IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

CRR 3138 of 2022

Girija Shankar Verma @ Varma & Anr.
Versus
State of West Bengal & Anr.

For the Petitioner	:	Mr.Moyukh Mukherjee Mr. Abhijit Singh Ms. Sagnika Banerjee Ms. Sharmistha Basak
For the Opposite Party no.2	:	Mr. Barun Ghosh
For the State	:	Mr. Ranabir Roy Chowdhury Mr. Sandip Chakraborty
Heard on	:	18.09.2024
Judgment on	:	12.11.2024

Dr. Ajoy Kumar Mukherjee , J.:

1. Challenging the impugned proceeding being GR Case no. 1238 of 2021, arising out of Lake Town police station case no. 263 of 2021, petitioners have preferred the present Application with a prayer for quashing the said proceeding, qua the petitioners herein.

2. Petitioner contended in the Application that complainant stated in the FIR (First Information Report) that the opposite party no.2/FIR maker was introduced to Mr. Sanjoy Kumar Agarwal by one Subhash Kumar Roy and one Samaresh Das and relying upon the representation that the said Sanjoy Kumar Agarwal is a developer, the petitioner expressed his desire to join Mr. Agarwal as partner in his firm and thereafter Mr. Agarwal took the opposite party as a partner with him in his partnership firm namely "*Shree Krishna Realtors*". It is alleged that relying upon said representation the opposite party no.2 along with aforesaid person entered into a registered development agreement dated 18.12.2016 and it is further alleged that when the construction work commenced, said Sanjay Kumar Agarwal took control of the project and also taking advantage of the same took custody and control of the bank account, cheque books, vouchers papers etc. It has been further alleged that the opposite party No. 2 from time to time deposited money in the accounts of his said partner Sanjoy Kumar Agarwal but he did not cooperate with the opposite party no.2 herein /FIR maker and not only that said Sanjay had made huge withdrawal of funds and also misappropriated the funds of the firm amounting to Rs. 40 lacs in between August 2016 to March 2020 on the basis of false and fabricated documents and thereafter retired from the said firm on 17th November, 2020. The allegation against the present petitioners is that said Sanjay and the petitioners are jointly fraudulently took advance money from different buyers pertaining to the said project but neither executed deed nor refunded refundable money.

3. After completion of investigation police has submitted charge-sheet against all the accused persons including present petitioners under sections 420/406/467/468/379/120B of the IPC.

4. Mr. Mukherjee learned counsel appearing on behalf of the petitioners submits that the petitioners are husband and wife and they are owners of the plot being no. 176/101 measuring 300sq.mt. in New Town area allotted by N.K.D.A. Due to their old age and fund constraint, they decided to engage aforesaid developer *Shree Krishan Realtors* with the then partners in February 2016 and after negotiation finalized terms with the partners of the said firm namely Sanjoy Kumar Agarwal (who is the other accused in the instant case but not the petitioner herein) and one Mr. Subhash Roy. Amongst others it was agreed that an amount of Rs. 25 lacs is to be deposited as refundable security and accordingly said payment of Rs. 25 lacs was received by the petitioners as owner on 18th August, 2016 before the date of development agreement. He further contended that besides aforesaid payment the developers agreed to make payment of onetime non refundable amount of Rs. 15 lacs only at the time of signing of development agreement. On the date of signing the development agreement, the petitioners were informed by aforesaid co accused Sanjoy that his aforesaid partner Mr. Subhash Roy had resigned and in his place the opposite party no. 2 herein (FIR maker) had joined in the firm w.e.f. 17th August, 2016, who had taken full responsibility of funding the project. Accordingly the development agreement was signed between land owners i.e. petitioners herein and developers i.e. opposite party no.2 herein and co accused Sanjay on 18th August, 2018.

5. It is further submitted by Mr. Mukherjee that for payment of non refundable amount of Rs. 15 lacs, a supplementary agreement on Non judicial stamp paper was signed between land owners/petitiners and the developers and accordingly a postdated cheque was issued in favour of the petitioners which they accepted purely on good faith and was subsequently encashed. It is further contended that in terms of the development agreement, developers were to complete construction work within eighteen months from the date of receipt of revised plan from NKDA, which they received on 18th January, 2017. However, the construction was delayed by seventeen months but after getting completion certificate of the project from NKDA, the developers dishonestly did not hand over owner's allocation in favour of the petitioners till date, despite several reminders.

6. In the mean time the opposite party no. 2/ developer registered the above mentioned criminal case suppressing material fact. Mr. Mukhjeree further contended that the dispute is civil in nature and the story projected in the FIR is absolutely concocted and the petitioners are mere land owners only and they are no way connected with the business of the said partnership firm of the said Sanjay Agarwal and the Opposite party. no.2. Infact opposite party no. 2 has falsely implicated the petitioners herein due to his business dispute with his partner namely aforesaid Sanjay. He further submits that instant proceeding against the petitioners is absolutely baseless frivolous and clear misuse of the provisions of criminal law, which fails to disclose any offence against the petitioners and as such it is liable to be quashed. In this context he also relied upon the judgments of

(i) ***Saliv @ Sallu @ salim Vs. State of U.P. and others*** reported in **(2023) SCC Online SC 947**.

