

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

CIVIL PETITION NO. 3130 OF 2020

(On appeal against the judgment dated 01.10.2020
passed by the Islamabad High Court, Islamabad in
Writ Petition No. 1536/2020)

Muhammad Ali

... Petitioner

Versus

Samina Qasim Tarar and others

... Respondents

For the Petitioner: Mr. Muhammad Shahid Kamal Khan, ASC a/w
petitioner in person

For Respondents (1-2): Nemo

For the State: Mr. Jehangir Jadoon, A.G. Islamabad
Mr. Fakhar Abbas, S.I.

Date of Hearing: 29.09.2022

JUDGMENT

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Through this petition under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has called in question the *vires* of judgment dated 01.10.2020 passed by the learned Islamabad High Court, whereby the writ petition filed by the respondents was allowed and the FIR No. 163 dated 28.04.2020 registered under Sections 406/448 PPC at Police Station Lohi Bher, Islamabad registered against them, was quashed.

2. Briefly stated the facts of the matter are that respondent No. 1 was owner in possession of House No. 1885, Road No. 1, Phase-III, Behria Town, Rawalpindi. The respondent Nos 1 & 2 are husband and wife. The petitioner and the respondent No. 1 entered into an agreement to sell

the said house dated 30.07.2019 for a total sale consideration of Rs.19,600,000/-. The petitioner paid an amount of Rs.65,00,000/- as earnest money and took possession of two rooms on the upper portion of the said house. The balance sale consideration of Rs.13,100,000/- was to be paid by or before 30.09.2019 with the one month grace period i.e. upto 30.10.2019. According to the petitioner, the last date for payment of balance amount was extended to 31.12.2019. Later on, he paid yet another amount of Rs.10,00,000/- and Rs.500,000/- on 15.10.2019 & 04.11.2019 respectively. However, when the petitioner approached the respondents for transfer of the house in his name on the fixed date, they declined to do so. Subsequently, it transpired to the petitioner that the respondents have sold the said house to another person. Being aggrieved, the petitioner got registered the afore-referred FIR against the respondents. Thereafter, the respondents filed Writ Petition No. 1536/2020 before the Islamabad High Court, Islamabad, seeking quashment of the said FIR, which has been allowed vide impugned judgment. Hence, this petition seeking leave to appeal.

3. At the very outset, learned counsel for the petitioner contended that pursuant to the agreement to sell, the petitioner was given possession of two rooms in the house in question where he shifted his luggage etc but the respondents sold the property to another person, therefore, committed criminal breach of trust. Contends that the learned High Court has ignored the fact that other efficacious remedies are available to the respondents, therefore, there was no justification for filing of the Constitutional petition. Contends that the impugned order is unjust and arbitrary, which has resulted in grave miscarriage of justice, therefore, the same may be set at naught.

4. No one entered appearance on behalf of the respondents to prosecute this matter. The respondents were sent notices on their previous as well as on fresh addresses but according to the report of the process server, the house was locked and the phone number was switched off. To procure the attendance of the respondents, this Court vide order

dated 18.08.2022 directed for publication in daily 'Jang' but despite publication, no one appeared on behalf of the respondents. In these circumstances, we are left with no other option but to proceed with the matter on merits.

5. Learned Advocate General, Islamabad, defended the impugned order by stating that the transaction in dispute falls within the ambit of civil liability for which a civil suit is pending adjudication between the parties and the same cannot be converted into criminal liability.

6. We have heard learned counsel for the petitioner as also learned Law Officer at some length and have perused the relevant provisions of law.

