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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

BEFORE

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR KAURAV

+ **CRIMINAL MISCELLANEOUS NO. 5165/2014 & CRL.
M.A. 17697/2014**

Between:-

**VIJAY NARAIN PANDEY
S/O SITA RAM PANDEY
R/O 27, ISHWAR NAGAR,
NEW DELHI-25**

**ALSO AT
R/O 80A, MAYUR ROAD,
ASHOK NAGAR
ALLAHABAD, U.P.**

.....PETITIONER NO. 1

**JAI PRAKASH OJHA
S/O LATE MATA PRASAD OJHA
RESIDENT OF 5-D/2, MINTO ROAD,
ALLAHABAD, (U.P)**

.....PETITIONER NO. 2

(Through: Mr. Sulaiman Mohd. Khan, Mr. Taiba Khan, Mr. Bhanu Malhotra, Mr. Shubham Arora and Mr. Shikhar Koushal, Advocates.)

AND

THE STATE (NCT OF DELHI)RESPONDENT NO. 1

**COL. Y.S. TYAGI
R/O G-404,
VIVEK VIHAR (AWHO) COMPLEX
SECTOR-82, NOIDA-201009**

.....RESPONDENT NO. 2



(Through: Mr. Utkarsh, APP for State/R-1 with SI Nikhil Raman, PS Tughlak Road.

Ms. Akshay Malik and Mr. Anmol Mishra, Advocates for R-2.)

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Pronounced on : 27.09.2022

J U D G M E N T

PURUSHAINDRA KUMAR KAURAV, J.

1. This petition under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C) is directed against the order dated 06.01.2014, by the learned Metropolitan Magistrate, Patiala House Courts, New Delhi, whereby, the order of summoning has been passed against the petitioners for commission of offence punishable under Sections 405/420 of the Indian Penal Code, 1860 (in short 'IPC').

2. The facts of the case are that the respondent No.2 / complainant filed a complaint under Section 200 of the Cr.P.C. against the petitioners and one Sita Ram Pandey for commission of offences under Sections 405/406/420/120B of the IPC. As per the complaint, the main allegation against the accused, therein, was of deceiving the complainant in paying a sum of Rs. 5.0 Lakh by giving false assurance of providing him built-up house/flat when his intention from the very beginning was to cheat and defraud innocent depositors like the complainant. The complainant filed an application under Section 156 (3) of the Cr.P.C. for direction to the concerned police to register an FIR. On 27.01.2010, the SHO of the concerned police station filed a status report stating therein various



reasons for non-registration of the FIR including the reason that the issue raised was predominantly of civil nature. On 09.02.2010, the learned Metropolitan Magistrate dismissed the application under Section 156 (3) of the Cr.P.C. The respondent No.2/complainant was directed to lead evidence. He examined himself and two other witnesses at pre-summoning stage. Vide impugned order dated 06.01.2014, the learned Magistrate after considering the statements of the complainant and the other witnesses, directed for issuance of summons to the petitioners for offences punishable under Sections 405/420 of the IPC. This court vide order dated 17.11.2014, stayed the further proceedings of the complaint case.

3. The learned counsel appearing on behalf of the petitioners submits that the complaint in question has been filed after a delay of almost 20 years. The only aim to file the complaint is to harass the petitioners, and extort money; and the same is abuse of the process of law. He further submits that the entire matter is of the civil nature, yet it has been given a colour of criminality and the offences under Sections 405/420 of the IPC are not made out even if the complaint is taken on face value. He further submits that in any case there was no intention to cheat the complainant at the time of making promise as there was no dishonest intention on the part of the petitioners. He places reliance on the decision of the Hon'ble Supreme Court in the matters of *M/s Thermax Ltd. and Ors. v. K.M. Johny and Ors.*¹, *V.Y. Jose and Anr. v. State of Gujarat and Anr.*² and *Ajay Mitra v. State of M.P. and Ors.*³.

