IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.1616 OF 2023

1. Robert Mathew D'souza, &
2. Santan Robert D'souza. …..Applicants

Versus

1. The State of Maharashtra, &
2. M/s. Kenny 23 Developers LLP. …. Respondents

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WITH
INTERIM APPLICATION NO.2955 OF 2023
IN
ANTICIPATORY BAIL APPLICATION NO.1616 OF 2023

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WITH
INTERIM APPLICATION NO.366 OF 2024
IN
ANTICIPATORY BAIL APPLICATION NO.1616 OF 2023

Ms. Rohini Wagh, Advocate a/w. Omkar Sambherao i/b. Darshan Juikar for the Applicants.

Ms. Mahalakshmi Ganapathy, APP for the Respondent-State.

Ms. Mallika Ingale, the complainant present in-person.

Mr. Dileep Satale, Advocate for the Intervenor in IA/2955/2023.

Ms. Savita Nangare, Advocate (through VC) i/b. Law Focus for the Intervenor-Bank of Baroda in IA/366/2024.

CORAM : SARANG V. KOTWAL, J.

DATE : 27th MARCH, 2024

P.C. :

1. The Applicants are seeking anticipatory bail in connection with C.R. no.731/2022 registered at MHB Colony police station, Mumbai on 17.6.2022 under Sections 406, 420 read with 34 of IPC and under Section 13 of the Maharashtra Ownership of Flats Act.

2. Heard Ms. Rohini Wagh, learned counsel for the Applicants, Ms. Mahalakshmi Ganapathy, learned APP for the Respondent-State, Ms. Mallika Ingale, the complainant present in-person, Mr. Dileep Satale, learned counsel for the Intervenor in IA/2955/2023 and Ms. Savita Nangare, learned counsel for the Intervenor-Bank of Baroda in IA/366/2024.

3. The FIR is lodged by Mrs. Mallika Ingale, who is a practicing Advocate. She has stated that her husband has retired from Mumbai Police. They wanted to purchase a flat for their residence. One of the Estate Agents gave them information about M/s. Peteresa Realtors. The informant and

her husband approached both the Applicants, who told the informant that both the Applicants and one Victor Lobo were the Partners of M/s.Peteresa Realtors, which was a Partnership firm. Victor Lobo was brother of the Applicant No.2 Santan. They informed about the project which they were developing at Exer village, C.T.S. No.2321 (Part), 2322(Part), 2032(part) and 2033(part), Borivali, Mumbai by the name Gavdevi Krupa Building. There were three proposed Wings in the project. 'A Wing' was to have ground + seven floors. 'C Wing' was to have ground + 15 floors out of which four floors were reserved for car-parking. They told the informant that the project would be completed by 30.5.2017. They gave a brochure. The informant and her husband liked the project. They showed interest for purchasing a 2 BHK flat. They insisted on receiving all the documents, a car parking allotment letter and all receipts of the amount given. The Applicants assured to give all these documents. The informant and her husband decided to purchase flat No.202, 'C' Wing admeasuring 580 sq. ft. They were asked to pay the stamp duty, registration fees etc. The FIR mentions that from 6.12.2014, the informant and her husband transferred various amounts in the account of M/s. Peteresa Realtors. The amount was totally Rs.59 Lakhs. In addition they had paid Rs.13 lakhs in cash on 12.12.2014, 17.12.2014 and 10.3.2015. According to the informant, a receipt of the cash payment of Rs.13 Lakhs is available with the informant. It is alleged that the Applicant No.1 used to demand more money on some pretext. He used to give excuses that he had placed order for cement, he was expecting more money from other parties etc.. He used to tell that he would give special features and concessions to the informant. He also promised to pay interest on their amount. The FIR goes on to mention the further payments made by the informant. According to her the total amount which was paid was to the tune of Rs.74,89,000/-. Apart from that, certain amount was paid for registration etc.. The amount which the informant had finally paid to the Applicants was Rs.79,92,500/-. The informant came to know that the project was not going ahead. The Applicants were giving evasive answers. Both the Applicants left their house and started residing at village Agashi, Virar Taluka Vasai. After that, lock-down was imposed. Till May 2021 only the plinth of 'A' Wing was constructed. 'B' & 'C' Wings were constructed upto 5th floors but the project was halted. They came to know that the Applicant had mortgaged the entire property of the project with Bank of Baroda, Borivali (West) Branch for Rs.4,30,00,000/- as loan. The FIR mentions that one of the customers had filed criminal case in Borivali Court. One flat purchaser Deepak told the informant that M/s. Peteresa Realtors was reconstituted through the Reconstitution of Partnership Deed. In that deed, there was no mention of the informant's name. The FIR further mentions that the Applicants have sold the flats in 'A' Wing on the floors which were not sanctioned by the BMC. The Bank of Baroda started recovery proceedings against the Applicants. On these allegations, the FIR is lodged.

