IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2519 OF 2016

1) Gangadhar S. Shetty
601, Omkareshwar Apts., New Link Road,
Kandarpada, Dahisar (W), Mumbai – 400068.

2) Uday K. Shetty
501, Omkareshwar Apts., New Link Road,
Kandarpada, Dahisar (W), Mumbai – 400 068.

3) Bhaskar Monappa Shetty
502, Omkareshwar Apts., New Link Road,
Kandarpada, Dahisar (W), Mumbai – 400 068.

4) Raju Monjayya Shetty
502, Omkareshwar Apts., New Link Road,
Kandarpada, Dahisar (W), Mumbai – 400 068. …. Petitioners

V/s.

1) The State of Maharashtra
Through Kandivali Police Station,
S.V. Road, Kandivali (West), Mumbai – 400 067.

2) M/s. Kamla Aims Housing & Construction
Pvt. Ltd., a Company registered and incorporated
under the Companies Act, 1956 and having its
registered Office at Shanti Vimal, Ground floor,
P.M. Road, Vile Parle (East), Mumbai – 400 057. …. Respondents

Mr. A.R. Shaikh for the Petitioners.
Mr. Shreekant V. Gavand, APP for the State.

CORAM: A.S. GADKARI AND
SHYAM C. CHANDAK, JJ.

RESERVED ON : 23rd FEBRUARY, 2024.
PRONOUNCED ON : 8th MARCH, 2024

JUDGMENT [PER: SHYAM C. CHANDAK, J.] :-

1) Present Petition filed under Article 226 of the Constitution of India read with Section 482 of the Criminal Procedure Code, is seeking to quash F.I.R. No.189 of 2014 registered with *Kandivali* Police Station, Mumbai for an offence punishable under Section 420 read with 34 of the Indian Penal Code.

2) Heard Mr. Shaikh, learned Advocate for the Petitioners and Mr. Gavand, learned APP for the State. Perused the record produced before us.

3) Record indicates that, by an Order dated 29th August 2016, notice was issued to Respondent No.2 and it was directed that, though investigation shall continue, charge-sheet shall not be filed against the Petitioners without permission of this Court. Thereafter, Petitioners filed the Affidavit of service to Respondent No.2 on 23rd September 2016. However, none appeared for the Respondent No.2 when called for hearing.

4) Facts giving rise to this Petition are as under :-

4.1) Respondent No.2 is a Private Limited Construction Company. Mr. Jitendra Jain (first informant) is Director of the said Company. In 2nd week of July 2012, Lukhi J. Bhatia and Suresh Tekchandani, both Estate Brokers, met the first informant and told that, the Petitioners want to sell their property *viz.*, land bearing Survey No.65, Hissa No.13, CTS No.556, Village Kandivali, Taluka Borivali, Mumbai. In 3rd week of July 2012, said brokers, Petitioners and the first informant had a meeting. At that time, the

Petitioners impressed upon the first informant that, the said property is not encumbered in any way; it is not the subject matter of any Development Agreement; no third party interest is involved therein etc. Further, Petitioners agreed to sell the said property to the first informant, give him the right to develop it and to transfer all other rights therein for a consideration of Rs.18.61 Crore.

4.2) In turn, the first informant published a Public Notice dated 7th August 2012, in two daily newspapers and called objections of third party, if any, who has an interest in the said property. However, the first informant did not receive any objection within the notice period. The first informant also obtained a 'Search Report' from an Approved Surveyor which did not reveal any objectionable entry in the Office of the concerned Sub-Registrar. Therefore, the first informant purchased the said property. For that purpose, Petitioners executed a 'Deed of Conveyance' and a 'Power of Attorney' dated 27th September 2012 in favour of the first informant for a consideration of Rs.18.61 Crore. The first informant paid that consideration from time to time between July 2012 to September 2012 and the Petitioners duly acknowledged the receipt thereof. Thereafter, first informant demanded the documents of title of the said property, but the Petitioners prolonged to give it for one or other reason. Meantime, the first informant did some paper work with the Corporation Office, obtained an I.O.D.C. and made certain construction on the plot investing additional money.