(ii) ***Gurukanwarpal Kripal Singh Vs. Surya Prakasm & Others*** reported in **2022 LiveLaw (SC) 519**

(iii) ***Lalit Chaturvedi and Other Vs.State of Uttar Pradesh and anothers,*** reported in **2024 SCC OnLine SC 171**

7. Mr. Barun Ghosh appearing on behalf of the opposite party no. 2 submits that the FIR maker/opposite party no. 2 was lured into getting into becoming a partner in the said firm namely *Shree Krishna Realtors* with one Sanjay Kumar Agarwal for the development of the plot of land owned by the petitioners herein and as per development agreement the petitioner herein were paid Rs. 25 lacs at the time of execution of the development agreement and again in February, 2017 the petitioners induced the brother of the opposite party no. 2 to pay a sum of Rs. 15 lacs as advance.

8. Mr. Ghosh further alleged that petitioners herein along with co accused Sanjoy while dealing with a shop room within the owner's allocation took advance consideration amount in the name of partnership firm but denied his share as partner. He further alleged that Sanjoy Kumar Agarwal was known to the petitioners much earlier and the petitioner lured the complainant in getting into becoming a partner in the said partnership firm. Moreover the petitioners also took advance amount of Rs. 5 lacs in order to sell a shop room from the owners allocation and without registering the same in favour of the firm, said Sanjay had pressurized opposite party no. 2 to sign the agreement and in fact the petitioners in connivance and conspiracy with said Sanjay lured the brother of the FIR maker namely Binod Kr. Singh to pay advance of Rs. 15 lacs for purchasing the allocation of the owners share but the petitioners now deny to perform the promise and has mis appropriated the said amount of money with fraudulent and dishonest intention for their use. However to cover up the said fraudulent and dishonest intention the petitioners thereafter with the aid and assistance of co-accused Sanjay manufactured a supplementary development agreement between the petitioners herein and *M/s Shree Krishna Realotors*, wherein only the co–accused Sanjay Kumar Agarwal signed the agreement and thereby the petitioners further siphoned the said amount of Rs. 15 lacs from the brother of opposite party no.2.

9. Infact opposite party no. 2 and the petitioner are hand in gloves and cheated the opposite party no.2 intentionally with *malafide* intention to cause wrongful loss to the opposite party no.2 and the co accused sanjoy had made huge cash withdrawal amounting to more than Rs. 40 lacs from the firm and siphoned it for their own use by executing fake unilateral vouchers and share the benefit with the petitioners as reflected from their personal and mail communications during the entire period. He also submitted that all the correspondences were made between the petitioner and the co accused Sanjoy Kumar Agarwal in their personal capacity, keeping the opposite party no. 2 in dark which also corroborates the fact of conspiracy that existed between the petitioner and the co-accused in conspiring to siphon huge amount of money from the account of FIR maker. Mr. Ghosh further submitted that investigating agency has submitted charge sheet after completion of investigation and as such quashing of proceeding without trial, at this stage, does not arise and accordingly he has prayed for rejection of the present Application.

Decision

10. I have gone through the material available in the case diary including the FIR and the statements recorded under section 161 of the Cr.P.C. It is clear on a bare perusal of the FIR that the main allegation has been levelled against other accused Sanjay Kumar Agarwal (who is not the petitioner herein) who is also co-partner of the FIR maker. In the concluding part of the FIR the allegation levelled against the petitioners is that petitioners along with Sanjay took advance from different buyers pertaining to the said project and thereby committed offence with the public at large. The other allegation levelled against the petitioners are that the petitioners and Sanjay are not responding to the repeated phone calls to the FIR maker and that for last few days petitioners, Sanjay and others are creating pressure upon FIR maker to reduce the consideration amount for purchase of the shop and threatening with dire consequences though FIR maker is ready to execute and register deed of conveyance in favour of the proposed buyers.

11. On perusal of the statement of FIR maker recorded under section 161 of the Cr.P.C it also appears that the allegations levelled against the present petitioners is that the petitioners in collusion with other accused are not refunding the refundable security amount of Rs. 25 lacs and the petitioners who have taken Rs. 5 lacs for selling shop rooms in favour of his firm from owners allocation have neither registered any deed in his favour no refunded said amount of Rs. 5 lacs. Furthermore the petitioners took

Rs. 15 lacs to sell one flat in favour of the brother of the FIR maker Binod Kumar Singh but the petitioner in spite of receiving said amount of Rs. 15 lacs have neither executed deed in favour of his brother nor refunded the said amount. Other two witnesses namely Binod Kumar Singh and Ashok Kumar Singh made the same statement before Police during investigation. The allegation of threat with dire consequence by the petitioners has not been substantiate during investigation. I do not find any other incriminating material against the present petitioners in order to compel them to go for trial.

12. It has been reiterated by the Apex Court time and again that while exercising jurisdiction under section 482 of the Code, the High Court has to be cautious and the power is to be exercised sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure the ends of justice. It is no doubt true that in many cases the complain disclosing civil transition may also have a criminal texture but the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence or not.

