IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO. 3218 OF 2023

1. Suresh Babu Malge (A1) - Deceased
2. Sushila Suresh Malge (A2) ...Applicants

Versus

1. State of Maharashtra
2. Jasbir Kaur Jaspalsingh Malhotra ...Respondents

WITH

INTERIM APPLICATION NO. 5368 OF 2024

Madan Kishan Gurow ...Applicant

In the matter between

Suresh Babu Malge ...Applicant

Versus

1. State of Maharashtra ...Respondent
2. Sushila Suresh Malge

WITH

INTERIM APPLICATION NO. 162 OF 2025

1. Uday Bhanu Sharan
2. Shilpi Kumari ...Applicants

In the matter between

1. Suresh Babu Malge (now deceased)
2. Sushila Suresh Malge ...Applicants

Versus

1. State of Maharashtra ...Respondent
2. Jasbir Kaur Jaspalsingh Malhotra

Mr. Munir Merchant, a/w Jenisha Gala, i/b Sanjay Chaturvedi Associates, for the Applicant in ABA/3218/2023.
Mr. A. S. Shalgaonkar, APP, for the Respondent-State.
Mr. Mandar Soman, i/b Mr. Bharat Manghani, for Respondent No.2 in ABA/3218/2023.
Ms. Rashmi Joshi, for the Applicant in IA/5368/2024.
Mr. Mehul Thakker, a/w Pooja Bandgar and Shaista Syed, i/b Bhandary & Bhandary, for proposed Intervenor for the Applicant in IA/162/2025.

CORAM: N. J. JAMADAR, J.
DATED: 27th JANUARY, 2025

ORDER:-

1. Heard the learned Counsel for the applicant, the learned Counsel for the intervener and the learned APP for the State.

2. This is an application for pre-arrest bail in connection with CR No.155 of 2023, registered with Rabale Police Station, Navi MUmbai, for an offence punishable under Section 420 read with Section 34 of Indian Penal Code, 1860 ("the Penal Code").

3. Jaspalsingh Malhotra, the first informant's husband, had booked a flat in a Project Green World, Digha Airoli, Navi Mumbai, being Flat No.A2/1903. The said project was developed by M/s. Mount Mary Builders, of which the applicant Sushila Suresh Malge is the Proprietress. India Bulls Distribution Services Pvt. Ltd. was appointed as a marketing agent. An allotment letter was issued to Jaspalsingh Malhotra, on 3rd September, 2016 incorporating the terms of the contract.

4. Jaspalsingh passed away on 3rd November, 2020. As the daughter of the first informant received an e-mail on the account of the deceased, the first informant learnt that the deceased had booked the flat and paid Rs.1,00,11,000/-

towards consideration. The first informant alleged the first informant and her daughter approached the applicant and offered to pay the balance consideration, if any. The applicant and her husband Suresh Malge (A1), did not execute the instrument on one or the other pretext and, eventually, it transpired that the applicant had sold the said Flat No.A2/1903 for a consideration of Rs.1,13,00,000/- to a third party. Hence, report was lodged against the applicant and her husband Suresh Malge (A1).

5. The learned Additional Sessions Judge rejected the application for pre-arrest bail. However, the interim protection, initially granted, was continued.

6. On 9th January, 2023, when the application was listed before this Court, the said interim protection came to be continued, while directing the applicant to implead the first informant as a party respondent who had appeared on that day.

7. In the intervening period, Suresh Malge (A1) passed away. The application thus survives qua Sushila Malge (A2). The parties explored possibility of a mediated settlement of the dispute. As the negotiations did not materialize, the application was heard.

8. It would be contextually relevant to note that the applicant in IA/5368/2024 and IA/162/2025 are the persons, who had also purchased the flats in very same project and it, later on, transpired that the said flats were again sold to the third parties.

9. Mr. Munir Merchant, the learned Counsel for the applicant, submitted that the entire business operations were looked after and managed by Suresh Malge (A1). The applicant was the Proprietress of M/s. Mount Mary Builders for the namesake. Neither the applicant had made the inducement nor the applicant was instrumental in the alleged subsequent sale, during the substance of the earlier contract for sale.

10. Mr. Merchant further submitted that, at any rate, the dispute is purely of civil nature. The first informant had already approached Maharashtra Real Estate Regulatory Authority (MahaRERA) and orders have been passed by MahaRERA directing the applicant to refund the entire amount paid by the first informant towards the consideration, alongwith interest.

11. Mr. Merchant further submitted that the documents on record would clearly indicate that there was no dishonest intention on the part of the applicant. In fact, the first informant was given opportunity to pay the balance consideration and get the instrument executed. Attention of the Court was invited to the e-mails dated 4th August, 2021 and 23rd July, 2021 addressed on behalf of the Green World Project calling upon the first informant to make the balance payment. Mr. Merchant would urge that, after the demise of Jaspalsingh, the applicant was required to ascertain the right and entitlement of the first informant to get the sale deed executed and also recover the balance consideration. The first informant was put to notice that if the balance payments were not cleared, the vendor would sale the flat and refund the amount after deducting the marketing fees. Therefore, no criminality can be attached to the act of subsequent sale of the subject flat to the third party by executing a registered instrument, on 8th October, 2021.

12. Mr. Merchant further submitted that the interveners can resort to independent remedies as available in law. Therefore, the allegations of the interveners need not be delved into, in this application.

13. The learned APP resisted the prayer for pre-arrest bail. It was submitted that the applicant was the Proprietress of

Mount Mary Builders. The applicant had executed the instruments of sale in favour of the third parties. In effect, the applicant had sold one unit to multiple purchasers and there are multiple victims of the fraud perpetrated by the applicant. Therefore, the applicant does not deserve the relief of pre-arrest bail. It was further submitted that the applicant did not appear before the Investigating Officer and co-operate with the investigation, despite notice.