4.3) That, on 30th May, 2014, Officials of the State Bank of India (SBI) visited at the construction site and affixed a notice there stating that, the said property has been already mortgaged with the bank as a security towards repayment of a loan obtained by the Petitioners. Thus, the said property was under the financial burden. On inquiry, the first informant learnt that, there is SBI's encumbrance of Rs.14 Crore on the said property. However, the Petitioners suppressed that fact and by deceiving the first informant, dishonestly induced him to purchase the said property for a huge consideration and thus cheated him. Thereafter, on 2nd June 2014 the first informant lodged a complaint with the police and provided necessary documents. In turn police recorded his statement and registered the impugned F.I.R. on 13th June 2014.

5) Learned Advocate for the Petitioners submitted that, the transaction stated in the F.I.R. is civil in nature. Pointing a Memorandum of Agreed Terms (MoAT) enclosed with the Petition, it is submitted that, at the very inception the Petitioners had informed the first informant that, the said property was mortgaged with the SBI against certain loan availed by the Petitioners. The first informant, however, entered into the Agreement to Sale with the Petitioners by signing the MoAT In this regard learned Advocate drew our attention to Clause 4.2, 5.1.1 and 5.1.2 in the MoAT which reads as under :

" <u>4.2</u> Rs.4,00,00,000/- (Rupees Four Crore only) shall be paid

to the Owners by the purchasers within 15 days from the execution of these present as and by way of reimbursement to the owners on repayment of the outstanding dues of the SBI and on furnishing all original title deeds of the said property to the purchaser's Advocates M/s. Precept Legal.

5.1.1. The Owners on the execution hereof, shall obtained an e-mail/letter from State Bank of India recording that as on 24th July, 2012, a sum of Rs.4,00,00,000/- (Rupees Four Crore only) is payable so as to clear the loans. A copy of the said letter of the said bank is annexed hereto (Annexure "B").

5.1.2. Within fifteen days from the date hereof, the owners will repay the entire outstanding loans/amounts due to the said State Bank of India and get the Property released from the Bank's charge and obtain back all original title deeds of the Property and hand over the same to the Purchasers' Advocates M/s. Precept Legal" .

5.1) Learned Advocate for the Petitioners submitted that, the fact of mortgage is also evident from the Order of this Court, passed on 1st April 2016, in W.P.(L) No.944 of 2016 and the Order of the Debt Recovery Tribunal-III, at Mumbai, passed on 30th June 2016, in S.A.No.132 of 2016. It is submitted that, absolutely there is no *mens rea* to attract the offence of Section 420 of the I.P.C. Yet, by suppressing the fact of MoAT, the first informant caused the police to believe his false report and register the impugned F.I.R. Therefore, continuation of said F.I.R. would be abuse of process of law and it is liable to be quashed.

5.2) Learned Advocate has relied upon the following decisions to strengthen his aforesaid submissions.

(a) Rashami w/o. Satish Khandvikar and another v/s. State of Maharashtra and another reported in [2017(3) Mh.L.J. (Cri.) 643],

(b) Mamta Shailesh Chandra v/s. State of Uttarakhand and ors. in Criminal Appeal No(s)./2024 [arising from SLP (Crl.)No(s).7273/2019],

(c) M N G Bharateesh Reddy v/s. Ramesh Ranganathan and Another in Criminal Appeal No.1273 of 2022 [Arising out of SLP (Crl.) No.9509 of 2019].

6) Learned APP submitted that, there is sufficient material against the Petitioners that, they have suppressed the fact that, the said property was mortgaged with the bank against huge loan amount and caused the first informant to enter into the said agreement and pay Rs.18.61 Crore as consideration. However, the Petitioners did not clear the outstanding loan as promised. Consequently, the transaction could not be completed and the first informant did not get title to the property. Thus there is *prima facie* case against the Petitioners of the offence alleged in the F.I.R. The investigation is completed and charge sheet is ready. Hence, Petition may be rejected.

7) Considering the rival submission, the question that arise for our consideration is whether there is *prima facie* case for the offence of cheating against the Petitioners or not.

