has neither condoned the delay nor has expressed any opinion about maintainability of any proceeding’s u/s 423 IPC, for which leave has been sought. Learned Trial Court has to take call regarding maintainability of any such petition, as and when filed, keeping in view the fact as to whether any similar ground was already raised or not in any proceedings as well as the ground of limitation.”

1.2 As per the petitioner, the correct facts had not been appreciated in the right context as no fresh proceedings under Section 423 of Indian Penal Code, 1860 (hereinafter referred to as ‘IPC’) have to be initiated, as learned Magistrate as well as learned Sessions Judge had failed to consider the applicability of Section 423 IPC on the facts of the case, when the same was pending before them. In fact, the petitioner had invoked Section 423 IPC at both the stages, *i.e.*, before the learned Trial Court as well as the learned Sessions Court. Under the above mentioned circumstances, the modification of order dated 24.02.2023 was prayed for.

1.3 The matter was taken up on 12.05.2023 and the order passed on the said date is reproduced hereunder:-

“CRL.M.A. 12586/2023 in CRL.M.C. 1900/2018
CRL.M.A. 12587/2023 in CRL.M.C. 1923/2018

1. The petitioner has moved these applications with the following prayer:

“A. Allow the present Application for modification, and modify Order dt. 24.02.2023 passed by this Hon’ble Court in terms of para 6 of the present Application;

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B. Pass such other order and/or directions as this Hon'ble Court may kindly deem fit and proper in the facts and circumstances of the case in favour of the petitioner."

2. Mr. J. Sai Deepak, learned counsel for the petitioner has submitted that at the time when the request for withdrawing the petition was made by the earlier counsel, inadvertently, it was not brought to the notice of this Court that Section 423 IPC was already invoked before the learned Trial Court as well as before the Court of Sessions and later on, it was noticed that although, it was ordered by this Court that the petitioner is at liberty to take appropriate steps to proceed further by invoking Section 423 IPC, but the order passed by this Court on 24.02.2023 will come in the way of the petitioner as Section 423 IPC was already invoked but was not considered by the Courts below.

3. Issue notice.

4. Ms. Rachna Agrawal accepts notice on behalf of the respondents.

5. Heard.

5.1 Since, the order dated 24.02.2023 was passed on the submission of the learned counsel for the petitioner that Section 423 IPC was not invoked till date, which is factually not correct; hence, with the consent of the parties, the order dated 24.02.2023 allowing the petitioners to withdraw the petition is hereby recalled and set aside.

5.2 The application is disposed of accordingly.

CRL.M.C. 1900/2018 & CRL.M.C. 1923/2018

6. Part arguments heard.

7. Both the parties shall file two-page synopsis before the next date of hearing after exchanging copies with each other.

8. List the matter for final arguments on 16.05.2023 in the post-lunch session".

1.4 The main petitions were revived and final arguments were heard on 16.05.2023, when learned counsel appearing on behalf of the petitioner, who was also present in person before the Court, under instructions, submitted that he was confining his challenge to the impugned order only to the extent of invocation of Section 423 read with Section 120B IPC, meaning thereby that the order of the learned Session Judge dated 01.12.2017 is admitted as final as far as findings regarding applicability of Section 406 and Section

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420 read with Section 120-B IPC were concerned. The order dated 16.05.2023 is reproduced hereunder:-

“CRL.M.A. 12586/2023 in CRL.M.C. 1900/2018
CRL.M.A. 12587/2023 in CRL.M.C. 1923/2018

1. At the outset, learned counsel appearing on behalf of the petitioner, under instructions of the petitioner, who is present in the Court, has submitted that he is confining his petition to challenge the impugned order only to the extent of invocation of Section 423 read with 120B IPC, meaning thereby that the petitioner accepts as final the judgement of the learned Sessions Judge vide impugned order dated 01.12.2017 as far as applicability of Section 406 and 420 read with Section 120B IPC is concerned.
2. Moreover, it has been brought to my notice by the learned counsel appearing on behalf of the petitioner that the application moved by the petitioner under Section 482 Cr.P.C. seeking modification of order dated 24.02.2023 is also confined to Section 423 read with 120B IPC.
3. The parties shall file and ensure that the written submissions, of not more than two pages each, along with citations, if any, are placed on record within a period of two days from today.
4. Arguments heard on Section 423 read with Section 120B IPC.
5. Judgement reserved.”

