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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1110 OF 2020

Nisar Kazi
Aged : 61 years, Occ. : Business,
Director of M/s. Zoya Shelcon Pvt. Ltd.
A company incorporated under the
Indian Companies Act, 1956 having
its registered office at Fortune Classic,
15th Road, Khar (W), Mumbai 400 052. ..Petitioner

vs.

1. The State of Maharashtra
(through Khar Police Station)

2. Khurshid Majid Khunju
Aged : 58 years, Occ. : Business,
Kutihal House, Post – Khrushna
Puram, Taluka – Kayan, District -
Alleppey, Kerala
(original complainant/first informant) ..Respondents

Mr. Rizwan Merchant a/w. Mr. Ramiz Shaikh i/b. Rizwan Merchant & Associates for petitioner.

Mr. Khurshid Kunju – respondent No. 2 in person a/w. Ms. Lata Khubchandani.

Mr. K.V. Saste, APP for State.

CORAM : S.S.SHINDE &
M.S.KARNIK, JJ.

DATE : DECEMBER 22, 2020

JUDGMENT : (PER M.S. KARNIK, J.)

Rule. Rule is made returnable forthwith. Heard finally with the consent of learned counsel appearing for the parties.

2. This Petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure is filed for quashing of the First Information Report ('FIR' for short) bearing No.854 of 2019 registered at the Khar Police Station under Sections 406, 420 read with 34 of the Indian Penal Code ('IPC' for short).

3. The FIR is made on the following allegations :

That from 25/4/2013 till date, the alleged directors of 'Zoy Shelcom', namely Nisar Kazi (petitioner No.1), Nasir Kazi and other members, in collusion with each other executed and registered an agreement with the residents of 'Moon Star CHS', in the matter of redevelopment of Plot No.393, 16th Road, TPS-III, Khar (West), Mumbai 400 050. The residents were to be paid rent regularly till completion of the project and also a bank guarantee of Rs.2 crores was to be furnished. It is further alleged that 'Zoy Shelcom' started construction in 2013 and they completed the work only till 11th floor, whereas as per the agreement, the construction was to be done till the 15th floor. It is further alleged that no further construction was carried out till 2016. Further, the said construction was to be completed within three years from the date of registration of the said agreement. It is, therefore, the case of the prosecution that till today, the accused persons apart from not completing the project as per the agreement and giving possession of the flats, though have deducted amounts payable towards municipal taxes from the rent paid to the tenants, have not paid the municipal taxes and thereby have committed fraud thereby have misappropriated the amount of Rs.22,27,571/- deducted from the rent paid to the tenants.

4. A reading of the FIR would thus reveal that though the property in question was handed over to the petitioner for redevelopment and the terms of the agreement having clearly stipulated that the building had to be completed and possession handed over within three years of the registration of the agreement, the petitioner failed to fulfill their part of the obligation. Further, the occupants have not been paid rent

allegedly for 32 months and on the contrary despite having deducted amounts from the rent earlier paid to the tenants, the petitioner has not paid the municipal taxes and thus have committed the fraud and misappropriated the amounts of Rs.22,27,571/-.

5. Learned counsel for the petitioner submitted that all the allegations read in the FIR even if taken at its face value do not attract the ingredients of Sections 406, 420 of the IPC. Learned counsel for the petitioner would submit that to attract the offence of cheating under Section 420 of the IPC, the intention to cheat from inception must be present and established. According to him, the offence of cheating cannot be said to have been made out as admittedly out of the 15 floors, 11 floors are constructed by the company of the petitioner from the year 2013 to 2016. He would further submit that even the rent upto the year 2016 is paid to the occupants.

6. Learned counsel for the petitioner would thus submit that at the highest this is a case of breach of contract and as the complaint related to purely contractual dispute of a civil nature, even if all the allegations in the complaint are taken to be true, they did not constitute any criminal offence as defined under

Sections 406, 420 of the IPC. Learned counsel for the petitioner relied upon the following decisions in support of his submissions :-

1. Indian Oil Corporation vs. NEPC India Ltd. and others.[1]

2. Mahadeo Prasad Alias Mahadev Prosad Choudhury vs. State of West Bengal.[2]

3. Hridaya Ranjan Prasad Verma and others vs. State of Bihar and another.[3]

4. Vir Prakash Sharma vs. Anil Kumar Agarwal and another.[4]

5. Union of India and others vs. Ramesh Gandhi.[5]

6. Motilal Songara vs. Prem Prakash alias Pappu and another.[6]

7. Learned counsel for the petitioner further submitted that it was orally agreed between the parties that for smooth completion of the project, instead of furnishing the bank guarantee in terms of the agreement, the said amount of Rs.2 crores could be utilised for constructing 11 floors of the building. Learned counsel would submit that since the date of entering into the agreement, no grievance was ever made by the respondent No.2 that the bank guarantee has not been furnished, meaning thereby that the occupants were well aware that the

1 (2006) 6 SCC 736
2 AIR 1954 SC 724
3 (2000) 4 SCC 168
4 (2007) 7 SCC 373
5 (2012) 1 SCC 476
6 (2013) 9 SCC 199

said amounts of Rs.2 crores was to be utilised for cost of construction of the building.

