IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

C.R.R. 1081 of 2022

Sri Beni Madhab Roy
versus
Miss Sanjukta Chourasia & Ors.

Mr. Indrajeet Dasgupta,
Ms. Puspita Bhowmick … For the Petitioner.

Heard on : 28.07.2023 & 17.08.2023.

Judgment on : **31.08.2023**

Tirthankar Ghosh, J:-

The present revisional application has been preferred challenging the proceedings of Complaint Case No. CN-1059/21 dated 29.11.2021 which is pending before the learned Metropolitan Magistrate, 18th Court, Calcutta under Sections 420/406/506/34 of the Indian Penal Code. The Complaint Case was initiated before the learned Additional Chief Metropolitan Magistrate, Calcutta by one Miss Sanjukta Chourasia and the petitioner was implicated as accused no.5 in the said complaint. The learned Magistrate on perusal of the complaint was pleased to take cognizance of the offences under Sections 420/406/506/34 of the Indian Penal Code and subsequently after examination under Section 200 of the Code of Criminal Procedure of the complainant/representative and another witness, namely, Om Prakash Chourasia and Meena Chourasia was pleased to issue process under Sections 420/406/506/34 of the Indian Penal Code.

The allegations made in the petition of complaint were to the effect that M/s. B. S. Enterprises, the partnership firm and Bimal Kumar Sikaria (accused no.2) and Sri Sandip Sen are partners of the said firm who were engaged in developing a multistoried building with the landowners on joint venture basis. The accused nos. 4 and 5 being Neel Madhab Roy and Beni Madhab Roy were the joint owners of the land situated at 53B, Sova Bazar Street and 12, Rasik Lal Ghosh Lane, Kolkata-700005. It has been contended that the accused nos. 4 and 5 (petitioner) handed over the schedule property to the partners of the accused firm by executing a development agreement which was notarised on 09.05.2018 where accused nos. 4 and 5 jointly signed as Administrator to the Estate of Kumar Pramatha Nath Roy and the accused nos. 2 and 3 as developers jointly signed the terms and conditions for developing the multistoried building. A registered power of attorney was also given in favour of the accused nos. 2 and 3 by the accused nos. 4 and 5 for the purposes of development of the multistoried building and also for execution of agreement of sale and deed of conveyance for the intending purchasers of any newly constructed flat of the said multistoried building. Additionally, the developers were also empowered to collect advance amount of the total sale consideration on behalf of the accused nos. 4 and 5 as they are lawful representatives and attorneys. After scrutinising all the documents and papers, the complainant entered into an agreement for sale on 02.01.2018 with accused nos. 2 and 3 both being partners of accused no.1/firm for purchasing one flat on Block A, 1st Floor being flat no. 1C, measuring super built up area of 1050 sq. ft. (more or less) in the said land at 53B, Sova Bazar Street and 12, Rasik Lal Ghosh Lane, Kolkata-700005 where the accused nos. 2 and 3 signed as constituted attorney of the accused nos. 4 and 5. The complainant gave a sum of Rs.23,00,000/- by cash and by RTGS in the name of the accused nos. 1 and 3 by electronic mode out of total consideration of Rs.31,50,000/- for purchasing the said flat by way of advance payment.

The complainant alleges that after passage of time the developers along with land owners were not able to collect completion certificate from the competent authority and as such were not able to hand over the flat to the complainant. The time period which was mentioned in the agreement for sale i.e., 30 months from the date of execution of the said agreement was also not adhered to neither the advance amount was returned. The complainant thereafter started visiting the office of the accused persons, but she was thrown out and abused in filthy languages. The complainant by way of a demand notice dated 23.09.2021 demanded the amount of Rs.23,00,000/-. The said notice was received by the accused persons, but in spite of receipt of the same, they did not refund it, thereby causing wrongful loss to the complainant to the tune of Rs.23,00,000/-. According to the complainant, the developer and the land owner knowing full well have falsely and fraudulently accepted the advance amount with a malafide intention to deceive the complainant for enriching themselves by way of wrongful gain. The accused persons have by their act and conduct committed offences of cheating, criminal breach of trust, criminal intimidation and all of them were hand in gloves with each other. As such, according to the complainant, they should be tried for the offences under Sections 420/406/506/34 read with Section 120B of the Indian Penal Code.