1.5 Section 423 IPC, which sought to be invoked by the petitioner herein, is reproduced hereunder:-

“423. Dishonest or fraudulent execution of deed of transfer containing false statement of consideration.—Whoever dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

1.6 Learned counsel appearing on behalf of the petitioner submits that, since inception, specific allegations against all the respondents have been made with respect to commission of offence under Section 423 read with Section 120-B IPC but the learned Trial Court as well as the learned Sessions

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Court have failed to take cognizance of the same. It has been submitted that Agreement to Sell dated 06.01.2006 executed by respondent nos. 4 and 5 (Vendors) and respondent no.2 (Vendee) is a fraudulent and sham document as the statement regarding consideration in this document is a false statement and the document has been fraudulently executed under a criminal conspiracy hatched by respondents to defeat the rightful title of the petitioner under an earlier Agreement to Sell dated 12.11.2002. The entire sale consideration is stated to be received by respondent nos. 4 and 5 from respondent no.2 by way of two cheques, both dated 05.01.2006, being cheque no. 206017 for Rs. 32 lakhs and cheque no. 206018 for Rs. 22 lakhs. Out of these cheques, only first cheque of Rs. 32 lakhs was got encashed by respondent nos. 4 and 5 and second cheque of Rs. 22 lakhs was never handed over by respondent no.2 to respondent nos. 4 and 5 and the said amount remained in the account of respondent no.2 till date. Mere preparation of demand draft dated 01.05.2006 in the name of the petitioner and its subsequent cancellation on 23.09.2006 does not cure the illegality with respect to false statement regarding sale consideration recorded in Agreement to Sell dated 06.01.2006 inasmuch as this amount of Rs. 22 lakhs was never paid to respondent nos. 4 and 5. The IO has not investigated as to whether the amount of Rs. 22 lakhs was indeed transferred from respondent no.2 to respondent nos. 4 and 5. Hence it is to be presumed that necessary ingredient of Section 423 read with Section 120B IPC in respect of false statement regarding sale consideration stands satisfied. Moreover, there is no reason specified as to why the sale consideration of Rs. 54 lakhs was split into two parts, i.e., Rs. 32 lakhs and Rs. 22 lakhs as the component of Rs. 22

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lakhs was exactly the same as the earnest money paid by the petitioner to respondent nos. 4 and 5. Since the intended beneficiary was the petitioner, so the amount of Rs. 22 lakhs was never meant to be part consideration as intended beneficiaries were not respondent nos. 4 and 5. It has been further submitted that there is no need by the petitioner, who is stated to be third party, to be privy to the contract for invoking Section 423 read with Section 120-B IPC particularly, when the contract itself has been executed for defeating the rights of the third party, i.e., the petitioner. It has been submitted that the petitioner has *locus standi* to file the present petition.

1.7 Reliance has been placed on paragraph 6 of the judgment tilted as ‘*A.R. Antulay vs. Ramdass Srinivas Nayak & Anr.*’ 1984, AIR 718, which is quoted hereunder:-

*”It is a well recognised principle of criminal jurisprudence that anyone can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary. The Scheme of the Code of Criminal Procedure envisages two parallel and independent agencies for taking criminal offences to court. Even for the most serious offence of murder, it was not disputed that a private complaint can, not only be filed but can be entertained and proceeded with according to law. **Locus Standi of the complaint is a concept foreign to criminal jurisprudence save and except that where the statute creating an offence provides for the eligibility of the complainant....** While Sec. 190 of the Code of Criminal Procedure permits anyone to approach the Magistrate with as complaint, it does not prescribe any qualification the complainant is required to fulfil to be eligible to file a complaint. But where an eligibility criterion for a complainant is contemplated specific provisions have been made such as to be found in Secs. 195 to 199 of the Cr.P.C. **These specific provisions clearly indicate that in the absence of any such statutory provision, a locus standi of a complainant is a concept foreign to criminal jurisprudence.** In other words, the principle that anyone can set or put the criminal law in motion remains intact unless contra-indicated by a statutory provisions.”*

1.8 Reliance has been also placed on paragraph 18 and 19 of the judgment

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tilted as '*G. Ramesh vs. State*', *Crl. O.P. 17701 of 2013 of High Court of Madras*, which is quoted hereunder:-

