

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P No. 2684/2016

Muhammad Nawaz

Versus

SHO P.S Sabzi Mandi, Islamabad, etc.

PETITIONER BY: Raja Ikram Amin Minhas, Advocate

RESPONDENT NO. 2 BY: Mr. Muhammad Nawaz Bhatti, Advocate

STATE BY: Ch. Abdul Khaliq Thind, State Counsel.

Muhammad Shabir S.I, P.S Sabzi Mandi, Islamabad.

DATE OF DECISION: 29.07.2016

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MOHSIN AKHTAR KAYANI J. Through the instant writ petition, petitioner has prayed for quashment of case FIR No. 152/2016 dated 18.05.2016 U/S 406 PPC P.S Sabzi Mandi, Islamabad.

2. Brief facts of the case are that respondent No. 2 Muhammad Ashiq, complainant entered into agreement to sell with petitioner against the total sale consideration of Rs. 4,300,000/- for the sale of House No. 587 Street No. 10-B, Phase-V Ghouri Town, Islamabad measuring four (04) marlas vide agreement dated 27.08.2015. The petitioner being owner of the said house received an amount of Rs. 800,000/- and was under obligation to transfer the said house after receiving the balance sale consideration of Rs. 35,00,000/-. The complainant got prepared the documents of sale deed but on the fixed date, the petitioner did not turn up and it transpired that the said house has been transferred to one Saeed Shah S/o Yar Badshah through incorrect means, hence he has committed the offence of fraud, criminal breach of trust in connivance with Muhammad Nawaz, Saeed Shah, Javed Iqbal and Malik Muhammad Hameed. As a result of said complaint case FIR No. 152/2016 dated 18.05.2016 U/S 406 PPC P.S Sabzi Mandi, Islamabad has been registered.

3. Learned counsel for petitioner contends that parties entered into agreement to sell dated 27.08.2015 regarding sale of House No. 587 Street No. 10-B Phase-V, Ghouri Town, Islamabad measuring four (04) marlas against the total sale consideration of Rs. 43,00,000/- and petitioner had received Rs. 800,000/- as earnest money whereas house in question was to be transferred after receiving the balance sale consideration of Rs. 35,00,000/-; he further contends that the respondent No. 2 has filed civil suit titled "*Muhammad Ashiq Vs. Muhammad Nawaz and others*" for specific performance and mandatory injunction on 14.11.2015 before Senior Civil Judge, Islamabad; he further contends that the instant criminal case has been registered with malafide in order to convert the civil dispute into the criminal proceedings whereby the respondent No. 2 intends to blackmail and harass the petitioner. He has relied upon 2014 YLR 2241, 2014 P Cr. LJ 487, 2014 P Cr. LJ 1305, 2011 P Cr. LJ 1241, 2013 YLR 2513, 2006 P Cr. LJ 1900, 2007 YLR 2766, 2015 SCMR 1575, 2006 SCMR 276, 2006 SCMR 1957.

4. Conversely, learned counsel for the respondent No. 2 as well as the learned State Counsel states that agreement between the parties dated 27.08.2015 is admitted and it was agreed that plot in question has been purchased by respondent No. 2 whereby civil suit titled Muhammad Ashiq Vs. Muhammad Nawaz and others for specific performance and mandatory injunction has also been filed on 14.11.2015 seeking the specific performance of the said agreement referred above, however, respondent No. 2 states that there is no bar to initiate the criminal proceedings against the petitioner as he has committed fraud and deprived respondent No. 2 from his hard earned money of Rs. 800,000/-.

5. Arguments heard, record perused.

6. From the perusal of record it has been observed that petitioner is owner of House No. 587 Street No. 10-B Phase-V Ghouri Town, Islamabad measuring four (4) marlas which has been sold to respondent No. 2 through agreement to sell dated 27.08.2015 against the total sale consideration of Rs. 43,00,000/- whereas the petitioner had received Rs. 800,000/- as earnest money and the time for the execution

of sale deed was settled as 16.10.2015 subject to payment of balance sale consideration.

