

JUDGMENT SHEET
ISLAMABAD HIGH COURT
ISLAMABAD

W.P No.1536/2020

SAMINA QASIM TARAR AND ANOTHER.

Versus

THE STATE AND ANOTHER.

Petitioner by: Syed Hussain Abuzar Ahmad and Sheyryar Nawaz Malik,
Advocates.

Respondent by: Ch. Amjad Ali, Advocate.

Date of Hearing: 21.09.2020.

LUBNA SALEEM PERVEZ; J: Through instant petition, both the petitioners seek quashment of case FIR No.163/2020, dated 28.04.2020, for offences under section 406/448 PPC, registered at Police Station Lohi Bher, Islamabad.

2. Facts as per FIR are that complainant entered into an agreement to sell dated 30.07.2019, regarding House No. 1885, Road No. 1, Phase-III, Bahria Town, Rawalpindi, with petitioner No.1, being the owner, through property dealers namely Muhammad Anwar and Raja Asad, in presence of Petitioner No.2/husband of Petitioner No.1. At the time of agreement, complainant paid an amount of Rs. 65,00,000/- as partial payment and took possession of two rooms on the upper portion of the said house. Later on complainant paid an amount of Rs. 10,00,000/- and 5,00,000/- to the Petitioner No.1 on 15.10.2019 & 04.11.2019, through cash and cheque, respectively, in the presence of Petitioner No.2 and other property dealers. As per FIR the date of payment of balance amount was extended to 31.12.2019, however, the petitioners denied this fact and stated that the extension was allowed upto 05.11.2019. However, when Complainant approached the petitioners for transfer of house in his name on the fixed date, they avoided to do the needful and complainant came to know from the Bahria Town office that the subject house had already been sold and transferred in the name of one Noman Sultan also an accused in the FIR. Accused petitioner allegedly, despite acceptance, refused to return the amount of Rs. 80,00,000/-. Hence, instant FIR for offence u/s 406/448 PPC.

3. Learned counsel for the petitioner submitted that the Petitioner No.1 entered into an agreement to sell her residential property bearing House No. 1885, measuring (10 marla), Road No.1, phase III, Bahria Town/Rwp/Islamabad, registration No. ISL-1004 with the respondent on 30.07.2019 for total sale consideration of Rs. 19,600,000/-; that the initial/part payment of Rs. 6,500,000/- was paid by the respondents at the time of signing of agreement and the balance amount of Rs. 13,100,000/- was agreed to be paid on or before 30.09.2019, however, parties amicably agreed for extension of agreement for grace period upto 30.10.2019; that after receiving partial payment, the petitioner handed over the physical possession of two rooms in the upper portion of the house to the respondent, however, he was restrained from shifting in the house till the finalization of the deal and transfer of the said house; that respondent on 15.10.2019 paid an amount of Rs. 10,00,000/- but could not make the balance payment as per terms of the agreement, however, on his request the grace time was verbally allowed upto 05.11.2019; that respondent on 04.11.2019 paid an amount of Rs. 5,00,000/-; that thereafter when the balance payment was not made by the respondent even after the extended period upto 05.11.2019, the property was sold to another person as there was dire need of funds for the purchase of another property for which earnest money was paid out of partial payment received from the respondent; that due to respondent's failure to pay the balance amount on time the petitioner suffered huge financial loss as their amount paid for another house got forfeited; that the petitioners has filed a civil suit on 03.02.2020, for cancellation of agreement dated 30.07.2019 and the notices has already been issued to the respondents in response whereof written statement has also been filed; that the FIR has been registered as a counter blast to involve petitioners into false criminal cases; that no case of 406 PPC is made out against the petitioners as the transaction for sale of property is purely a business transaction, which has no criminal element; that the respondent malafidely and with ulterior motives have involved the petitioners in a fake and frivolous FIR; that no civil suit for specific performance of the agreement or suit for recovery has been filed by the respondent. Learned counsel submitted that the FIR is liable to be quashed as the issue in question is of a civil nature triable before the civil court. Learned counsel for the petitioners relied on the judgment titled as "*Muhammad Nawaz vs. SHO, Police Station, Sabzi Mandi, Islamabad*" (2017 P Cr. L J 133).

4. Learned counsel for the respondent on the other hand opposed the arguments of the learned counsel for petitioners and submitted that the petitioners have played a fraud on the respondent and after receiving of Rs. 80,00,000/- have sold the house to another person before the dead line verbally granted to the respondent i.e. 31.12.2019; that offence under section 406 PPC has been made out as the petitioners have intentionally committed criminal breach of trust; that the alternate remedy is available to the petitioners in terms of section 249-A & 265-K Cr.P.C before the concerned trial Court who have ample powers to acquit the petitioners/accused at any stage of the trial if respondent failed to prove the criminal intent to the satisfaction of the trial Court. The circumstances narrated in the FIR with reference to offence under section 406/448 PPC requires probe into the matter which can only be determined after proper trial. The petition under Article 199 of the Constitution for quashment of FIR is not maintainable.