"Para 18. It is yet another submission of learned counsel for the Petitioner that presently the property has been sold to one Muthukumar by the defacto-complainant and his father and therefore, the defacto-complainant is not the owner of the property as of now, and he has no locus standi to lodge the complaint

Para 19. But the material available on record would show that, as contended by the learned counsel for the 2nd Respondent/ defacto-complainant, that the possession of the property is still with the 2nd Respondent and the same was not conveyed to the said Muthukumar. Further, there is an indemnity clause in sale agreement to the effect that the defacto-complainant should take care of any dispute with regard to the property. Therefore, it is incorrect to state that the 2nd Respondent defacto-complainant has no locus standi to lodge the complaint, as he is not totally alien to the subject property. Under such circumstances, I do not find any force in the submissions made by the learned counsel for the Petitioner. Absolutely no case has been made out to quash the Complaint and the present petition is liable to be dismissed".

1.9 Reliance has been placed on paragraph 3 of the judgment tilted as '*Devi Dass vs. Mohan Lal*', *AIR 1982 SC 213*, which is quoted hereunder:-

"Para 3. The appellate authority, rejected the tenant's case on the view that tenant could not challenge the validity of the sale deed executed in favour of Mohan Lal because the tenant was not a party to it. We do not think this was a correct view to take. An allegation had been made that in reality there was no sale and the sale deed was a paper transaction."

1.10 Reliance has been also placed on paragraph 17 of the judgment tilted as '*K. Ashoka vs. N.I. Chandrashekar & Ors.*', (2009) 5 SCC 199, which is quoted hereunder:-

"Para 17. Whether the allegations made in the complaint petition are correct or not have to be considered during trial. The High Court in its impugned judgment proceeded inter alia on the premise that the appellant has no locus standi. It may be true that Gopal and Hanumanth gowda had not been impleaded as accused but that by itself may not be a ground for quashing the order of cognizance taken against the respondents. If the role played by them in regard to that part of the conspiracy is only to make Gopal a member and got the land allotted in

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his name by way of camouflage, appellant as a member of society had a locus standi to file a complaint.

1.11 Reliance has been placed on paragraph 8 of the judgment tilted as '**Raj Narain Aggarwal vs. Baij Nath Khanna**', 1983 SCC online Del. 177, which is quoted hereunder:-

"Para 8. Mr. L.R. Gupta, on behalf of the tenant, has mainly relied on a recent decision of the Supreme Court in Devi Dass v. Mohan Lal, A.I.R. 1982 S.C. 1213. In that case the plea of the tenant was that the sale was a sham transaction, The courts below took the view that he could not raise this objection. So no finding was recorded on that point. The Supreme Court held that he was entitled to challenge the sale transaction as sham. The case was remitted for a finding on the point raised by the tenant. The tenant had alleged that the sale deed is a sham transaction and that no right, title or interest had passed to the landlord, Mohan Lal, under that document, The facts of that case were peculiar, One Jugal Kishore, father of Mohan Lal, the landlord in that case executed a sale deed in the name of his son Mohan Lal, acting as the mukhtiar of Jagirilal and Vasdey, The tenant's plea was that this was done in order to create a ground of ejectment against him because on earlier occasions several applications filed by Jugal Kishore as mukhtiar of Jagirilal and Vasdev for ejectment of the tenant had been dismissed against him. On this plea of the tenant the Supreme Court took the view that there was no sale and the sale deed was merely "a paper transaction" if the tenant's plea is correct. Therefore, the lower court was required to record a finding on this point.

9. This is not the case before me. The sale deed is of the year 1947. The question of ejectment of the tenant arose only recently when the petition was filed in 1981. If there is a sham sale in order to create a cause of action in favour of the so-called landlord so that the tenant can be evicted from the property forming the subject matter of sale, I think, it is open to the tenant to allege that the sale is a sham transaction and that the sale deed was executed merely to eject him from the property. The Supreme Court seems to be saying that if the sale is sham nothing passes by the conveyance which is no more than a paper transaction. And if there is a casual connection between the sham sale and the tenant's ejectment the court must find out what is the true nature and character of the sale. All the circumstances, past and present, will have to be seen. The tenant cannot be turned away merely by saying: "you have no locus standi". He has a stake. The sham sale is made, to evict him and for no other purpose. That was the kind of case before the Supreme Court. That was not a case of benami transaction."