13. In the present case there is no allegation against the present petitioners that they have made any unlawful representation nor it is the case of the FIR maker that the petitioners falsely represented that they are the owner of the said plot of land or that they have lured FIR-maker to join in a firm, which is not a developer. Even according to FIR, the FIR-maker entered into development agreement with the other developer as well as with the petitioner/landlords but the grievance seems to be that the petitioners/accused persons failed to discharge their obligation in terms of the agreement. In the FIR, there is no allegation that there was fraud or dishonest inducement on the part of the petitioners. It is well settled that for mere failure of a person to keep up promise subsequently, a culpable intention right from the beginning i.e. when the development agreement was made, cannot be presumed. There is always a distinction in between mere breach of contract and the offence of cheating and it depends upon the intention of the accused at the time of alleged inducement, and thereby subsequent conduct is not the sole test. Though the FIR-maker in the FIR used the words like “threat”, “forgery”, “criminal misappropriation”, “criminal breach of trust”, “cheating with the common intention” “ criminal conspiracy” etc. but mere using of such expression in the complaint is of no consequence as there is no specific averment in the FIR about the deceit, cheating or fraudulent intention of the present petitioners at the time of entering into the development agreement, wherefrom it can be inferred that the accused/petitioners being the owner of land had any intention to deceive the complainant or to breach the alleged agreement. According to the FIR and the other materials including the statements recorded during investigation it reveals that certain refundable money has not been allegedly refunded or in terms of agreement certain flat from ownership quota has not been handed over by executing deed to the FIR maker in terms of agreement nor refunded advance amount.

14. It is trite law and common-sense that a landowner entering into a contract to develop his land and building is deemed to represent that he has the present intention of carrying it out but if having accepted the pecuniary advantage involved in the transaction, he fails to keep his alleged promise, he does not necessarily evade the promise by deception. It is also settled proposition of law that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. Even if the intention to cheat the FIR-maker has developed in the mind of the petitioners later on, the same cannot amount to cheating. Infact where allegations are made in regard to failure to execute deed or to refund of the advance amount, 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. Infact the allegations levelled in the FIR against the present petitioners do not disclose any criminal offence at all. The dispute between the parties are essentially of a civil nature and has been tried to give a cloak of criminal offence to make a short cut of other remedies available in law.

15. Here the main allegation against the petitioners is that the petitioners lured the FIR maker to make the agreement and thereafter on completion of the building the petitioners are not either refunding the refundable sum or are not executing deed of transfer even after taking consideration price nor refunding the consideration price and thereby committed the offence of “cheating”, “theft”, “forgery”, “misappropriation of property”, “criminal breach of trust” etc. Further the allegation against the petitioners is that they have induced dishonestly the FIR maker to deliver property or to give money. In order to attract the term “deceive”, one has to show that there is inducement to a man to believe that a thing is true which is false and which the person practicing the deceit knows or believe it to be false and it must be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence.

16. I have already stated that there is no allegation that the petitioners made any wilful misrepresentation. The materials available in the case diary states that the parties entered into a valid development agreement but the grievance of the opposite party no. 2 is that the petitioners fail to discharge their contractual obligations. The charge sheet also discloses contractual obligation and breach thereof, for which the remedy is available in civil court. There is no *prima facie* material to show that the present petitioners committed offences either under section 420 or 406 or 467 or 468 or 379/120B of Indian Penal Code. The nexus between the offences allegedly committed and the petitioners/accused are found absent in the charge-sheet. The entire idea appears to be to convert a civil dispute into criminal proceeding in order to put pressure on the petitioners for return of the amount allegedly paid. It is settled law that the criminal court are not meant to be used for settling scores or pressurise parties to settle civil disputes. The materials in the present case clearly show that initially the development agreement was entered in between the petitioner being landlord and the partners/developer in February 2016 and the opposite party no.2/FIR maker had joined the firm with effect from 17th August 2016 after resignation of erstwhile partner Subash Roy and thereby new development agreement was also executed and registered on 18th August 2018. There was no dispute in between the parties since then till lodging the FIR in the year 2021. Therefore the ingredients of entrustment dishonest intention leading to delivery of property and cheating with knowledge to cause wrongful loss from the very beginning or subsequent thereof are not on record. The dispute is clearly civil in nature and may be even a commercial dispute but the ingredients required to constitute a criminal offence are totally absent in the present case.

17. In such view of the matter the present proceeding against the present petitioners should not be encouraged when it is found to be malafide or otherwise an abuse of the process of the court. In the circumstances I find that the continuation of the present criminal proceeding qua the petitioners herein will be sheer abuse of the process of court and I find sufficient reason to invoke the inherent power under section 482 of the Code to quash the present proceeding qua the petitioners herein.

18. As such the present application being CRR 3138 of 2022 is allowed. The criminal proceeding being G.R case no. 1238 of 2021 arising out of Lake Town Police Station case no. 262 of 2021 presently pending before the court of learned Additional Chief Judicial Magistrate, Bidhan Nagar is quashed, qua the petitioners herein namely Girija Sankar Verma @ Varma and Banani Verma.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Dr. AJOY KUMAR MUKHERJEE, J.)