Reserved On : 14/02/2025
Pronounced On : 18/03/2025

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION (FOR QUASHING & SET ASIDE FIR/ORDER) NO. 18531 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE DIVYESH A. JOSHI Sd/-

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Approved for Reporting	Yes	No
		No

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SANDIP HASMUKHBHAI CHUDASAMA & ORS.
Versus
STATE OF GUJARAT & ANR.

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Appearance:
MR DEEP B KOTHARI(12220) for the Applicant(s) No. 1,2,3
MR. MANAN MAHETA, LD. ADDL. PUBLIC PROSECUTOR for the Respondent(s) No. 1
UNSERVED EXPIRED (N) for the Respondent(s) No. 2

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CORAM:**HONOURABLE MR. JUSTICE DIVYESH A. JOSHI**

CAV JUDGMENT

1. By this application under section 482 of the Code of Criminal Procedure,1973, the applicants seek to invoke the inherent powers of this Court praying for quashing of the first information report being C.R. No.I-184 of 2018 registered before the City ‘A’ Division Police Station at Himmatnagar for the offence punishable under sections 406, 420 read with Section 114 of the Indian Penal Code.

2. The nuts and bolts of the FIR as well as the charge-sheet are that the accused Nos.1 to 5 started construction scheme of flats in the name and style as ‘Proton Eng. Plus’ and sold the said flats to the complainant and other witnesses by getting the amount of Rs.8,86,001/- from the complainant. Thereafter, the said accused persons sold out the very same flats to the other persons by also getting the money from them, however, till today the accused persons have not completed the said scheme and have also executed sale deeds in favour of the accused Nos.6 and 7, who happens to be the relatives of accused Nos.2,3,4 and 5, and thereby, all the accused persons, as named in the FIR, in collusion with each other, have committed a cheating and criminal breach of trust with the complainant. Hence, the impugned FIR.

3. Learned advocate Mr. Deep Kothari appearing for the applicants submits that the impugned FIR is nothing but a sheer abuse of process of law and is filed with an ulterior motive. He further submits that the impugned FIR came to be lodged against total seven persons, wherein the applicants herein have been shown as accused Nos.3,4 and 7 respectively. The applicant No.1 happens to be the son of applicant No.2. Learned advocate Mr. Kothari submits that as per the FIR, the so called incident took place on 31.05.2013 whereas the impugned FIR came to be lodged on 29.08.2018, and as such, there is a huge delay of five years in registering the FIR. Even at the time of registration of the FIR, there is no explanation worth the name by the complainant about delay in registering the FIR. Learned advocate Mr. Kothari also submits

that the applicant No.1 herein was one of the partners in the firm namely ‘Proton Engi Plus’, who floated a residential scheme called ‘Suranva Residency’, wherein the complainant has booked a flat, and the flat which was sold to the complainant was not by the applicant herein, but the said flat was sold by the other partners without the knowledge of the applicant No.1 herein. He further submits that due to some disputes arose between the parties, the applicant No.1 had canceled the power of attorney executed in favour of Pareshbhai qua the property of his share. Learned advocate Mr. Kothari also submits that the applicant No.1 herein had sold his part of the share to the applicant No.3, and he was completely unaware about the transaction that had taken place between the complainant and the other partners. Learned advocate Mr. Kothari further submits that nowhere in the entire body of the complaint, there is any allegation against the applicant No.1 that the complainant had made any transaction with the applicant No.1. Even otherwise, the applicant No.1 herein had registered one criminal complaint against the other partners with the City ‘A’ Division Police Station, Himmatnagar being C.R. No.I-69 of 2018, which is indicative of the fact that the applicant No.1 herein is otherwise a victim of the fraud played by the other accused persons with him as well as with the other customers, due to which, the applicant No.1 has suffered a huge monetary loss. He also submits that the applicant had never came in contract with the complainant directly or entered into any transaction with him.