¹ (2011) 13 SCC 412

² (2009) 3 SCC 78

³ AIR 2003 SC 1069



4. The prayer is vehemently opposed by the learned counsel appearing on behalf of respondent No. 2 / complainant. He submits that this court in exercise of its power under Section 482 of the Cr.P.C. should not enter into the roving enquiry as to whether there is probability of conviction of the petitioners or not. He further submits that the learned Magistrate has applied his mind and has taken cognizance on the basis of material available on record. According to him, the learned Magistrate is well within his right to issue summons against the petitioners for alleged offences punishable under Sections 405/420 of the IPC in terms of power vested with him under Section 204 of the Cr.P.C. He further submits that the impugned order is well-reasoned and the same should not be interfered with. He further submits that there was no delay in filing the complaint, as according to him, repeated assurances were given by the petitioners to repay the amount. It is, therefore, submitted that the entire petition is bereft of merit and the same deserves to be dismissed. He places reliance on the judgment of the Hon'ble Supreme Court in the cases of *Bhushan Kumar & Ors. v. State of NCT of Delhi & Ors.*⁴, *Deputy Chief Controller of Imports and Exports v. Roshal Lal Agarwal & Ors.*⁵, and *U.P. Pollution Control Board v. Bhupendra Kumar Modi & Ors.*⁶

5. I have heard learned counsel appearing on behalf of the parties and perused the record.

6. A perusal of complaint filed by respondent No.2/complainant demonstrates that he is a retired Colonel of Indian Army. The petitioner

⁴ AIR 2012 SC 1747

⁵ AIR 2003 SC 1900

⁶ (2009) 2 SCC 147



No. 1 and petitioner No. 2 are Secretary and President of Raj Laxmi Cooperative Group Housing Society (in short 'the Society'). The gravamen of the allegation is that in the year 1990, through a friend of the complainant, the petitioners were introduced to the complainant at his office at Sena Bhawan as the Office Bearers of the concerned Society. It is alleged that the complainant, his sister-in-law and brother-in-law deposited a sum of Rs.5.0 Lakh in total with the petitioners in the name of the Society on the false assurance of providing built-up houses/flats. Respondent No. 2/complainant further states that after the year 1990, he was posted out of Delhi and when he came back to Delhi, he enquired about the status of the flat and he was informed that there were certain technical problems with the project and the petitioners agreed to return the money invested by issuing cheques. Certain cheques were also given and it is stated that on presentation, the cheques were bounced. After 1999, again when he came back to Delhi, after completion of his tenure in Kashmir Valley, he enquired about the status of flat in question and he was assured that they were in the process of allotting the houses and the same would be done very soon. It is also stated that in the year 2001, respondent No.2/complainant suffered a serious heart attack and later in the year 2003, he suffered from a stroke and has remained under medical treatment since then. It is also stated that respondent No.2/complainant was repeatedly assured, time and again, by the petitioners that they would provide alternate flat in their new project at Indira Puram as there were some technical problems in their previous project. It is also stated that the so-called Raj Laxmi Cooperative Society was a family enterprise and the same has been formed solely with the illicit design to cheat and defraud the depositors. The respondent No.2/complainant also came to



know that there were several cases against the petitioners such as FIR No. 374/1994 under Sections 406/409/420/421/422/423/120B registered at PS Lajpat Nagar and on the basis of the entire facts, he construed that he was cheated by the petitioners and, therefore, the alleged offences were sought to be registered vide complaint dated 15.01.2010.

7. In pursuance to the directions given by the learned Magistrate on an application under Section 156 (3) of the Cr.P.C., the concerned SHO filed status report on 27.01.2010, wherein, it was stated that the name of the complainant/respondent No. 2 was at serial No. 236 in the list of investors/members and the name of Divya Lok Tyagi was at serial No. 253 and the name of Sh. Rana Pratap Singh was at serial No.254. It is also stated therein that the money transaction in Sena Bhawan was not possible. The money of the depositors/members was returned through Mr. Balram Barera, who was appointed by the Registrar of Cooperative Societies. He had circulated a notice in Times of India dated 14.05.2000 to contact him for return of the money. The concerned police station also mentioned that the issue was of civil nature.