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1.12 There is no dispute regarding the respective ratios of these judgments but the facts of the present case, which are discussed herein below, are quite unique; hence these judgments are not applicable to the facts of the case in hand.

1.13 On behalf of respondent nos.2 and 3, it has been submitted that the present petition is not maintainable as it is actually a second revision petition in the garb of a petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'). As far as CrI.M.C. 1923/2018 is concerned, it has been submitted that inherent powers cannot be exercised when the statutory remedy is available. Section 423 IPC can be invoked only by the parties, who are signatories to the document and not by a third party. None of the party to the agreement has alleged that there was any dishonest or fraudulent execution of Deed of Transfer containing false statement of consideration. Moreover, respondent nos.4 and 5 have never alleged that they have not received full consideration from respondent no.2. Total consideration is Rs. 54 lakhs, duly mentioned in the document in question, with complete details of the two cheques. Moreover, there are two concurrent findings of facts *qua* the alleged allegation under Section 423 IPC, so the said findings cannot be disturbed under Section 482 Cr.P.C. and the petition is liable to be dismissed. There is no illegality or perversity in the impugned orders *qua* the findings on the allegation under Section 423 IPC, so the petition, being an abuse of the process of law, is liable to be dismissed. The petitioner is not the purchaser and hence, he is not entitled to invoke this section. Section 423 IPC was not the ground initially taken when the FIR was registered, which was only under Section 420/406/120-B

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IPC. This aspect was duly investigated subsequently by the investigating officer in terms of directions passed by the learned ACMM vide order dated 08.06.2011 and the investigating officer filed a closure report dated 23.09.2009 stating that no offence was made out. Although the petitioner has alleged that Agreement to Sell dated 06.01.2006 is a sham document but in the suit filed by him, he has not sought any relief *qua* cancellation of the document or declaration to declare the said document to be null and void and no such issue has been framed in the civil suit in respect of the said Agreement to Sell. The petitioner is trying to give a colour of criminal dispute to a civil dispute and he wishes to arm-twist the respondents, hence it has been prayed that the petition may be dismissed with costs.

1.14 The arguments on behalf of respondent nos.4 and 5 are also on the same lines.

2. After hearing all the parties to the petitions, my considered view is as under:-

2.1 The starting point of the entire dispute is the FIR No. 52/2008 dated 18.03.2008. The relevant portion of the said FIR is reproduced below, where specific allegation has been made:-

“Thus, Mr. Anoop Diwan and Mr. Arun Srivastava had conspired with Mr. Dinesh Garg and Mrs. Chitra Garg to illegally sell my property even when a valid legal agreement was in force/part payment stood made by me and thereby caused wrongful loss to me. All the accused persons have tried to cheat me by entering into a conspiracy on 31.01.06. Mr. Prabhaka Garg is the witness of all illegal document's. I also fear that amount of Rs. 54.00 lacs shown as sale consideration was part of a sham transaction and the said amount was never, paid by Mr. Dinesh Garg through the cheques cited in the same. I, therefore, pray that accused persons may be brought before the law for the unlawful act of purchasing my property illegally and on the basis of fabricated documents and false affidavits filed by them before the L&DO”.

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2.2 This FIR was registered in Police Station: Economic Offences Wing under Section 406/420/120-B IPC. The final report under Section 173 Cr.P.C. was submitted. The said final report contains the finding of the investigation regarding consideration as under:-

“As per complainant he paid Rs. 22 lacs out of the agreed amount of sale of Rs. 54 lacs and in fact the complainant took the physical vacant possession of the 1st and 2nd floor of the building. It is not the case of the complainant that the alleged persons have never applied for the permission to sale the property before L&DO. It is admitted by the complainant that the alleged persons had applied for permission and the alleged persons kept on contesting for the sale permission of the building from L&DO for the next three years and in the meantime the alleged persons handed over the vacant possession of the buildings 1st floor and 2nd floor to the complainant. The withdrawal of the application by the alleged persons is not amounts to offence of cheating. In these circumstances, it is clear that offence u/S 420 IPC r/w 120B IPC is not made out. Basically the allegation of the complainant are seems the matter of breach of the agreement and complainant has also filed a suit for specific performance.