4. Learned advocate Mr. Kothari submits that the impugned FIR has been lodged by the complainant with an oblique and ulterior motive with a sole intention to harass and pressurize the applicants. Even if the entire case of the prosecution is believed to be true and correct, there is no prima facie case made out against the applicants for the offences as alleged in the complaint. Learned advocate Mr. Kothari further submits that the alleged incident took place somewhere in the year 2013, whereas the impugned FIR came to be lodged in the year 2018, and, therefore, there is a gross delay of five years in registering the complaint and the complainant has miserably failed to explain about such delay in registering the complaint. The delay on the part of the complainant is fatal to the case of the prosecution and also creates doubt about the credibility and veracity of the facts mentioned in the complaint.

5. In such circumstances, referred to above, learned advocate Mr. Kothari prays that there being merit in his application the same be allowed and the impugned FIR be quashed.

6. On the other hand, the present application has been vehemently opposed by learned APP Mr. Maheta. He submits that it is an admitted position of fact that the applicant No.1 is one of the partners in the Partnership Firm dealing in the Real Estate and development projects. Thereafter, all the accused persons named in the FIR floated a scheme named ‘Suranva Residency’, and then lured the complainant and other witnesses to make investment in the said scheme. The applicant No.1 along with the other partners of the firm

executed one power of attorney in favour of one of the partners to enter into any kind of transaction with the customers including the complainant. Learned APP Mr. Maheta further submits that upon the say of the accused persons, the complainant booked one flat in the said scheme by paying the amount of sale consideration as agreed upon between them. It is to be noted that the said scheme was floated in the year 2013, and uptill now, the said scheme remains incomplete. Learned APP Mr. Maheta also submits that even on number of occasions, the complainant as well as other witnesses went to the office of the accused, and in the presence of the applicant No.1, demanded their money back or to complete the project and handover the possession of the property. Not only that, after the disputes having been cropped up between the partners, all the accused persons entered into a partition deed and distributed all the flats amongst each other, and knowing fully well that the Flat No.105 is sold to the complainant by getting the amount of sale consideration, the applicant No.1 along with the other co-accused sold out the said flat to the third party by executing registered sale deed. The statements of the witnesses have also been recorded during the course of investigation wherein all of them have very categorically stated that they have been lured and duped by all the accused persons. Learned APP Mr. Maheta also submits that the complainant as well as the other witnesses also initiated proceedings before the Consumer Forum against all the accused persons. Learned APP Mr. Maheta also submits that so far as the FIR filed by the applicant No.1 against the other partners are concerned, the same is nothing but a hoodwink to save his skin.

7. In such circumstances, referred to above, learned advocate Mr. Maheta prays that there being no merit in this application, the same be rejected.

8. Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is whether the F.I.R. should be quashed.

9. Before examining the respective contentions on merits, it would be appropriate to analyze the legal proposition vis-à-vis the contentions raised by the counsel for the parties.

10. Sections 406 and 409 IPC prescribe punishment for criminal breach of trust. Section 405 IPC defines the offence of criminal breach of trust, which reads as under :

> "405. Criminal breach of trust --
>
> Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

11. A careful reading of Section 405 IPC shows that a criminal breach of trust involves the following ingredients:-

(a) A person should have been entrusted with property, or entrusted with dominion over property;

(b) That person dishonestly misappropriated or converted to his own use that property, or dishonestly used or disposed of that property or willfully suffered any other person to do so;

(c) That such misappropriation, conversion, use or disposal was in violation of any direction of law prescribing the mode in which such trust was discharged.