8. The learned Magistrate vide order dated 09.02.2010 found that an FIR No. 374/94 was also registered with respect to non-returning of the money of the depositors. It was also found that the accused were released on bail on furnishing a sum of Rs.60 Lakh as per the directions of this court. The Official Liquidator was already appointed and the name of the complainant and his family members were already there in the list of depositors. Only because of the reason that respondent No.2/complainant could not get his money back, FIR could not be directed and, therefore, no direction under Section 156 (3) of the Cr.P.C was issued.



9. After recording the pre-summoning evidence, the learned Magistrate vide impugned order dated 06.01.2014, found that the allegations *prima facie* disclose the commission of offence under Section 405 of the IPC or in alternate under Section 420 of the IPC and, therefore, order of issuance of summons has been passed.

10. No doubt, delay in lodging the complaint without assigning the reason for the same, raises suspicion as to the whole truth of the allegations. Mere statement that the complainant was being assured can hardly be taken as a sufficient explanation for such a huge delay. The duty of the Magistrate in a complaint case set out under Section 200 of the Cr.P.C. is to find whether there is any matter which calls for investigation by a criminal court. It is also to find out whether there exists any valid foundation for issuance of process against the accused persons in the complaint or as to whether it is baseless one, on which no action is required to be taken. The law imposes a serious responsibility on the Magistrate to decide if there is sufficient ground for proceeding against the accused. Existence of a *prima facie* case, whether the prosecution of the case is an abuse of the process of the court or whether a civil dispute has been given colour of criminal dispute etc. are factors to be considered by the Magistrate while conducting/holding enquiry under Section 202 of the Cr.P.C. No doubt, the enquiry at that stage of issuance of process does not partake the character of a full dress trial which can only take place after process is issued under Section 204 of the Cr.P.C. while calling upon the accused to answer the accusation made against him for adjudging the guilt of the accused person. Further, the question whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry



contemplated under Section 200 of the Cr.P.C. It is true that in coming to a decision as to whether the process should be issued, the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence lead by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a *prima facie* case against him.

11. If in the instant case without taking into consideration the defence of the petitioner/accused, if the material available before the learned Magistrate is considered to be true, the following findings can be recorded without any roving enquiry.

- (i) the amount in question was given by the complainant voluntarily in the year 1990 on an assurance that they would be allotted a flat.
- (ii) the complainant/respondent No.2 was aware of the fact that the petitioners are Secretary and President of the Society and the amount in question was in the form of advance towards allotment of a flat.

12. As per paragraph No. 7 of the complaint, all that is stated is that the complainant was repeatedly assured time and again that the accused persons would provide an alternate flat in their new project. But the accused persons have not provided the same. There are no steps stated to have been taken either for recovery of the money or any action against the petitioners/accused by the complainant/respondent No.2 after depositing the money, once he realized that he has been cheated. According to the complainant itself, he had come to know in the year



1999 that the flats were not constructed. Respondent No.2/complainant has not claimed any refund in pursuance to notice published by Mr. Balram Barera, who was appointed by the Registrar of Cooperative Societies, in Times of India dated 14.05.2000. The complaint in question has been filed only on 15.01.2010. On the basis of the aforesaid facts, it can be concluded that the complainant/respondent No.2 and his family members invested a sum of Rs.5.0 Lakh with the petitioners/accused with the hope of allotment of a flat in the Society. The registration of FIR against the petitioners, appointment of Administrator by this court and return of the money to some of the investors clearly shows that respondent No.2/complainant could have resorted to any of the options available to him but he did not take any action in the last 20 years after depositing the money. It is seen that only with an object to recover the money, which he could not get it as he had missed the opportunity before the Administrator, he filed the instant complaint to give a criminal colour to the entire episode.