7. Both the parties admits the execution of sale agreement dated 27.08.2015, sale consideration of Rs. 43,00,000/- and payment of Rs. 800,000/- as earnest money, however, it is apparent from record that due to breach of terms of the said agreement civil suit titled Muhammad Ashiq Vs. Muhammad Nawaz and another for specific performance and mandatory injunction has also been filed by respondent No. 2 on 14.11.2015 which is subjudice before the Civil Court East, Islamabad.

8. Respondent No. 2 got registered a criminal case FIR No. 152/2016 dated 18.05.2016 registered U/S 406 PPC P.S Sabzi Mandi, Islamabad against the petitioner on the basis of alleged breach of agreement.

9. Under Section 406 PPC, the essential ingredients of the offence of criminal breach of trust are as follows:-

- a) Entrustment.
- b) Dishonest misappropriation or conversion to his own use by the person in whom the confidence reposed.
- c) Dishonest use or disposal of property in violation of any direction of law.
- d) Dishonest use or disposal of property in violation of any legal contract.

In view of above ingredients of criminal breach of trust, breach of any term of agreement to sell does not fall within the above mentioned criteria as the agreement to sell has been created under Contract Act, 1872 where on party signifies his willingness to do or not to do anything against a consideration and if the same has been accepted by the other party it becomes a promise whereas the said promise is if enforceable by law creates the term "contract".

Hence it is manifestly clear that any agreement requires an offer/proposal, acceptance, promise, consideration and enforceability then the same creates the reciprocal obligations agreed between the parties. This concept of contract if applied to the present situation it simply establishes that one party offered its property i.e. House No. 587 Street No. 10-B, Phase-V Ghouri Town, Islamabad measuring four (04) marlas to sell whereas the other party accepted the same against the sale consideration of

Rs. 43,00,000/- and out of the said amount Rs. 800,000/- was paid and an agreement to sell dated 27.08.2015 was executed whereas certain other obligations have been agreed which are as follows:-

- ۳۔ یہ کہ مذکورہ بالا مکان کے عوض تمام بقایا جات فریق اول ادا کرے گا اور رجسٹری فیس فریق دوم ادا کرے گا۔
- ۴۔ یہ کہ فریق دوم اگر بقایا رقم مقررہ وقت تک ادا نہیں کرے گا تو اس کی ادا شدہ رقم ضبط تصور کی جائے گی۔
- ۵۔ یہ کہ فریق اول مذکورہ مکان کی رجسٹری بجٹ فریق دوم وقت مقررہ کے اندر کروا کر دینے کا پابند ہوگا بصورت دیگر وصول کی گئی رقم کا دو گنا دینے کا پابند ہوگا۔
- ۶۔ یہ کہ بعد ازاں اگر اراضی مذکورہ کسی سقم ہائے قانونی کی وجہ سے فریق دوم کے ہاتھ سے نکل جائے یا ٹرانسفر/انتقال/رجسٹری کا عدم ہو جائے تو بھی فریق اول سالم رقم کی دو گنی زر ثمن بمعہ ہر جانہ و خرچہ واپس کرنے کا پابند ہوگا۔

In view of above agreed terms the reciprocal promises for lawful consideration between the parties is to sale and purchase the property against an amount of Rs. 43,00,000/- hence , it is agreed to perform the obligation whereas payment of earnest money does not fall within the preview of "entrustment" of property in terms of Section 406 PPC, even otherwise, there is no misappropriation if the seller after receiving the sale consideration or part of sale consideration refused to transfer the property or failed to abide the terms of agreement as the said failure or breach of terms could not be equated with dishonest use, disposal of the property, violation of any legal contract, however, any breach of such agreement has a remedy under Specific Relief Act, 1877 where one can seek a specific performance of a contract if the same is enforceable by law and the court of law has to see which party is responsible for refusal or failure of performance of the terms of the contract. As a result of said evaluation by the court of law either the defendant has been directed to perform the contract or pay the damages under the said law.