12. The crucial word used in Section 405 IPC is “dishonestly‟, and therefore, it implies the existence of mens rea, that is to say, a guilty mind. Dishonest intention is the gist of the offence. The offence of criminal breach of trust is completed by the misappropriation or conversion of the property dishonestly. The word “dishonestly‟ is defined in Section 24 IPC, which reads as under :-

> "*24.* "*Dishonestly*" -
>
> *Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing* "*dishonestly*"*.*

13. A person can be said to have dishonest intention if in taking the property is his intention to cause gain by unlawful means, of the property even if he is not legally entitled to or to cause loss, by wrongful means of property which the person loosing is entitled. The actual intention to convert the illegal or doubtful claim into an apparently legal one makes the action dishonest. The phrases “wrongful gain and wrongful loss‟ have been defined under section 23 IPC, which reads as under :-

> " *23. "Wrongful gain" –*
>
> "*Wrongful gain" is gain by unlawful means of property, which the person gaining is not legally entitled.*
>
> "*Wrongful loss*" -
>
> "*Wrongful loss*" *is the loss by unlawful means of property to which the person losing it is legally entitled.*"

14. It would be evident from the definition of phrases “wrongful gain and wrongful loss‟ that when the owner is kept out of the property with the object of depriving him of the benefit arising from the possession even temporarily, the case will come within the definition of “wrongful gain and wrongful loss‟.

15. It would, thus, appear that for the offences punishable under section 406 IPC, the prosecution must prove :-

(i) that the accused was entrusted with property or with dominion over it; and

(ii) that he (a) dishonestly misappropriated it, or (b) dishonestly converted it to his own use, or (c) used it, or (d) disposed of it in violation of any direction of law prescribing the mode in which such trust was discharged.

16. Having considered the definition of Sections 23, 24 and 405 IPC, it would be evident that the gist of the offence prescribed under section 406 IPC, is misappropriation done in a dishonest manner. There are two distinct parts of the said offence. The first involves the fact of entrustment, wherein an obligation arises in relation to the property over which

dominion or control is acquired. The second part deals with misappropriation which should be contrary to the terms of the obligation which is created.

17. The offence of cheating is defined under section 415 IPC, which reads as under :-

> "*415. Cheating –*
>
> *Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".*

18. The Section consists of two distinct parts, each part dealing with one way of cheating, (i) the first part contemplates where by deception practiced upon a person the accused dishonestly or fraudulently induces that person to deliver a property to any person or to consent that any person shall retain any property, (ii) the second part envisages where by deception practiced upon a person the accused intentionally induces that person to do or omit to do so, if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

19. The offence punishable under section 420 IPC reads as under:-

> "*420. Cheating and dishonestly inducing delivery of property.-*

> *Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*"

20. The essential ingredients of Section 420 IPC are:

(i) cheating;

(ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security, and

(iii) mens rea of the accused at the time of making the inducement.

21. As per the charge-sheet, the gravamen of the complainant is that there was a project called 'Suranva Residency' which was launched almost 12 years ago which contained various types of apartments and flats floated by a group of builders and developers named ‘Proton Eng.Plus’. The said group of builders and developers through a network of real estate brokers, dealers and underwriters created a false impression of being a reputed builders and thereby induced the gullible people to book flats and apartments of various sizes and specifications and collected a huge amount from the date of its launch. Till the filing of complaint, not a single flat was delivered in the project which was lying incomplete, unfinished and abandoned. It was promised that the project

would be completed by December, but despite the passing of almost 12 years, the project was lying incomplete in violation of Builder Buyer Agreement.

22. It would be evident from the pleadings of the parties that there is no dispute to the fact that the applicant No.1 was the partner of the partnership firm and they received a huge sum from the complainant and other witnesses under the guise of booking amount and installment of the flats. There is also no dispute that the applicant No.1 and all the other accused failed to either return back the money or to handover the possession to the respective buyers. Whether or not their default would be misappropriation punishable under Sections 406 and 409 IPC, is a question of fact, to be adjudicated during trial. The contention of the learned counsel for the applicants that the dispute in the present case arises from a breach of contract whether oral or written, and therefore, the applicants default would not attract the criminal consequences seems to be logically unsound. It clearly reveals from the record as well as the statements of the witnesses recorded during the course of investigation that the applicant herein along with accused-Paresh Kantilal Suthar and accused-Ronak Satishbhai Gajjar floated a residential scheme of 32 flats, wherein the complainant had also booked one flat. There were bookings from the other buyers also. However, subsequently disputes cropped up between the three partners with regard to the accounts of the firm, and therefore, the applicant No.1 herein transferred his 33% share in favour of applicant No.3 and accused No.5-Dhaval Suryakant Patel and declared him to be