8) In this regard, it is admitted that, the Petitioners are the owners of the said property; the said property was already mortgaged as security for repayment of the loan amount; certain loan amount was outstanding to the knowledge of Petitioner when they agreed to sell the said property to first informant; the Petitioners and first informant had entered into the Agreement to Sale the said property; the Petitioners have received Rs.18.61 Crore as consideration towards the said Agreement to Sale and that they have not paid the outstanding loan amount till date.

9) On perusal of the MoAT, we noticed that, even though the said property was mortgaged against the loan from SBI, the Petitioners proposed and agreed to sell the said property to first informant for a consideration of Rs.19.08 Crore. Out of the said amount, Rs.13,41,00,000/- were paid to the Petitioners on or before execution of the MoAT. Further, Rs.4,00,00,000/- were to be paid to the Petitioners within 15 days from the execution of the MoAT as and by way of reimbursement to the Petitioners on repayment of the outstanding dues of the SBI and on furnishing all original title deeds of the said property to the purchaser's Advocates M/s. Precept Legal. Further, Rs.1,67,00,000/- were to be paid to the Petitioners within a period of 30-45 days from the date of the MoAT, and against the execution and registration of a Deed of Conveyance and all other writing as may be required for completion of the sale, but subject to the Petitioners complied with their obligations mentioned in Clause 5.1 to 5.5 of the MoAT and subject to

compliance of the MoAT, the registration of the Deed of Conveyance was to be completed within sixty days from the date of the MoAT.

10) The main contest herein is that, according to first informant, at the very inception *i.e.* in July 2012, the Petitioners had suppressed that the loan of Rs.14 Crore was outstanding against the said property, but the Petitioners contended that, before entering into the Areement to Sale they had clearly told the first informant that the said property was mortgaged with the SBI as security against repayment of the loan and also the outstanding loan amount. And to accept this, the Petitioners wants this Court to rely upon the said MoAT.

11) However, based on the said MoAT, contention of the Petitioners cannot be accepted that, at the inception *i.e.* before entering into the MoAT the Petitioners had disclosed to first informant that, the loan of Rs.14 Crore was outstanding. In this context it be noted that, the initial amount of Rs.13.41 Crore was to be paid on or before execution of the MoAT and it was paid between between July to August, as under :-

Cheque No.	Date	Bank	Paid by whom	Amount
833051	20/07/2012	Corporation Bank	Gangadhar Shetty	Rs.21,00,000/-
833053	25/07/2012	Corporation Bank	Gangadhar Shetty	Rs.1,00,00,000/-
833056	27/07/2012	Corporation Bank	Gangadhar Shetty	Rs.1,00,00,000/-
833028	01/08/2012	Corporation Bank	Gangadhar Shetty	Rs.1,00,00,000/-

529891	30/08/2012	State Bank of India	Gangadhar Shetty	Rs.2,00,00,000/-
RTGS/Cheque No.24212	01/08/2012	Corporation Bank	Gangadhar Shetty	Rs.5,70,00,000/-
RTGS	30/08/2012	State Bank of India	Om Sai Motors	Rs.2,00,00,000/-
RTGS Ch. No.242025	28/08/2012	Indian Overseas Bank	Om Sai Motors Ltd.	Rs.50,00,000/-

11.1) Thereafter, first informant paid Rs.20,00,000/- on 28th August 2012 and Rs.5,00,00,000/- in September 2012. Thus, the amount totalling to Rs.18.61 Crore was paid by the first informant. Out of this amount, Rs.4 Crore were paid as and by way of reimbursement to the Petitioners on repayment of the outstanding dues of the SBI and on furnishing all the original title deeds of the said property to the purchaser's Advocates M/s. Precept Legal. However, as conceded by learned Advocate for the Petitioners, the Petitioners have not deposited the said amount of Rs.4 Crore in the loan account. That apart, the letter dated 13th January 2014 produced by the Petitioners indicates that, as on the date of said letter, in fact Rs.14 Crore were payable to the SBI from the Petitioners towards the outstanding loan amount. However, nowhere in the MoAT it is mentioned that, Rs.14 Crore were outstanding as above. Surprisingly, the Petitioners have not explained as to how they utilised the amount of Rs.18.61 Crore paid by the first informant. Meanwhile, the Petitioners allowed the first informant to construct on the said property and hence, the first informant constructed a basement plus 2 storey structure there.