There are no allegations that alleged persons dishonestly misappropriated or converted to their own use the money paid to him in respect of agreement for sale, in violation of any directions of law or that the accused dishonestly used or disposed of the money or that accused acted dishonestly. In the present case the money was given against an agreement and even the possession of the part portion of the part portion of building was given to the complainant. Hence in the absence of particular mens rea no offence u/S IPC is made out.

xxx

...He further alleged that when he was convinced that the complainant has no intention to pay the balance amount, he (Arun Srivastava) sent the letter dated 03.01.2006 to the complainant informing about expiry of Agreement. Further the complainant refused to accept the refund of Rs. 22,00,000/-. A bank draft toward refund of aforesaid amount was also sent to the complainant by Registered Post which he refused to take and later the same Bank Draft was offered through written statement in the Hon'ble Delhi High Court in OMP No.203 of 2006 filed by the complainant which he again refused to accept. The OMP has already been dismissed by Delhi High Court vide Order dated 26.8.2008. Thereafter complainant subsequently filed Suit No. CS (OS) 354/2007. Despite it complainant

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continuing in possession of entire first floor.

xxx

During the investigation of this case it is also not proved that accused dishonestly misappropriated or converted to his own use the money paid to him in respect of agreement for sale in violation of any directions of law or that the accused dishonestly used or disposed of the money or that accused acted dishonestly. Accused persons are also inclined to return Rs. 22 lakhs and to that effect a draft was also prepared which was not accepted by the complainant. In the present case the money was given against an agreement and even the possession of the part portion of building was given to the complainant and in the absence of particular mens rea no offence U/s 406 IPC is found to be made out. Further as per complainant he received a letter where he mentioned that agreement dated 12.11.2002 has been cancelled the letter is dated 03.01.2006 and as per the complainant the seller had already entered in an agreement of sale with one Dinesh Garg on 03.01.2006. In these circumstances when agreement dated 12.11.2002 was only an agreement to sell, hence these allegations are not covered to connect alleged with commission of offence u/s 420 r/w 120B IPC. Opinion in the present case was also taken from the prosecution/legal branch.

xxx

From the investigation conducted and evidence collected (both oral and documentary), it is evident that the allegations of the complainant are of civil in nature: Accordingly, this Cancellation u/s 173 Cr.P.C. has been prepared. It is, therefore, respectfully prayed that the same may kindly be accepted u/s 173 Cr.P.C. List of documents and witnesses, relied upon are enclosed herewith for kind perusal"

2.3 This closure report was considered by the learned ACMM on 08.06.2011 and he was pleased to pass the following order directing further investigation as under:-

"FIR No. 52/08

PS EOW

08.06.2011

Present:

Ld. APP for the State.

None for the applicant.

On the earlier occasion, I have heard the arguments on an application U/s 173 (8) Cr.P.C.

Record perused.

After giving due consideration. I think the further

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investigation is required in terms of para 8 of the said application. IO is directed to further investigation the matter and file report with reply / clarification para wise vis a vis para 8 of application U/s 173 (8) Cr.P.C.

Case file be handed over to IO for further investigation.

Copies of order sheets and application be kept for record.

Put up for status report and consideration on 30.08.2011”

2.4 Further closure report was filed on 13.12.2013, which was running into about 2000 pages, including the annexures.

2.5 In this closure report issue no.3 raised by the present petitioner and the outcome of the investigation regarding the allegation that Agreement to Sell dated 06.01.2006 is sham document, is as under:-

“Objection No. III: *The Investigating Officer has not examined the conspiracy of the accused persons and more particularly the accused persons Anup Dewan, Arun Shrivastava, Dinesh Garg and Chitra Garg in so far as the agreement of sale deed dated 06.01.2006 was a sham document as the sale consideration said to have been received was Rs.54,00,000/- (Rupees fifty four lacs only) when only Rs.32,00,000/- (Rupees third two lacs only) was only paid by Mr. Dinesh Garg. The remaining amount of Rs.22,00,000/- (Rupees twentytwo lacs only) was always with Dinesh Garg”.*