A bare perusal of the record reveals that the petitioner and the respondent No.1 entered into an agreement to sell the house referred above for a total sale consideration of Rs.19,600,000/-. The petitioner paid an amount of Rs.65,00,000/- as earnest money and took possession of two rooms on the upper portion of the said house. Subsequently, he paid another amount of Rs.10,00,000/- and Rs.500,000/- on 15.10.2019 & 04.11.2019 respectively. However, when the petitioner approached the respondents for transfer of the house in his name, they declined to do so and ultimately sold the said house to another person. This led to registration of FIR, detail of which has been mentioned above. The respondents invoked Constitutional jurisdiction of the High Court seeking quashing of FIR on the plea that no offence of criminal breach of trust is made out. Before proceeding further with the case, it would be in order to reproduce Section 405 PPC, which defines criminal breach of trust. The same reads as under:--

"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 of prescribing the mode in which such trust is to be discharged, 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'."

7. From the bare reading of the afore-quoted provisions of law, it appears that to constitute an offence falling within the ambit of criminal breach of trust following ingredients are essential:--

- (i) There should be an entrustment by a person who reposes confidence in the other, to whom property is entrusted.
- (ii) The person in whom the confidence is placed, dishonestly misappropriates or converts to his own use, the property entrusted.
- (iii) 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.
- (iv) Dishonestly uses or disposes of that property in violation of any legal contract express or implied which he has made touching the discharge of such trust.

8. To constitute an offence of criminal breach of trust defined in Section 405 PPC, which is punishable under Section 406 PPC there must be an "entrustment" of property with the accused and a misappropriation of the same by him. The expression "entrustment" with the property or with any domain over the property has been used in a broader sense under Section 405 PPC. It has wide and different implications in different context. The expression "trust" in Section 405 PPC is a comprehensive expression and has been used to denote various types of relationship, like relationship of trustee and beneficiary, bailor and bailee, master and servant, pledger and pledgee. It is established law that while using the inherent powers, the High Court is to determine whether continuance of the proceedings would constitute a gross abuse of the judicial process. Both under the criminal law and civil law remedy can be pursued in diverse situations. Although they plainly overlap, they do not always exclude one another, and essentially vary in both content and impact. An act does not lose its criminal nature just because it has a civil liability. It is wrongly presumed that when a civil liability is under challenge and its discipline

relates to civil remedy, criminal prosecution is unsustainable. This impression has been clarified by this Court while rendering a number of judgments on this subject. In the instant matter without critically analyzing the scope of quashing of FIR, we are surprised to note that the alternative remedy of filing petition under the law was not availed rather directly filing a Constitution petition calling in question the very registration of FIR was something extraordinary coupled with the fact that the contents of the crime report were totally ignored and were not taken into consideration while adjudicating the matter in hand. The fate of deciding any criminal litigation primarily without recording of evidence seems to be something which has narrow scope. However, this principle is not absolute. In an appropriate case where complete injustice has been done, a Constitutional remedy can be pressed into and that can prove to be beneficial if the contents of the same warrant interference by a Constitutional court. Even otherwise, the legal remedy provided under the statute is based upon two words used by the Legislature i.e. "possibility" and "probability". Both these words in their entirety are sufficient to provide remedy to a sufferer of criminal litigation if at all it infringes the legal rights of any litigant on the basis of malicious prosecution. In the instant case a bare perusal of the FIR and the agreement to sell *prima facie* reveals that a clear allegation of entrustment and misappropriation of the property was made by the petitioner against the respondents in the FIR, which *prima-facie* discloses an offence under Sections 405 PPC punishable under Section 406 PPC. Admittedly, despite lapse of statutory period, the *challan* had not been submitted before the Trial Court, which *ex-facie* means that investigation had not been completed. In such circumstances, the possibility cannot be ruled out that further material may be collected for proceeding with trial. In view of the above, we are of the view that question regarding determination as to whether there was an entrustment of property, as asserted by the petitioner, could best be left to Trial Court to consider and decide in exercise of its power after recording of evidence.

9. For what has been discussed above, we convert this petition into appeal, allow it and set aside the impugned judgment dated

01.10.2020 passed by the learned Islamabad High Court. The prosecution branch is directed that the *challan* of the case be submitted before the Trial Court without un-necessary delay. The Trial Court shall proceed with the matter in accordance with law.

JUDGE

JUDGE

Islamabad, the
29th of September, 2022
Approved For Reporting
Khurram