13. The Hon'ble Supreme Court in the matter of *Ajay Mitra (supra)* in paragraph 17, after placing reliance on the earlier decision in the case of *Hari Prasad Chamaria v. Bishnu Kumar Surekha*⁷, has held that unless the complaint shows that the accused had dishonest or fraudulent intention at the time the complainant parted with the money, it would not amount to offence under Section 420 of the I.P.C. and it may only amount to breach of contract. A guilty intention is essential ingredient of the offence of cheating. In *Mahadeo Prasad v. State of West Bengal*⁸, it has been held that where the charge against the accused under Section

⁷ 1973 (2) SCC 823

⁸ AIR 1954 SC 724



420 of the IPC is that he induced the complainant to part with his goods, on the understanding that the accused would pay for the same on delivery but did not pay, if the accused had at the time promised to pay cash against delivery, an intention to do so, the fact that he did not pay, would not convert the transaction into one of cheating. But, if, on the other hand, he had no intention whatsoever to pay but merely said that he would do so in order to induce the complainant to part with the goods, then a case of cheating would be made out.

14. The Hon'ble Supreme Court in the matter of **V.Y. Jose (supra)** has held that for the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the IPC can be said to have been made out. In another decision in the matter of **M/s Thermax Ltd. (supra)**, in paragraph 23, it has been held that the complaint in question was filed in the year 2002 when the alleged dispute was with respect to year 1993-95, it was found therein that the complainant was trying to circumvent the jurisdiction of the civil court which estopped him on account of law of limitation.

15. It is thus seen that in the present case, on the basis of the aforesaid analysis, the learned Magistrate has completely failed to analyse the entire material in a right perspective and has simply recorded that the record is perused, the complainant is examined and the witnesses substantiated the allegations made therein, therefore, the same disclosed



commission of offence in question. There does not seem to be any application of mind, as has been indicated in the preceding paragraphs. In view of the aforesaid, this court finds that if the order of summon in the instant case, is allowed to sustain, the same would amount to abuse of process. The order of summon has serious consequences as has been held by the Hon'ble Supreme Court in the case of *Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors.*⁹, *Dhariwal Tobacco Products Ltd. & Ors. v. State of Maharashtra & Anr.*¹⁰, and *M.A.A. Annamalai, v. State of Karnataka & Anr.*¹¹

16. So far as the decision relied upon by the learned counsel appearing for respondent No. 2, in the case of *Bhushan Kumar (supra)* is concerned, the Hon'ble Supreme Court in that case has held that it is not the province of the Magistrate to enter into a detailed discussion on the merits or demerits of the case. To determine whether the process should be issued or not, the Magistrate can take into consideration improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judiciously exercised by him. It has also been held that once the Magistrate has exercised his discretion, it is not for the High Court or even for the Supreme Court to substitute its own discretion or to examine the case on merits with a view to find out as to whether the allegations are true. The aforesaid legal position is not disputed.

⁹ (1998) 5 SCC 749

¹⁰ (2009) 2 SCC 370

¹¹ (2010) 8 SCC 524



17. Unfortunately, in the instant case, the application of mind by the Magistrate is not reflected. What the Magistrate had done is to record in the order sheet that he has examined the material and has found that the offence in question is attracted. Even otherwise, the facts in the case of ***Bhushan Kumar (supra)*** are completely different. In the case of Bhushan Kumar, the FIR was registered. The same was challenged in the High Court. The High Court granted liberty to take appropriate steps in case they are summoned. The Magistrate then summoned the accused therein which was again challenged before the High Court. The High Court rejected the challenge and has held that the petition was not maintainable. The Hon'ble Supreme Court in paragraph No. 18 has reversed the conclusion with respect to maintainability of the petition. The Hon'ble Supreme Court, however, accepted the view of the High Court on merits.

18. So far as the other decision relied upon by the learned counsel for respondent No. 2 in the case of ***Deputy Chief Controller of Imports and Exports (supra)*** is concerned, the same also lays down the principle which is to be followed by the Magistrate at the time of issuance of summons. As stated above, the legal position propounded by the Hon'ble Supreme Court in the cases of ***Deputy Chief Controller of Imports and Exports (supra)*** and ***U.P. Pollution Control Board (supra)*** is unquestionable but the cases have been decided on the basis of their facts.

19. In view of the aforesaid, this court is of the view that the impugned order is unsustainable. The impugned order dated 06.01.2014, passed by learned Metropolitan Magistrate is set aside and quashed. Consequently,



complaint case is rejected. Accordingly, the instant petition along with pending application stands disposed of.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

SEPTEMBER 27, 2022/hk