14. Mr. Soman, the learned Counsel for the first informant, submitted that the thrust of the defence that the first informant was given notice to pay the balance consideration and, upon her failure, the sale deed came to be executed in favour of the third party, is a subterfuge. The balance consideration, on the own showing of the applicant, was only to Rs.7,00,000/-. Yet, within a month of the e-mail communication, the flat was sold to the third party on 7th October, 2021 for a consideration of Rs.1,13,00,000/-. That works out the retribution of the claim of the applicant that the flat was agreed to be sold to Jasbirsingh for a consideration of Rs.1,40,50,351/-.

15. The learned Counsel for the interveners in IA/5368/2024 and IA/162/2025 submitted that the applicant had sold the very same flat to more than one purchasers and thereby the applicants in the Intervention Applications have been defrauded.

16. I have perused the report, material on record and the documents tendered by the parties for the perusal of the Court. I have given anxious consideration to the rival submissions canvassed across the bar.

17. Indisputably the applicant is the Proprietress of M/s. Mount Mary Builders. The submission on behalf of the applicant that her husband Suresh Malage (A1) was operating the business of M/s. Mount Mary Builders through the applicant was the Proprietress, may not be brushed aside completely. However, the matter cannot be looked through the said prism alone.

18. Incontrovertibly, the instruments in question have been executed by the applicant in the capacity of the Proprietress of Mount Mary Builders. Had it been a one off transaction, different considerations may have come into play. If there appears an element of system, continuity and repetition in the alleged fraudulent acts, on the part of the applicant, the submission of Mr. Merchant that the applicant had no concern with the alleged transactions, cannot be readily accepted.

19. Mr. Merchant fairly submitted that around Rs.1 Crore was paid by the husband of the first informant by way of part consideration. However the communications, calling upon the first informant to pay the balance consideration, were pressed into service to show that the intention of the applicant was not dishonest. At the first blush, the submission appears alluring. However, on close scrutiny, I find it difficult to accede to this submission unreservedly.

20. Under a couple of months of the said demand, the subject flat was sold for a consideration of Rs.1,13,00,000/- only. About 90% of the sale consideration was already received by the applicant from Jasbirsingh before 2020. Secondly, the material on record indicates that the same flats were sold to multiple purchasers, with impunity. Flat No.1703 in the said project was sold to Madan Kishan Gurow - the applicant in IA No.5368 of 2024, under a registered instrument dated 7th August, 2017 for a consideration of Rs.70,85,500/-. It subsequently transpired that it was already sold by the applicant to Sana Hospitality Services Pvt. Ltd. under an instrument registered on 23rd March, 2016.

Sana Hospitality Services Pvt. Ltd lodged complaint before MahaRERA. Thereupon the fraud came to light.

21. Uday Sharan and Shilpi Kumari, the applicants in IA/162/2025, had purchased Flat No.204 in the said project under a registered Article of Agreement dated 27th November, 2019. Entire consideration of Rs.1,17,00,000/- was paid. Possession of the flat was delivered to the applicants. It, later on, transpired that the said flat was already sold under an agreement registered in the year 2013 to Mr. Dinesh Shah. Mr. Dinesh Shah has instituted a suit in the Court at Akola for recovery of the amount of Rs.1,17,00,000/- to which the interveners have been impleaded as party defendants.

22. In addition, there are many flat purchasers, who were allegedly duped by the applicant in a similar fashion. The Investigating Officer has recorded the statements of the victims. Orders have been passed by MahaRERA on the complaints of a number of flat purchasers about the delayed delivery of the possession of the flats agreed to be constructed and sold by the applicant.

23. Indeed there is distinction between a breach of contract and the offence of cheating. Mere failure to perform the promise necessarily does not constitute an offence of cheating. The offence of cheating involves element of deceit coupled with injury. In order to make out an offence of cheating, the existence of fraudulent or dishonest intention since the inception of the transaction is required to be demonstrated. However, where a number of persons were allegedly deceived, in an identical fashion, by suppressing the fact that the flats were already sold, the defence of civil dispute cannot be countenanced. It is equally well settled that the same act whilst amounting to a breach of contract may also constitute an offence of cheating. The present case appears to be of the later category, where the legitimate civil transactions were used as a means to commit fraudulent activities.

24. The only explanation Mr. Merchant could offer was that, the earlier transactions were to be cancelled. This explanation is belied by the fact that in the subsequent instruments there is no reference to the earlier transactions. Nor is it a case that immediately after the subsequent sale, the amount of the prior purchasers was promptly returned. All these factors bear upon the intent of the applicant.

25. It is true the applicant is a woman and the offence entails punishment which may extend to seven years only.

However, in the circumstances of the case, an effective investigation is warranted as a number of innocent and unsuspecting persons appear to have been deceived. The same flats were apparently sold to multiple purchasers. Thus, to facilitate effective investigation, unearth the fraud in its facets, unmask the identity of the persons, who were privy to the fraud, and also have trail of money, which was fraudulently obtained, the custodial interrogation of the applicant seems warranted. I am, therefore, not inclined to exercise the discretion in favour of the applicant.

26. Hence the following order:

: O R D E R :

(i) Application stands rejected.

(ii) It is clarified that these *prima facie* observations are confined to determine entitlement to pre-arrest bail only.

(iii) In view of disposal of ABA/3218/2023, IA/5368/2024 and IA/162/2025 stand disposed.

[N. J. JAMADAR, J.]

SANTOSH SUBHASH KULKARNI
Digitally signed by SANTOSH SUBHASH KULKARNI
Date: 2025.01.27 20:28:19 +0530