The above referred scheme of law under Specific Relief Act, 1877 provides a mechanism which covers all those contracts between the parties which have been executed in terms of Contract Act, 1872 and their remedies are only provided in Specific Relief Act, 1877 where the ingredients of criminal breach of trust have no space under the said law as the concept of mens rea could only be assessed by the criminal court whereas the agreement dated 27.08.2015 does not fulfill the requirement of criminal breach of trust.

10. The dispute related to such kind of contracts can easily be categorized under civil rights and their breach has also been remedied under the terms of contract or under Specific Relief Act, 1877 whereby the parties can approach the civil court in terms of Section 9 of CPC and especially when respondent No. 2/complainant has already approached the competent civil court in suit titled *Muhammad Ashiq Vs. Muhammad Nawaz and others* for specific performance and mandatory injunction filed on 14.11.2015 and the same is subjudice before the competent court with the following prayer:-

"Under the above mentioned circumstances it is humbly prayed that a decree for specific performance be passed in favour of plaintiff and against the defendant No.1 on the basis of agreement dated 27.08.2015 with the effect that defendant No. 1 is bound to comply each and every conditions of the said agreement and plaintiff is ready to pay the balance amount, and entitle to get registered the suit property on his name in the interest of justice.

It is further prayed that a decree of mandatory injunction be passed in favour of plaintiff against the defendant No. 1 with the effect that defendant No. 1 transfer/registered the suit property in the name of plaintiff with possession after cordial requirements.

It is further prayed that defendant No. 2 & 3 be directed to transfer the suit property in the name of plaintiff.

Any other relief which this honorable court may deem fit be awarded".

In view of above prayer filed before the competent court on 14.11.2015 the subsequent move for registration of criminal case No. 152/2016 dated 18.05.2016 U/S 406 PPC, P.S Sabzi Mandi Islamabad whereby the date of occurrence in the FIR is 27.08.2015 is based upon the agreement to sell dated 27.08.2015 and discloses the following allegations:-

مسمی محمد نواز نے فرد جاری کرایا اور فرد کی کاپی بھی سائل کو دی۔ رجسٹری تیار کرنے کے لئے محمد نواز مقررہ وقت پر نہ آیا اور نہ رجسٹری کرا کر دی بعد ازاں سائل کے علم میں آیا کہ محمد نواز نے مذکورہ مکان کی رجسٹری سعید شاہ ولد یار بادشاہ کے حق میں غلط طریقے سے کر دی اس بابت محمد نواز سعید شاہ جاوید اقبال ولد گلزار عباسی اور ملک محمد حمید ولد حسن دین نے ملی بھگت کرتے ہوئے سائل سے دھوکہ، خیانت مجرمانہ کی۔

The above allegation, if put in juxtaposition with the terms of agreement dated 27.08.2015, it is evident that in fact the allegations are based upon the breach of terms of agreement to sell and the complainant/respondent No. 2 has concealed the filing of civil suit or disclosing a fact that he has already sought the remedy in terms of Specific

Relief Act, 1877 by filing of civil suit before the competent court, hence, the entire edifice is built on the basis of concealment, enforcement of contract through criminal prosecution and with malafide which are apparent on record. In such like circumstances the inherent powers of the High Court in terms of 561-A Cr. P.C are meant to rescue the persons who are victim and those persons who believe in the safe administration of justice appearing before the court for the settlement of their civil suits which could only be interpreted by the competent civil courts. Even otherwise, when the agreement provides the remedy for breach of any term in the contract as of damages, all other remedies could be seen under the said clause whereas the breach of contract, its enforcement, its remedy has already been defined in the said contract, therefore, the criminal prosecution is just an abuse of process which is apparent on record.