Response No. III: *In the Agreement to Sell dated 06.01.06, it is mentioned that Sh. Dinesh Garg and Smt. Chitra Garg (subsequent purchaser) had made the payment of entire sale consideration to Sh. Anup Diwan and Sh. Arun Srivastava (Sellers) by way of two cheques i.e cheque no. 206017 dated 05.01.06 for Rs. 32 lacs and cheque no. 206018 dated 05.06.06 of Rs. 22 lacs. The investigation has revealed that the cheque of Rs. 32 lacs was got encashed by the sellers. With regard to the other cheque of Rs. 22 lacs it has been informed by the alleged persons (sellers as well as; subsequent purchasers) that the same was returned to the subsequent purchaser within the validity period of the cheque with a request to give a bank draft of Rs. 22 lacs in favour of the complainant. The reply received from AXIS Bank has also proved that a bank draft/pay order no. 017342 dated 01.05.06 amounting to Rs. 22 lacs favouring the complainant was got issued by the subsequent buyers and the same was offered to the complainant in OMP No. 203/2006 on 15.05.06 before the Hon'ble High Court of Delhi but the complainant refused to accept the same. Thereafter, the owners kept the said pay order with them for about 5 months and when the Complainant did not accept the same and it was going to expire, the said pay. order was got cancelled by the subsequent purchaser on 23.09.06. Moreover, the sellers are not denying the receipt*

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of full sale consideration and the complainant has no locus to dispute the said payment.

The investigation has also revealed that beside the sale consideration of Rs. 54 lacs, the subsequent buyer had also made the following payments

- a. Rs. 4.05 lacs toward the stamp duty
- b. Rs. 27.22 lacs paid to L&DO toward misused charges.
- c. Rs. 4.85 lacs paid to L&DO towards conversion charges.
- d. Rs. 38,800/- toward the stamp duty on conveyance deed.

Therefore, the allegation of conspiracy for execution of a sham sale transaction could not be substantiated”.

2.6 Lastly, the investigating officer has come to the conclusion that no cognizable offence was made out and a closure report was filed. The petitioner filed a protest petition before the learned CMM on 29.04.2014, which was disposed of on 30.09.2016. In the detailed order of the even date, the learned Judge has observed as under regarding the Agreement to Sell dated 06.01.2006 and the payment of the sale consideration:-

“20. Regarding involvement of Mr, Deepak Kumar Garg and his wife Smt, Chitra Garg in this conspiracy angle, I am of the view that it has come on record that they paid full consideration amount towards property in question to Anup Diwan through his attorney Dr. Arun Srivastava by way of two cheques and also paid complete conversion charges to L&DO and hence they cannot be said to be part of conspiracy with Anup Diwan and his attorney Dr. Arun Srivastava despite the fact that cheque of Rs. 22 lacs was not got encashed by Anup Diwan as it is finding of 10 that same was returned to subsequent purchaser within period of validity of the cheque with request to give bank draft of the same amount in favour of complainant and that bank draft/pay order bearing No. 017342 dated 01.05,2006 amounting to Rs. 22 lacs was got issued by subsequent buyers and same was offered to complainant in OMP No, 203/2006 on 15,05,2006 before Hon'ble High Court of Delhi but the complainant refused to receive the same, 10 further has stated that thereafter owners kept the same pay order with them for about five months and when complainant did not accept the same and it was going to expire the said pay order was got cancelled by subsequent purchaser on 23.09.2006. From finding of 10, it appears that cheque of Rs. 22 lacs was returned to subsequent purchaser within validity period with request to give bank

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draft of Rs. 22 lacs in favour of complainant, From finding of 10, it does not appear that there was any role of Mr. Deepak Kumar Garg or his wife Smt. Chitra Garg in not getting cheque of Rs, 22 lacs not encashed and it appears that they became aware of earlier transaction when Anup Diwan /his attorney Dr. Arun Srivastava requested to give bank draft in favour of complainant as 10 has clearly stated that it was on request of sellers that draft of Rs. 22 lacs was made in favour of complainant. In view of the fact that complete payment was made by Mr. Deepak Kumar Garg (except for Rs. 22 lacs regarding which he got bank draft made later on and also tried to give the same to complainant which complainant refused), his intention does not appear to be fraudulent and there does not appear any complicity vis a vis his role and his wife's-role in conspiracy in question”.

