

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION No. 721 OF 2018

M/s. Whiz Enterprises Pvt. Ltd. & Ors.

...Petitioners

Versus

The State of Maharashtra & Anr.

...Respondents

Mr. A.M.Saraogi for the Petitioners.

Mr. A.R.Patil, APP for Respondent No.1-State.

Mr. Laxman Kanal I/b. Laxman Kanal & Associates for Respondent No.2

CORAM : MRS. MRIDULA BHATKAR, J.

DATE : 11 MARCH 2019

P.C.:

1. Rule. Rule made returnable forthwith. By consent, the Petition is heard finally and disposed of at the stage of admission.

2. In this Petition, the order dated 31.01.2018 passed by the learned Additional Sessions Judge, City Civil & Sessions Court, Gr. Mumbai, rejecting Revision Application No. 1139 of 2017 with costs of Rs. 50,000/- to be payable to the original complainant i.e., respondent No.2, is challenged.

3. In Revision Application No. 1139 of 2017, the order of issuance of process dated 23.08.2017 passed by the learned Addl. Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai under sections 383, 406 and 420 read with 34 of the Indian Penal Code is challenged.

4. Petitioner No.1 is a company having the business of development of the building and petitioner Nos. 2 to 4 are the directors of the said company. Petitioner No.1 company had entered into an Agreement of Development with one society Jeevandeep CHS Ltd., Khar on 18.04.2008. Pursuant to that agreement, the said building was demolished and the new building was constructed in the year 2015. At the time of entering the agreement, the names of all 12 occupants are mentioned in the agreement. However, all the 12 occupants have not signed the said agreement, but it was signed on behalf of the office bearers of the said society, who chose petitioner No.1 company as their builder/developer for redevelopment of the said building. In the said agreement, it was agreed between the parties that after stipulated days, all the occupants shall handover the vacant tenements to petitioner No.1-company for the purpose of redevelopment. However, the present respondent No.2 i.e., original complainant did not handover her

tenement for considerable period of time for certain issues and, therefore, the builder had filed a Petition in the High Court where the original complainant lost. As per the order passed by this Court, the original complainant had to surrender her tenement to the builder/ developer. However, the building was redeveloped. After completion of the said building, all other 11 occupants were given their respective flats in the new building except the original complainant. The petitioners refused to handover her flat in the new building on the basis of clause No. 7 (a) of the Agreement dated 18.04.2008. Therefore, the original complainant had filed a private complainant before the learned Magistrate. After going through the averments made in the complaint, the learned Magistrate issued process for criminal breach of trust, cheating and extortion under sections 383, 406 and 420 read with 34 of the Indian Penal Code. The said order was challenged in Revision Application, which was rejected. Hence, this Petition.

5. The learned counsel for the petitioners has challenged the maintainability of the order of issuance of process against these petitioners mainly on the ground that the act is committed by petitioner No.1 company and one of the petitioners i.e., Amrit Rajani, as he was a

signatory to the impugned agreement and other two petitioners viz. Pooja Rajani and Narendra Rajani were not the signatories to the impugned agreement. He has submitted that petitioner Nos.2 and 3 had not played any role in the agreement and the development proceedings. This being a criminal prosecution, it is necessary for the original complainant to attribute a specific role to each of the director of the company and no such vicarious liability can be caused upon the other directors of the company. He has further submitted that no case in fact is made by the complainant much less of the cheating, extortion and criminal breach of trust. He has relied on clause No. 7 (a) of the impugned agreement and submitted that the society has agreed that the occupants/ members who would not handover the vacant tenements to petitioner No.1 company at the time of redevelopment process, then the developer has every right to deduct the amount of Rs. 40,000/- per day from the corpus fund. He has argued that the entire corpus is handed over by the developer to the society, then how the developer can deduct the amount as agreed in clause No 7 (a). He has further argued that there was privity of contract between the complainant and the petitioners. He has further argued that the complainant was never a signatory to the impugned agreement of 2008 and, therefore, there is no