not a partner of the said firm. However, merely declaring that he has relieved from the partnership firm would not exclude the applicant No.1 from his liabilities. It is apparent from the materials collected by the investigating officer that the applicant No.1 was very much available in the meetings held with the buyers even after he said to have left the firm. His presence is very much there in the meetings with the buyers along with the other partners, and at that time, they all gave assurance to either complete the scheme and handover the possession to the respective parties or to return back their money. It appears that instead of executing sale deeds and handing over possession to the concerned parties who booked the individual flats by paying their heard earned money, the accused Nos.1 to 3 executed sale deeds of the said flats in favour of their friends and relatives without there being any sale consideration. The applicant No.1 seems to be not so innocent as trying to be projected by his learned counsel. Relieving from the firm would not exclude him from his liabilities. He is also equally liable and guilty of the misappropriation than that of the other accused persons. The applicant No.1 and other partners are under an obligation to either complete the project and hand it over to the concerned party or to return back their money, and non-fulfillment of contract or promise, whether oral or written, would definitely amount to cheating. Thus, there appears to be a clear cut mens rea on the part of the applicant No.1 to deceive the complainant. Whatever may be the dispute inter-se between the partners, the buyers should not be the victims of the same.

23. It is also evident from the record that pursuant to the registration of the FIR, the investigation was commenced, and during the course of investigation, the concerned investigating officer has collected ample evidence against the applicant, on the basis of which, ultimately, charge-sheet also came to be filed. During the course of investigation, the investigating officer has recorded statements of complainant and other witnesses who were also duped by the applicant and the other co-accused as well as drawn number of Panchnamas. If those statements of the complainant as well as other witnesses are to be read conjointly, then it appears that initially they have initiated proceedings before the Consumer Forum against all the accused persons, wherein the applicant also used to attend the said proceedings along with other co-accused persons, and at that point of time, all the accused persons including the applicant had given assurance to the complainant as well as the other witnesses that they will either handover the possession or return back their money.

24. The dispute appears to be between the builder and buyers and there is a clear, unambiguous and categorical allegations of cheating and siphoning of funds of the innocent buyers against the accused and there exists valid and legal grounds to infer that the applicants herein are guilty for offence under sections 406 and 420. Thus, after taking into consideration the facts and circumstances of the case, I find that in the case on hand, the essential ingredients of dishonest misappropriation and cheating are spelt out, and hence the

prosecution lodged against the applicants under Section 406 and 420 cannot be quashed at this stage by exercising inherent jurisdiction under 482 of the Cr.P.C.

25. It has been held by the Supreme Court in Onkar Nath Mishra Vs. State (NCT of Delhi) [(2008)2 SCC 561], that in the commission of the offence of criminal breach of trust, two distinct parts are involved. The first consists of the creation of an obligation in relation to the property over which dominion or control is acquired by the accused. The second is a misappropriation or dealing with the property dishonestly and contrary to the terms of the obligation created.

26. In Jai Krishan Das Manohar Das Desai Vs. State of Bombay [AIR 1960 SC 889], it has been held by the Supreme Court in paragraph 4 as under:-

> "4. ... to establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be

made."