2.7 The final outcome of the entire discussion is mentioned in paragraph 24 and 25 in order dated 30.09.2016 passed by learned MM, which is reproduced hereunder:-

*“24. In view of my aforesaid discussion, I am of the view that prima facie, it appears that Anup Diwan and his attorney Dr Arun Srivastava are indulged in offences u/sec 420/120B IPC. I take cognizance for the same. Let they be summoned to appear as accused in present case for next date of hearing for the abovesaid offences.
25. No cognizance for any offence is taken on basis of facts in hand against proposed accused Mr. Deepak Kumar Garg and his wife Smt, Chitra Garg.”*

2.8 The above mentioned order was challenged by the present petitioner as well as the summoned persons, i.e., respondent no.4/Anup Diwan and his attorney respondent no.5/Dr. Arun Shrivastava before the learned Session Judge. After hearing both the parties, impugned judgment dated 01.12.2017 was passed by the learned Session Judge in Crl. Rev. Nos. 8442/2016 and 8451/2016. In respect of the Agreement to Sell dated 06.01.2006, the following was observed:-

“14. In terms of record, simultaneous to the notice of termination, agreement to sell was entered into between petitioners and the subsequent purchasers namely Dinesh Kumar Garg and Chitra Garg. The consideration amount was fixed at Rs. 54 lacs which was paid by the subsequent purchaser by way of two cheques in sum of Rs. 32 lacs and Rs.

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22 lacs. The cheque in sura of Rs. 32 lacs was got encashed Whereas- cheque in sum of Rs. 22 lacs was not got encashed which later on was got converted to Demand Draf in sum of Rs. 22 lacs. The said amount was offered to the complainant, as the return of the amount of earnest money which was refused by the complainant. Subsequent purchasers also paid the mis-user charges to the L&DO, as is borne out of record. The agreement to sell with Dinesh Kumar Garg was dated 6.1.2006 and the stamp paper for the same was purchased on 3.1.2006, simultaneous to the letter dated 3.1.2006 written by Anup Diwan through his Attorney Arun Srivastava to the complainant which was posted on 5.1.2006. It may be noted that agreement to sell dated 6.1.2006 contained the mention that there was no subsisting agreement with any third party with regard to said property which was also considered and taken care of by Ld. Trial court while observing that the stamp paper was purchased on 3.1.2006 with simultaneous dispatch of letter dated 3.1.2006 which was posted on 5.1.2006. It was rightly noted by Ld. Trial court that as it is not practically feasible to find customer having sufficient amount for paying towards consideration amount within a day or two and it appears to be earlier planning of Anup Diwan and his attorney Dr. Arun Srivastava and date of 6.1.2006 appeared to have been kept by Anup Diwan so as to give no time to complainant to react and at the same time in order to avert information regarding earlier transaction to be trickled down to subsequent purchaser through complainant or someone else on behalf of complainant, thereby no complicity of Dinesh Garg appeared to the fore”.

2.9 The final outcome of both the petitions is described in paragraph 22 of the order dated 01.12.2017, which is as under:-

“22. The disputed questions of fact regarding valid termination of tenancy etc. are the subject matter to be decided by the civil court, but considering the abovesaid, it cannot be even said to be a case of cheating or offence u/s 403/406/409 IPG etc. Apparently, the disputes between the parties being civil in nature have-been given the colour of criminality. Accordingly, the impugned order dated 30.09.2016 qua non summoning of Dinesh Kumar Garg and Chitra Garg is upheld and the order qua summoning of petitioners Anup Diwan and Arun Srivastava is set aside. Revision petition filed by petitioner Anup Diwan and Ors. bearing no. 8442/2016 is allowed, whereas the revision petition filed by complainant/petitioner Gopal Johri bearing no. 8451/2016 is dismissed. TCR alongwith copy of this order be sent back to the trial court. Revision files be consigned to record room.

2.10 The Agreement to Sell dated 06.01.2006 mentions about total

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consideration being Rs. 54 lakhs as detailed in recital No.1 of the said Agreement. Apart from Rs. 54 lakhs, the buyer had to pay L&DO conversion charges. It is stated that entire sale consideration of Rs. 54 lakhs was received by Vendors through two cheques, first cheque bearing no. 206017 for Rs. 32 lakhs and second cheque bearing no. 206018 for Rs. 22 lakhs; both dated 05.01.2006 and drawn at UTI Bank, Greater Kailash, New Delhi. The Vendor had acknowledged receipt of the consideration amount and stated that nothing remained payable.