4. Learned counsel for the Applicants made following submissions :

A) The project was mortgaged with Bank of Baroda in the year 2016 and they were given loan of only Rs.5 Crores, out of which Rs.1 Crore was already paid.

B) On 20.3.2018 their account was declared NPA and the bank had started recovery proceedings. The Bank had approached the D.R.T., D.R.A.T. and, therefore, it was a serious impediment in further progress of the project.

C) She submitted that the Partnership was reconstituted which took further time.

D) Learned counsel for the Applicants accepted that the informant and her husband had made the full payment of the flat, but, according to her this shows that it was made only by way of investment and they were not the real flat purchasers, who were in need of residential house.

E) According to learned counsel for the Applicants the real flat purchasers paid the amount only when the part slabs were completed and thus they paid in installments. However, the informant and her husband were the investors and not the real flat purchasers in true sense.

F) The Applicants have given proposal to the bank for settlement so that the money can be raised and the project can move ahead, but, the bank is not cooperating.

G) Nobody will get anything if the Applicants are arrested.

H) She submitted that the informant had approached RERA Authority and has obtained a status quo order on the project. This is one more reason as to why the project is not being completed.

I) She submitted that all these reasons constitute sufficient causes for not completing the project.

Therefore, it cannot be said that there was intention to cheat the informant right from the inception or that the Applicants have misappropriated the informant's money.

J) Learned counsel for the Applicants submitted that they are the owners of the land and, therefore, the project is genuine.

5. Learned APP opposed these submissions. She submitted that the M/s.Peteresa Realtors was the name used by the two entities, one was a Partnership Firm as descried in the FIR and the other was a Proprietorship Firm. The Applicant No.2 was the Proprietor of the said firm. The bank accounts were opened in the names of both the entities with the same bank. Some of the amounts received from the flat purchasers were put in one account and the other amount was put in the other account. This itself shows that there was intention to cheat the investors. Otherwise, there was no need to have separate bank accounts for two separate entities in the same bank.

6. She further submitted that from the bank account of the Partnership firm Rs.48 Lakhs were transferred in the name of the Applicants' son to show that it was a loan amount. That amount was used for personal benefit and was misappropriated. She further submitted that the investigation has revealed that there were 34 similar flat purchasers who had paid various amounts to the Applicants and the total misappropriated amount is to the tune of Rs.9,12,99,730/-.

7. The informant, who is appearing as party in person, submitted that the land in question is not completely owned by the Applicants. One of the co-owners who has major share of the land is one Mhatre and, therefore, the submission that the project is genuine because the land is owned by the Applicants, is not correct.

8. The informant further submitted that the project cannot go ahead unless the land belonging to one Suraj Naik is also purchased as that land is adjacent to the project. However, no steps are taken in that behalf. She submitted

that the informant and her husband had paid amount right from the year 2015 and that was much prior to the Applicants approaching the bank for loan and mortgaging the property of the project with the bank. She submitted that the flats on the upper floors for which no permission was granted by the BMC were also sold by the Applicants. This clearly shows their dishonest intention. All this shows that serious offences are committed by the Applicants. She further submitted that the RERA has passed an order only to protect the interest of the flat purchasers.

9. I have considered these submissions. As rightly submitted by the first informant, she had paid money to the Applicants much before the Applicants mortgaging the land with the bank. The Applicants had not disclosed this fact to the informant and the other flat purchasers. That had caused serious prejudice to the informant and the other flat purchasers. There is absolutely no explanation as to why the amount paid by the informant, in particular, was not returned to her if the project was not going ahead. The

matter does not rest there. The investigation has revealed that there are 34 flat purchasers who were similarly cheated on such false representations and all of them together have lost an amount of more than Rs.9 Crores. Therefore, the offence assumes more seriousness and gravity. The conduct of the Applicants also suggest that they never had intention to honestly complete the project.

10. Learned counsel for the Applicants submitted that Peteresa Realtors was a Partnership firm which was reconstituted and therefore there were two bank accounts. However, that still does not explain the personal loan given to their son utilizing that amount for some other purpose than for the project for which it was taken from the flat purchasers.

11. The issue of the Applicants with the bank about mortgaging their property and to find the solution is strictly between the bank and the Applicants. The flat purchasers were kept in the dark. Their amount was misappropriated by the Applicants. The amount is huge. As described in the

FIR itself, the amount was taken from various purchasers systematically. It shows that there was dishonest intention right from the inception. In any case the money which was taken by the Applicants was misappropriated and nothing was returned to the flat purchasers nor the project was completed nor possession of the flats was given. Even the permissions from the BMC were not obtained as mentioned earlier.

12. Considering all these aspects, it is quite clear that the offence is serious and grave. Therefore, the Applicants cannot be protected under Section 438 of Cr.P.C.. The Application is rejected. With rejection of the main Application, the Intervention Applications do not survive and they are also disposed of.

(SARANG V. KOTWAL, J.)