On receipt of the complaint, the learned Additional Chief Metropolitan Magistrate, Calcutta was pleased to take cognizance of the offences and thereafter was pleased to transfer the case to the learned Metropolitan Magistrate, 18th Court, Calcutta.

As aforestated the learned Metropolitan Magistrate, 18th Court, Calcutta on examination of the complainant's authorised representatives and another Meena Chourasia was pleased to issue process under the provisions of Sections 420/406/506/34 of the Indian Penal Code.

I have considered the submissions advanced on behalf of the petitioner and the complicity of the present petitioner. From the allegations made in the petition of complaint, it is transparent that the case has been instituted for the purposes of refund of the sum of Rs.23,00,000/-. The said sum of Rs.23,00,000/- was paid to the accused no.1 which happens to be the partnership firm of accused nos. 2 and 3. Except oral assertions, there is nothing on record to show that any amount was paid to the accused no.5 being the present petitioner. The subject-matter of wrongful gain or wrongful loss which has been claimed by the petitioner was never part and parcel of any act or conduct of the accused no.5/petitioner. Further the petitioner along with another were the land owners. The main purpose of the amount being advanced was for the purposes of purchase of a flat on Block A, 1st

Floor being flat no. 1C of the premises at 53B, Sova Bazar Street and 12, Rasik Lal Ghosh Lane, Kolkata-700005.

Having regard to the nature of the allegations which has been made, I am of the view that the provisions of Section 420 of the Indian Penal Code or for that purpose Section 406 of the Indian Penal Code is not made out as in this case there was an agreement and in respect of the agreement, the amount was advanced. The said amount was advanced to the accused no. 1, the representatives of whom are accused nos. 2 and 3. Accepting the fact that the accused no.5/petitioner happens to be the owner of the land, there is nothing on record to show that the petitioner no.5 had any intention to deceive the complainant. The communications and/or representations were made between the accused no.1 and its partners and the complainant. Even if the allegations are taken to be true, I am of the considered view that the remedy of the petitioner is before the civil court and a dispute which should have been adjudicated by the civil court has been given a cloak of a criminal proceeding. To that effect the Hon'ble Supreme Court in Hridaya Ranjan Prasad Verma & Ors. –Vs.– State of Bihar & Anr. reported in (2000) 4 SCC 168 was pleased to observe as follows:

> ***"15.*** *....... that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been*

> *committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise…………”*

Further in Indian Oil Corporation –Vs. – NEPC India Ltd. & Ors. reported in (2006) 6 SCC 736, the Hon'ble Supreme Court was pleased to hold that:

> ***"14.*** *While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. ………”*

In a recent judgment of the Hon'ble Supreme Court being Mitesh Kumar J. Sha –Vs. – State of Karnataka & Ors. reported in 2021 SCC OnLine SC 976, the aforesaid view has been approved.

Having regard to the nature of the allegations and the complicity which has been portrayed particularly with regard to the present petitioner, I am of the opinion that further continuance of the proceedings so far as the present petitioner is concerned in the background of the allegations and the initial deposition of the witnesses do fail to make out any offences under Sections 420/406/506/34 of the Indian Penal Code. As such, further continuance of Complaint Case No. CN-1059/21 dated 29.11.2021 pending before the learned Metropolitan Magistrate, 18th Court, Calcutta is an abuse of the process of law and as such the same is hereby quashed.

Thus, the revisional application being CRR 1081 of 2022 is allowed.

Pending connected application, if any, is consequently disposed of.

All parties shall act on the server copy of this order duly downloaded from the official *website* of this Court.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Tirthankar Ghosh, J.)