8. Learned counsel for the petitioner would further submit that it is not as if the petitioner’s company has no intention of completing the project and in fact the only reason why the remaining four floors could not be completed was because of the additional FSI of the adjoining plots which was to be used to construct the sanctioned plan of 14 floors of the society, was not made available on account of failure of earlier builder 'Hicon' to hand over peaceful and vacant possession of the adjoining property. Learned counsel would thus submit that the case of the complainant is that of breach of the agreement and that the same is a civil wrong. Learned counsel would also submit that the redevelopment of the premises is registered with RERA which shows the outer limit for completion of the project is of 31/12/2021 and therefore, even this circumstance is sufficient to indicate that the petitioner company has no intention of cheating or committing any criminal breach of trust.

9. Learned counsel for the petitioner on instructions submitted that in all probabilities the construction of the building would be completed by 30/6/2021 and that the petitioner is even

ready to undertake the payment of arrears of rent on completion of the said project and on parting with possession of the flats to the members of the society. On instructions he would submit that the petitioner also undertakes to clear entire dues of municipal taxes at the stage of issuance of occupation certificate. To show his bonafides learned counsel for the petitioners on instructions submitted that the petitioner is willing to give an undertaking that a sum of Rs.25 lakhs as part payment towards arrears of rent would be paid on or before 15/1/2021.

10. Learned APP appeared for the respondent No.1 and the respondent No.2 appeared in person. On behalf of the respondents it is submitted that not only that the petitioner's company failed to complete the project and hand over possession of the flats within a period of three years as stipulated in the agreement, but they have also failed to pay the rent for 32 months in terms of the agreement. It is the submission of the respondents that the petitioner company had deducted from the rent amounts payable towards municipal taxes and having failed to deposit the amount of Rs.22 lakhs payable towards municipal taxes, have misappropriated this amount. Learned counsel for the respondents would submit that in terms of the agreement the petitioners have failed to even furnish the bank guarantee of

Rs.2 crores.

11. Heard learned counsel for the parties. There is no dispute that there was an agreement of assignment of development rights dated 6/4/2013 in favour of the petitioner company wherein they had agreed to complete the construction of the building within a period of three years. The petitioner's company had also agreed to pay rent to the residents as they had vacated the premises and handed over vacant possession of the building. There is no dispute that the construction of the building could not be completed within the time stipulated in the agreement. There is further no dispute that the petitioner company is in arrears of rent payable to the occupants sometime from the year 2016 onwards.

12. No doubt that the petitioner's company agreed to undertake that the project in question would be completed by 30/6/2021 and that the arrears of rent would be paid on completion of the said project and upon parting with possession of the flats. The petitioner's company has also undertaken to clear the entire dues of municipal taxes at the stage of issuance of the occupation certificate.

13. The undertaking though appears attractive, it is however not possible for us to gloss over the fact that the bank guarantee of Rs.2 crores which was to be furnished in terms of the agreement entered into in the year 2013 has not been furnished till date. Learned counsel for the petitioner wants us to infer that the occupants having not raised any demand to furnish the bank guarantee right from the year 2013 till date of the filing of the complaint would be indicative that the bank guarantee is rendered redundant. It is not possible for us to enter into this factual determination at this stage as this is a matter for trial.

14. It is also not in dispute that the property in question was to be developed within three years and that the rent was to be paid regularly to the occupants. The petitioner's company has stated that because the vacant possession of the adjoining plot was not handed over to the builder, the FSI which was to be used upon merger of the adjoining property could not be transferred and this was the reason for stalling the development work.

15. An upshot of the above discussion would go to show the allegations that

(a) pursuant to the agreement the occupants had vacated the flats and handed over possession of the building ;

(b) there is a breach of the agreement in completing the building within the stipulated time and handing over the flats to the occupants. An agreement has been entered into between the parties on 6/4/2013 and admittedly possession of new building is not given to the original owners who are now residing in rented premises ;

(c) Admittedly, for last 32 months rent is not paid to original flat owners of the premises in question. As argued by respondent No.2 appearing in person, some of original flat owners have to stay on streets ;

(d) though deductions were made from the rent towards payment of municipal taxes, the municipal taxes are not deposited and therefore, the petitioner's company has misappropriated the amount of Rs.22,27,571/-;

(e) failure to furnish the bank guarantee of Rs.2 crores as agreed ;

Prima facie reveals the ingredients of the alleged offences are attracted.

16. Learned counsel though has relied upon a number of decisions cited hereinbefore, in our opinion, the said decisions can have no application in the present facts as we have already observed that the allegations made in the FIR *prima facie* attracts the ingredients of the alleged offences. It is therefore not possible for us to accept the petitioner's case for quashing of the FIR.

17. It is made clear that observations made herein above are prima facie in nature and limited to deciding the present application made under Section 482 of Cr.P.C. for quashing FIR and the trial Court shall not get influenced by said observations while deciding the matter on merits.

18. We, therefore, do not find any merit in the Petition, consequently the Petition stands dismissed.

19. Rule is discharged.

20. The Writ Petition is disposed of accordingly.

21. This judgment will be digitally signed by the Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this judgment.

(M.S.KARNIK, J.) **(S.S.SHINDE, J.)**