5. Arguments heard, record perused with the assistance of the learned counsel for the parties.

6. Petitioners in the present case have prayed for quashment of FIR No. 163/2020 dated 28.04.2020 on the ground that the case is frivolous and the Respondent No.2 namely Muhammad Ali has got registered the FIR with the object to harass the petitioners. The above said FIR has been registered under section 406 PPC for offence of criminal breach of trust (Section 405 PPC) for alleged violations of agreement to sell dated 30.07.2019, whereby, the petitioners agreed to sell their house and respondent agreed to purchase the same for total consideration of Rs. 1,96,00,000/-. Perusal of terms of the agreement shows that the respondent No.2 agreed to pay the balance amount of Rs. 1,31,00,000/- upto 30.09.2019 or within extended time upto 30.10.2019. Admittedly, an amount of Rs. 65,00,000/- was paid at the time of signing of agreement and the trench of Rs. 10,00,000/- on 15.10.2019 i.e. after the actual deadline but within the grace period. Rs. 5,00,000/- was paid on 04.11.2019 i.e. after the cut of date of grace period. The respondent as per FIR, came to know from the Bahria Office about selling of the same house to another person namely Nouman Sultan for which an amount of Rs. 80,00,000/- was paid by Respondent No.2.

7. Respondent in the present case has alleged charges of criminal breach of trust against the petitioners. Perusal of section 405 PPC shows that it deals with the

breach of trust with fraudulent and dishonest intent for wrongful gain. The criminal breach of trust is committed (i) when there is entrustment of property to any person or with dominion over the property (ii) dishonest misappropriation or conversion of the property in his own use by the person who has been entrusted with the property (iii) who dishonestly use or dispose of the property in violation of any direction of the law prescribing the mode in which the trust is to be discharged (iv) dishonest use or disposal of the property in violation of any legal contract expressed or employed, which he has made touching the discharge of such trust (v) willfully suffers other person to do so by the person to whom the property has been entrusted. Thus to allege the criminal breach of trust against the petitioner, the respondent has to establish that he had entrusted the property or entrusted with dominion over property and the petitioners have converted the same for their own use or disposed of the same in violation of direction of law or a legal contract. In the present case, the ownership of the house for which the parties entered into agreement to sell remains with the Petitioner No.1, who received part consideration at the time of signing of agreement and the possession of the property was to be handed over after transferring legal title after payment of the entire sale consideration. Admittedly, the balance sale consideration was not paid within cut of date and the respondent could not prove the verbal extension of date for payment and, therefore, the part payment made by the respondent does not constitute entrustment and neither there is dishonest misappropriation for the reason that the petitioners have sold the property when the respondent failed to make the payment within the agreed date of agreement and verbal extension upto 05.11.2019. In the present case not a single ingredient can be found out to constitute offence u/s 405 PPC, punishment of which has been provided in Section 406 PPC and civil proceedings are being converted into criminal one which is not warranted under the law. Thus, the dispute between the parties is of civil nature for enforcement of agreement for sale of property, the remedy of which is available to the respondent, under Specific Relief Act, 1877, before the Civil Court. The amount of Rs. 80,00,000/- admittedly received by the petitioners can also be recovered by filing of recovery suit before the Civil Courts. As per record the petitioners have filed a suit for cancellation of agreement dated 30.07.2019 for sale of property in question 30.07.2019 and the respondent has joined the proceedings and has also filed the written statement. Instead of approaching the competent Civil Court for recovery of the admitted part payment and refusal to perform the part of

the petitioners in respect of the sale agreement dated 30.07.2019, the respondent has got registered the FIR against the petitioner which has been termed as counter blast by learned counsel for the petitioner. In a recent judgment, passed in an identical case titled as “**Muhammad Nawaz vs. SHO, Police Station Sabzi Mandi, Islamabad**” (2017 PCr. L J 133), this Court has elaborately dealt with the provision of section 406 by relying on the judgments “**Rana Saeed Ullah Vs. Inspector General of Police and others** (2013 YLR 2513)”, “**Badar ur Islam Vs. District Police Officer, Faisalabad and others** (2007 YLR 2766)”, “**Shaukat Ali Sagar Vs. SHO, Police Station Batala Colony, Faisalabad and others** (2006 PCr. LJ 1900)”, “**Umair Aslam Vs. SHO and others** (2014 PCr. LJ 1305)”, “**Mufti Pervaiz Manzoor Vs. The State and othes** (2011 PCr LJ 1241)” and “**Rafiq Haji Usman Vs. Chairman NAB and another** (2015 SCMR 1575). It has been held that:-

“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, P.P.C., 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 mensrea 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.”.

8. In a recent judgment the Hon’ble Lahore High Court, Multan Bench in a case titled as **Muhammad Asim vs. The State** (2020 PCr. LJ 335) has observed as under:-

“Needless to say that in the absence of clear entrustment mere breach of promise, agreement or contract does not ipso facto attract the definition of criminal breach of trust in terms of section 406, P.P.C. I respectfully place reliance on the case of Shahid Imran v. The State and others (2011 SCMR 1614),

wherein the Hon'ble Supreme Court of Pakistan, has observed as under:-

"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 not synonymous with criminal breach of trust without there being a clear element of entrustment therein which entrustment has been violated."

9. For the reasons discussed hereinabove, to continue with criminal trial of above mentioned FIR would amount to abuse of process of law, therefore, to meet the ends of justice instant petition is **allowed**, and the proceedings in case FIR 163/2020 dated 28.04.2020 registered under Sections 406/448 PPC, at Police Station Lohi Bher, Islamabad, are hereby quashed, however, the quashment of FIR shall not affect the civil litigation between the parties before the concerned Civil Court.

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in open Court on _____

JUDGE

APPROVED FOR REPORTING.
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