2.11 It is also an admitted case of the parties that the cheque of Rs. 22 lakh was later on returned to the Vendee by the Vendor with a request to get prepared a bank draft of the same amount in favour of the present petitioner, being the original complainant. The Vendee accordingly obliged the Vendor and got prepared a demand draft of Rs. 22 lakhs dated 01.05.2006 in favour of the present petitioner (complainant), which was offered by respondent nos.4 and 5 to the present petitioner during the proceedings in the OMP No. 203/2006 titled as '*Gopal Johari vs. Shri Anup Dewan & Anr.*' filed under Section 9 of the Arbitration and Conciliation Act, 1996 pending before the Hon'ble High Court of Delhi. The present petitioner refused to accept the said bank draft as refund of advance given by him to Vendors. There has been no evidence on record to prove that the sale consideration mentioned in Agreement to Sell dated 06.01.2006 is a false statement. As mentioned earlier, the total sale consideration was Rs. 54 lakhs and apart from this, the buyer had to pay the L&DO charge. The entire sum of Rs. 54 lakhs was tendered to the Vendors, i.e., respondent nos.4 and 5 by respondent no.2 in the form of two cheques. Out of these cheques, one cheque of Rs. 22 lakhs

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was returned to with a request to prepare a demand draft in favour of the present petitioner, who refused to accept the same and later on the said bank draft was cancelled on 23.09.2006.

2.12 There is no complaint from respondent nos.4 and 5 at any point of time that sum of Rs. 54 lakhs has not been paid by respondent no.2. The present petitioner cannot espouse the alleged cause of respondent nos.4 and 5 of non-receipt of the full sale consideration.

2.13 The complainant himself has refused to accept the bank draft of Rs. 22 lakhs, when it was tendered to him in the OMP No. 203/2006 proceedings in the Hon'ble High Court of Delhi and there are concurrent findings of the learned Metropolitan Magistrate as well as the learned Session Judge on this ground, based upon the cogent reasoning as detailed in first closure report and the second closure report, which were based upon the extensive investigation carried out by the Economic Offences Wing of Delhi Police and the said findings of investigation have been quoted hereinabove.

2.14 The second allegation of the petitioner is regarding fraudulent, sham or dishonest execution of instrument of transfer of Property, i.e., Agreement to Sell dated 06.01.2006. It is an admitted fact that a civil suit covering the entire dispute has already been filed by the present petitioner, which is pending adjudication before this Court. Surprisingly, neither a ground regarding the Agreement to Sell dated 06.01.2006 alleged to be a sham, fraudulent, or dishonest document has been taken by the present petitioner in the said suit nor any such issue has been framed in the suit based upon any such assertion made by the present petitioner. Moreover, the petitioner has not sought a declaration in the said suit to declare the Agreement to Sell

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dated 06.01.2006 as fraudulent, dishonest or a sham document in the Civil Court, where the civil suit filed by the present petitioner is pending.

2.15 Another contention of the petitioner is that the said document has been prepared with a view to defeat legitimate rights of the present petitioner under the previous agreement(s). On the one hand, the petitioner is alleging the said document to be a sham document but on the other hand, he has not sought any direction to declare the said document as a fraudulent or a sham document in the civil suit filed by him. It only shows that the petitioner intends to use the criminal litigation as an arm twisting technique and wishes to keep the sword hanging on the heads of the respondents, so that they do not agitate their legitimate rights before the Civil Court.

2.16 The petitioner has himself stated that he accepts the findings of the learned Session Judge, that no case under Section 406/420/120-B IPC is made out and the dispute is of the civil nature. If there is no intention to cheat, as held by the learned Sessions Judge, so there is no ground to now whip a dead horse, i.e., invocation of Section 423 read with Section 120-B IPC. Further, in the considered view of this Court, no case under Section 423 read with Section 120-B IPC is made out.

2.17 There are concurrent findings of two courts regarding non-applicability of Section 423 IPC read with Section 120-B IPC and there is no ground to disturb the said findings. There is no occasion to invoke the said section at this stage before this Court against respondent nos.2 to 5.

3. In my view, there is no ground to initiate any proceedings under Section 423 read with Section 120-B IPC against respondent no.2 to 5 and the relief claimed in this regard by the petitioner is hereby rejected.

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4. As a result, both the petitions, being CrI.M.C. 1900/2018 and CrI.M.C. 1923/2018, are hereby dismissed.

TALWANT SINGH, J

May 30, 2023/nk



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