27. Further, in Bhaskar Lal Sharma & Anr. Vs. Monika & [(2014) 3 SCC 383], a three-Judge Bench of the Supreme Court considered the question regarding making out of a case under Section 406 IPC. In the aforementioned case, in complaint petition, it was alleged that the appellants (Parents-in-law of respondent) were entrusted or had exercised dominion over the property belonging to the respondent and further that the appellants had unlawfully retained the same. After examining the aforesaid allegations while dismissing the appeal and directing the trial to be completed expeditiously, it observed in paragraph 12 as under:-

> "12. Insofar as the offence under Section 406 of the penal code is concerned, it is clear from the averments made in paras 16, 18, 24, and 29 of the complaint petition that it has been alleged that the appellants were entrusted or had exercised dominion over the property belonging to the respondent and further that the appellants had unlawfully retained the same. The statements in para 6 of the complaint also alleges retention of cash and other gifts received by the respondent complainant at the time of her marriage to the Appellant 2- accused. In the face of the said averments made in the complaint petition, it cannot be said that the complaint filed by the respondent is shorn of necessary allegations to prima facie sustain the case of commission of the offence under Section 406 by the appellants."

28. In my opinion, the FIR under consideration do attract ingredients of a cognizable offence. There is clear cut allegation of cheating and criminal breach of trust against the applicants. Even they have not completed the project yet.

29 The scope and power of the High Court to quash an FIR

either in exercise of powers conferred under Section 482 Cr.P.C. or under Article 226 of the Constitution of India has been explained by the Supreme Court in a series of decisions. It has consistently held in State of West Bengal and Ors. v. Swapan Kumar [AIR 1982 SC 949], Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre, [AIR 1988 SC 709], Rupan Deol Bajaj v. Kanwar Pal Singh Gill, [(1995) 6 SCC 194], Janata Dal v. H.S. Chaudhary & Ors. [AIR 1993 SC 892], G. Sagar Suri & Anr. v. State of U.P. & Ors; [(2000) 2 SCC 636], and Ajay Mitra v. State of M.P. [(2003) 3 SCC 11], that the court, under its extraordinary or inherent powers, can neither intervene at an uncalled for stage nor it can soft-pedal the course of justice at a crucial stage of investigation. It has further held that the power of quashing the criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the court cannot be justified in embarking upon an inquiry as to the reliability of the genuineness or otherwise of the allegations made in the FIR or complaint and the extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the court to act according to its whims and caprice.

30. In L.V. Jadhav Vs. Shankarrao Abasaheb Pawar & Ors. [AIR 1983 SC 1219], the Supreme Court held that the Courts power is limited only to examine as to whether the allegations are patently absurd and inherently improbable so as to no prudent person can reach to a just conclusion and that there is sufficient ground for proceeding against the accused. But the Court, at that stage, cannot go into truth or falsity of the

allegation.

31. In State of U.P. Vs. O.P. Sharma [J.T. 1996(2) 488], the Supreme Court has indicated that the High Court should be loath to interfere at the threshold to thwart the prosecution, exercising its inherent power under Section 482 of the Cr. P.C. or under Article 226 or 227 of the Constitution of India, as the case may be, and allow the law to take its own course.

32. While dealing with the contours of inherent power under Section 482 Cr. P.C. to quash a criminal proceeding, in Padal Venkata Rama Reddy Vs. Kovvuri Satya Narayan Reddy [(2011) 12 SCC 437], the Supreme Court after an exhaustive consideration of the principle governing the exercise of said power as laid down in its earlier decisions held that the said power should not be exercised to stifle a legitimate prosecution. In the aforementioned judgment it observed "when exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an inquiry whether the offence in question is reliable or not or whether on reasonable appreciation of it accusation would be not sustained that is the function of the trial court. The scope and exercise of power under Section 482 and the categories of cases whether the High Court may exercise its power under it relating to cognizable offences to prevent abuse of the process of any court or otherwise to secure the ends of justice were set out in detail in Bhajan Lal (supra). The powers possessed by the High Court under Section 482 are very wide and at the same time the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this

power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. It would not be proper for the Court to analyze the case of the complainant in the light of the probabilities in order to determine whether conviction would be sustainable or on such premise arriving at the conclusion that the proceedings are to be quashed."

33. On appraisal of the allegations made in the FIR under consideration, I am unable to hold that they do not disclose the commission of any cognizable offence.

34. In the result, the present application fails and is hereby dismissed. Notice is discharged.

(DIVYESH A. JOSHI,J)

VAHID