In such like situation the golden principles laid down in different precedent by the Courts of Pakistan further classify the situation in the following manner:-

2013 YLR 2513 tilted as Rana Saeed Ullah Vs. Inspector General of Police and

6 others it was held that:-

"6. The above mentioned resume of facts clearly establishes that the dispute and controversy between the parties is of civil nature and the rights and liabilities of the parties are sub judice in the competent civil courts. The allegation of the Raheel Khan that Rana Saeed Ullah had shown the fake title document is not correct as in the acknowledgement deed dated 2-9-2009, the status of the vendor is mentioned in the separate para wherein it is provided that Rana Saeed Ullah had purchased the suit property vide Sale Agreement No 4307 and it is further provided that the attested copy of that sale agreement is attached, therefore the allegation of presentation of any false title document becomes incorrect. Similarly the F.I.R. lodged by the Fiaz-ud-Din Siddiqui also becomes misuse of the process of the law as he has already challenged the controversy through a civil suit which suit was instituted on 24-11-2009 and which is being contested by both the petitioners. Raheel Khan petitioner had instituted a civil suit in this court which is also sub judice and in that suit the petitioner Raheel Khan had prayed for the cancellation of some cheques and it is appropriate to observe that Rana Saeed Ullah had lodged the case F.I.R. No.221 on 30-4-2011 under section 489-F, P.P.C. Police Station Kohsar against Raheel Khan with the allegation that the Cheque No.1235447 for the amount of Rs.130,65,000 was dishonored but about this cheque the civil suit of Raheel Khan is pending for adjudication in this court and furthermore it is yet to be determined that whether the petitioner Rana Saeed Ullah had fulfilled his obligations of the transfer of the suit property in favour of the Raheel Khan before seeking the encashment of the disputed cheque. In all the attending circumstances, it is held that the

registration of all the three criminal cases by Rana Saeed Ullah against Raheel Khan, by Raheel Khan against the Rana Saeed Ullah and by Fiaz-ud-Din Siddiqui against Rana Saeed Ullah and Raheel Khan amounts to misuse of the process of law; therefore, Writ Petitions Nos. 490-Q of 2013, 1189 of 2013 and 1297-Q of 2013 are allowed and all the three F.I.Rs. subject-matter of these Writ Petitions are hereby quashed”.

Similarly in **2007 YLR 2766 tilted as Badar Ur Islam Vs. District Police Officer,**

Faislabad and 3 others it was held that:-

"Petitioner besides committing breach of agreement had not returned the earnest money to the purchaser. A perusal of the police record shows that the purchaser was never associated with the investigation of case. The record does not reflect any grievance of the purchaser. The complainant appears to have got the case registered with an ulterior motive. Even otherwise, the payment of Rs.1,00,000 to the petitioner was made as part payment of the sale price. It cannot be termed as entrustment within the meaning of section, 406, P.P.C. The allegation levelled by the complainant can be described only-and-only as a breach of contract for which the purchaser alone may approach the civil Court. Breach of contract cannot be allowed to be made basis for criminal prosecution.

7. As regards the question touching the maintainability of this petition solely on the ground that the prosecution has submitted the challan in the competent Court of law, I am of the view that the case is purely of civil nature, therefore, the registration of criminal case was illegal and the continuance of criminal proceedings would also be unwarranted and would amount to abuse of process of law and that this Court in the exercise of its powers under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 and also under section 561-A, Cr.P.C. has ample powers to quash the F.I.R. as well as the proceedings pending in the Court of Ilqa Magistrate irrespective of, its stage. Reference may be made to the law laid down by the apex Court in the cases report as 1994 SCMR 798 and 2002 SCMR 1076”.

2006 P Cr. LJ 1900 tilted as Shaukat Ali Sagar Vs. Station House Officer,

Police Station Batala Colony, Faisalabad and 5 others it was held that:-

"4. A perusal of the impugned F.I.R. itself shows that there is an outstanding business dispute between the parties which dispute has all the trappings of a civil dispute. It appears that through lodging the impugned F.I.R. the complainant has tried to convert a civil and business dispute into a criminal case so as to bring the weight of criminal law to bear upon the petitioner and his co-accused in order to extract concessions in that civil dispute. This exercise on the part of the complainant appears to be actuated by nothing but malice which cannot be allowed by this Court to be perpetuated. This writ petition is, therefore, allowed with no order as to costs and the impugned F.I.R. is hereby quashed”.