12) From the aforesaid facts and circumstances, it is evident that, at the very inception, the Petitioners deliberately suppressed the fact that, loan amount of Rs.14 Crore was outstanding against the said property. The Petitioners intentionally did that, as they never wanted to clear the outstanding loan from the consideration amount of Rs.18.61 Crore received from the first informant. Thus, by deceiving the first informant, the Petitioners dishonestly induced him to enter into the Agreement to Sale the said property and pay Rs.18.61 Crore to them, which transaction the first informant would not have entered into if he was not so deceived. Thus, this is a well designed and clear case of cheating by the Petitioners.

13) The aforesaid conclusion is fortified by the fact that, even the Deed of Conveyance is silent about the outstanding loan amount. On the contrary it claims that, the said property is not subject to any mortgage meaning thereby the Petitioners have cleared the entire outstanding loan amount by that time. The Petitioners have not explained as to why the Deed of Conveyance does not mention about the outstanding loan and why it mentions that, the said property is not mortgaged even though the factual situation was to the contrary. From these circumstances it can be easily gathered that, first, by virtue of the MoAT the Petitioners caused the first informant to believe that, they would clear the outstanding loan amount of Rs.4 Crore within 15 days from execution of the MoAT *i.e.* before receiving

its reimbursement from the first informant. Then, the Petitioners pretended that, they have cleared the outstanding loan of Rs.4 Crore and thus, caused the first informant to enter into the Deed of Conveyance by trickily mentioning therein that, the said property is not mortgaged in any manner. By that time, the first informant had already parted with Rs.18.61 Crore as consideration, and therefore, he easily signed the Deed of Conveyance. That apart, even if it is accepted that, the first informant knew about the loan of Rs.14 Crore, it was subsequent to the Deed of Conveyance. Therefore, said knowledge will not nullify the act of cheating him prior to he entered into the MoAT.

14) Here it may be noted that, by not depositing Rs.4 Crore in the loan account, the Petitioners have defalcated the said amount for their own use. As such, there is an element of misappropriation and commission of an offence of criminal breach of trust in respect of the said amount of Rs.4 Crore. Not only that, by selling the said property to first informant without clearing the outstanding loan amount and behind back of the SBI, the Petitioners have also cheated the said Bank. The Bank knew about this cheating. The original title deeds are with the Bank. The loan amount was public money. However, it is surprising that, the Bank has not lodged a report of the said cheating for the reasons best known to it.

14.1) No doubt the Bank has initiated a recovery proceeding, however in vain as the Petitioners did not allow it to yield any result.

15) Lastly, learned Advocate for the Petitioners submitted that, various offences have been registered against the first informant. Said circumstance even if true, is not sufficient to give a clean chit to the Petitioners in this crime more particularly when their contention herein is palpably false.

16) Conspectus of the aforesaid discussion is that, perusal of F.I.R. and the documents relied upon by the Petitioners clearly makes out a *prima facie* case of cheating by the Petitioners.

17) In view thereof, there is no merit in the Petition and is liable to be dismissed. Petition is accordingly dismissed.

(SHYAM C. CHANDAK, J.) **(A.S. GADKARI, J.)**

18) At this stage, learned Advocate for the Petitioners prays for stay of the operation and implementation of the present Order to enable him to approach the Hon'ble Supreme Court and requested that, ad-interim relief which was running in favour of the Petitioners to continue for a period of 8 weeks.

19) For the reasons stated in the aforesaid Judgment and in view of the fact that, the Petition is pending since the year 2016 due to which investigation of the present crime is stalled, we are not inclined to continue the said-interim relief.

(SHYAM C. CHANDAK, J.) **(A.S. GADKARI, J.)**

PREETI HEERO JAYANI

Digitally signed by PREETI HEERO JAYANI Date: 2024.03.12 18:22:26 +0530