question of handing over any possession of any tenement to the complainant. He has further argued that not only the order of issuance of process is illegal, but the finding given by the learned Sessions Judge in paragraph Nos.12 and 13 is also not correct. He has further argued that the learned Sessions Judge has given contradictory finding especially in paragraph No. 13 of the impugned order. The learned Sessions Judge has considered that respondent No.2/ original complainant is neither a party or signatory to the development agreement and, therefore, she is not liable to pay the amount of Rs. 40,000/-, which could have been deducted from the corpus fund. The learned Sessions Judge has otherwise considered the amount for the purpose of giving possession and holding right of the complainant in the said tenement in respect of the proposed building. He has further submitted that in the impugned agreement, there is an arbitration clause.

6. The learned counsel for respondent No.2/ original complainant has pointed out clause No. 26 of the impugned agreement, and has submitted that it was agreed between the office bearers of the society and the developer/builder that the possession of the tenements would be handed over immediately after receipt of the completion certificate.

He has further submitted that all the 11 occupants, who were also not the signatories to the impugned agreement, were given their respective tenements for newly developed building except the original complainant because she opposed the redevelopment on certain issues. Pursuant to the order passed by this Court, she handed over her tenement.

7. Considered submissions. Perused impugned order of issuance of process, the order passed by the learned Sessions Judge, complaint so also the impugned agreement.

8. The impugned agreement is the basis of the argument of the learned counsel for the petitioners. In the impugned agreement, there is a clause of deduction of the amount of Rs. 40,000/- per day from corpus fund if the flat is not vacated within stipulated period for redevelopment. However, there is no such clause enabling the developer/ builder of withholding the tenement or not handing over the possession if the said amount is not paid by a member to the developer. Not giving possession of the flat to recover this penalty amount is arm-twisting tactics. The grievance of the petitioners against the complainant is basically that she did not give money as per clause No. 7 (a) of the

impugned agreement. For the purpose, another remedy is available hence that issue cannot be mixed up with the issue of handing over the flat. The builder has taken possession of the tenement of the complainant for the purpose of redevelopment of the building. The building is redeveloped and, therefore, it is necessary for the builder to hand over the possession of the flat to the complainant. If there are other issues, they can be decided by following the legal procedure.

9. After going through the complaint, it is found that the complainant has specifically averred in paragraph No.2 of the complaint that accused No.1 is a private limited company and accused Nos. 2 to 4 are the directors of the company. It is also mentioned in paragraph No.5 of the complaint that accused Nos. 2 to 4 have entered into an agreement through accused No.1 company and thereafter, they have demolished the old building for the purpose of redevelopment. In paragraph No.10 of the complaint, the complainant has mentioned that the accused have committed breach of the contract for the purpose of extortion by not handing over the flat to her though she had repeatedly requested for the same. The complainant has also averred that though she has entrusted the said flat to accused Nos. 1 to 4 through accused No.5, not handing

over possession of the ready flat is a criminal breach of trust.

10. Considering the ingredients of section 383 which is for extortion and section 406 (405) which is for criminal breach of trust, the order of issuance of process is correct. Under section 420, there may not be an intention to cheat right from the beginning, however, considering the ingredient of cheating, refusal of the flat will amount to cheating, as there is wrongful gain and wrongful loss. The order of issuance of process cannot be faulted with. Hence, the Petition is dismissed. Rule is discharged.

11. Mr.Saraogi, the learned counsel for the petitioners wants to challenge this order before the Hon'ble Supreme Court and hence he prays to stay the operation of this order for four weeks.

12. The learned counsel for respondent No.2 opposed the grant of stay on the ground that the Sessions Court has already expedited this case and, therefore, the matter has to proceed, as respondent No.2 has lost the possession of her tenement since 2009.

13. Though the submissions of the learned counsel for respondent No.2 are correct, however, in all fairness, to enable the petitioners to challenge this order before the Hon'ble Supreme Court, the operation of this order is stayed till 1st April, 2019.

(MRIDULA BHATKAR, J.)