2014 P Cr. LJ 1305 tilted as Umair Aslam Vs. Station House Officer and 7

others it was held that:-

"Even otherwise, the disputed amount of Rs.16,00,000 mentioned in the F.I.R. if at all was given in the backdrop of a property deal and the accused are not ready for execution of the sale-deed, that is only a matter to be resolved by the civil court and the learned counsel for the complainant has frankly conceded that the complainant has not filed any such suit for specific performance against the accused in the F.I.R".

2011 P Cr. LJ 1241 tilted as Mufti Pervaiz Manzoor Vs. The State and 2 others

it was held that:-

"The allegations do not seem to be justified on the basis of record and the Hon'ble High Court under writ jurisdiction has got ample powers to quash the proceedings of a criminal case, if no offence is made out and the dispute is entirely of civil nature, which was converted into criminal proceedings with ulterior motives. In such matters, where exceptional circumstances exist, the powers under Article 199 of the Constitution or under section 561-A, Cr.P.C. can be exercised".

2015 SCMR 1575 tilted as Rafiq Haji Usman Vs. Chairman, NAB and another it

was held that:-

"an essential element for making out and establishing a case of criminal breach of trust is the entrustment of property or money or with any dominion over property, which is dishonestly misappropriated or dishonestly used or disposed in violation of any direction prescribed by law or the mode in which such trust was to be discharged or in the context any contract etc., however the promise to sell the property for which consideration/money is paid or an agreement to sell is entered upon and the money has been paid pursuant to such an agreement, it shall not be the same as entrustment of property within the concept of noted provision. In case of entrustment, the money/property received is to be retained for return to the giver at a later time as opposed to a promise or contract where investment is made or money is paid for the purposes of fulfillment of a specific agreed upon purpose/contract. In such a case where money/property has been entrusted to a person, using such amount/property for any other purpose would not attract the penal consequences of section 405 ibid. For the purposes of above view, we draw support from the judgment of this Court reported as Shahid Imran v. The State and another (2011 SCMR 1614), wherein it has been held "The law clearly recognizes a distinction between payment/investment of money and entrustment of money or property as in the former case the amount of money paid or invested is to be utilized for some purpose whereas in the latter case that sum of money or property is to be retained and preserved for its return to the giver and the same is never meant to be utilized for any other purpose...a mere breach of a promise, agreement or contract does not ipso facto attract the definition of criminal breach of trust contained in section

405, P.P.C. and such a breach is nor synonymous with criminal breach of trust without there being a clear case of entrustment".

11. In view of above referred reasons High Court in inherent powers U/S 561-A Cr.P.C can exercise the jurisdiction to prevent the abuse of process of law which is apparent from record especially respondent No.2 has concealed the filing of civil suit for specific performance prior to registration of criminal case, competent civil court has already exercised its jurisdiction on the basis of agreement to sell dated 27.08.2015, breach of terms of agreement to sell has to be given effect and interpreted by the competent civil court after receiving pro and contra evidence of the parties. The matter in dispute is purely of civil nature and the terms of agreement only provides a remedy of civil nature, no limit can be put a clog on the exercise of inherent powers of this Court to make such orders as may be necessary to give effect in order to prevent the abuse of process of any court or otherwise to secure ends of justice, therefore, the instant writ petition under Article of Islamic Republic of Pakistan, 1973 read with Section 561-A Cr. P.C, is hereby allowed and impugned proceedings in case FIR No. 152/2016 dated 18.05.2016 U/S 406 PPC P.S Sabzi Mandi, Islamabad are quashed. Needless to add that quashing of FIR shall not effect the civil dispute, if any, between the parties in any manner between the parties whatsoever.

(MOHSIN AKHTAR KAYANI)
JUDGE

Approved for reporting.

JUDGE