IN THE HIGH COURT AT CALCUTTA

Criminal Revisional Jurisdiction

Present: - Hon'ble Mr. Justice Subhendu Samanta.

C.R.R. No. –3330 of 2018

With

C.R.R. 880 of 2018

IN THE MATTER OF

M/s. Sterling Holiday Resorts & Anr.
Vs.
The State of West Bengal & Anr.

For the Petitioners in CRR 3330 of 2018 : Mr. Ayan Bhattacharya, Adv.,
Mr. Rajib Mallick, Adv.,
Ms. Sonia Mukherjee Adv.

For the Petitioners in CRR 880 : Mr. Rajib Mullick, Adv.,

For the OP 2 : Mr. Sabyasachi Banerjee, Adv.,
Mr. Anirban Dutta, Adv.,
Ms. P. Mukherjee, Adv.,
Ms. Aditya Roy Adv.,

For the State : Mr. Imran Ali, Adv.,
Ms. Debjani Sahu Adv.

Reserved On : 18.04.2024

Judgment on : 14.05.2024

<u>Subhendu Samanta, J.</u>

1. Both the Criminal Revisions are preferred for quashing two criminal proceedings pending before the Learned Magistrate concerned on the basis of similar facts and circumstances. On 18th January, 2018 Mrs. Nirmala

Debi Singhaniaya, i.e. OP No. 2 of CRR 880 of 2018 filed a complaint before the Court of Learned ACMM Calcutta alleging inter alia that in the year 1997 Mrs. Singhaniya had approached by the present petitioners being the representative of M/s. Sterling Holidays Resort Limited for heritage membership in respect of different holiday destinations resort in India. By such approach the complainant and his family members took various membership with the said company and paid the necessary fees towards the membership. It has been agreed that in case the petitioners company failed to provide payment/resort, the company was obliged to pay the damages. The facts suggested that the petitioner company failed to complete the project within time. In 2001, the complainant soughtt for cancellation of such membership. Accordingly the company changed the membership of the complainant and requested for adjustment of the amount with Food Vouchers. Such request was not accepted by the complainant thereafter the company assured the complainant that some effective steps would be taken to redress her grievances. However, it has been alleged that nothing fruitful had happened in 2004 and in the mean time, the company had allegedly kept on changing its office. Thus in the year 2017, the complainant issued a legal facts thereby demanding a sum of Rs. 7,65,000/-which was denied by the company. Thus the complainant lodged the complaint before the Learned Magistrate.

2. On the basis of such complaint the Learned ACJM had taken cognizance and forwarded the case to the court of Learned Metropolitan Magistrate 8th Court Calcutta for inquiry in trial. After receiving such record,

Learned MM Concerned examined one Ajay Kr. Singhaniya u/s 200 Cr.P.C. and issued process against the present petitioner company u/s 406/420/417/418 of IPC.

3. Hence this instant criminal revision for quashing of the criminal proceeding being complaint case No. 36 of 2018 is preferred.

4. One Ajay Kumar Singhaniya on 6th of October 2018 filed a complaint before the court of Learned Additional Chief Metropolitan Magistrate (I) Calcutta seeking a direction u/s 156(3) of Cr.P.C. for investigation. The Learned ACMM went on the basis of such prayer and directed the concerned PS to investigate the matter; accordingly the Posta Police Station case No. 279 of 2018 u/s 446/420/120B of IPC was started by the police. The said FIR of Ajay Kumar Singhaniya also alleged that in pursuance to the representation of the present accused petitioner company in the year 1996, the OP No. 2 applied for Single Room Apartment at Corbet Resorts against payment of Rs. 59,825/-. As the Apartment was not constructed till 2001, the OP No. 2 applied for refund before the petitioner company. The petitioner company allegedly assured adjustment against the membership. However, neither any adjustment was made nor the money was refunded, in which the OP No. 2 i.e. the Ajay Kumar Singhaniya has lodged the complaint. To quash the said complaint the CRR No. 3330 of 2018 was registered.

5. Both the CRRs were heard analogously at length.

6. Learned Advocate for the petitioner submits that both the criminal proceeding are barred by limitation. It has been admitted that the proposed heritage membership was accepted in the year 1996-98 but the instant criminal proceeding, was initiated after inordinate delay that is after long 20 years of the alleged incident. The complaints disclosed no explanation for such delay; accordingly the instant criminal proceedings is liable to be quashed. Learned Advocate for the petitioner cited a decision of Hon'ble Apex Court in **Prem Kumar Vs. State of Rajasthan and Anr., (2020) 20 SCC 623** wherein the Hon'ble Apex Court has held that when a claim of a party is otherwise time barred, the same cannot be resurrected by ignite Criminal Jurisdiction. He also argued that the cost of membership was paid by the complainant amounting to Rs. 59,825/- but the complainant claimed through his legal notice from the petitioner company an amount of Rs. 23,16,423/-which they alleged to be principal with the interest.

7. Learned Advocate for the petitioner submits that a criminal proceeding cannot be degenerated into the recovery proceeding. He submits that from the petition of complaint as well as from the FIR it would be evident when the claim of the complainant is for non-adjustment of their earnest money paid for projects membership. It is an admitted fact that neither of the case the project was completed, therefore it is not the case of OP No. 2 that despite the completion of project the membership was sold to the third party.

8. In support of his contention Learned Advocate, for the petitioner cited two decisions of Hon'ble Apex Court reported it in

(i) **Lalit Chaturvedi and Ors. Vs. State of UP and Anr. 2024 SCC Online SC 171,**

(ii) **Naresh Kumar Vs. State of Karnataka and Anr. (2024)**. **(3) SCALE 664.**

9. Learned Advocate for the petitioner further submits that the dispute between the parties is the claim of payment and adjustment of money which the complainant stated that they have paid due to purchase of heritage membership but as the said promise was not carried so they prayed for refund of the money. As the petitioner company proposed to return the money in some other way which was not admitted or not accepted by the complainant. Thus the complainant claimed to refund of money. He submits that the entire transaction between the parties and disputes arising thereof is civil in nature. The criminal proceedings initiated by the present complainants are liable to be quashed in exercising of power u/s 482 of the Code of Criminal Procedure.

10. In support of his contention he cited two decisions of Hon'ble Supreme Court reported in

(i) **Thelapalli Raghaviah Vs. Station House officer and Ors. (2007) 10 SCC 424**

(ii) **Vijay Kumar Ghai Vs. State of West Bengal and Ors. (2022) 7 SCC 124**

(iii) **Sarabjit Kaur Vs. State of Punjab and Anr. (2023) 5 SCC 360**

Learned Advocate for the petitioner further argued that there is no ingredients of offence as defined u/s 406 or 420 IPC thus the proceeding is liable to be quashed. He further argued that the FIR lodged under the direction of the concerned Magistrate by virtue of an application u/s 156(3) Cr.P.C. has not complied with the provision of Section 154 (1) and 154(3) of the Code of Criminal Procedure 1973. He further argued that a Co-ordinate Bench of this court in **Mukul Roy Vs. State of West Bengal (2019) CRLJ 245** followed the observation of Hon'ble Apex Court in **Priyanka Srivastava** has formulated the guideline when a police case can be registered on an application u/s 156(3) by complying with the provisions of Section 154 (1) and 154(3) of Cr.P.C. The instant criminal proceedings has not followed the guideline of **Mukul Roy (Supra).** Thus the proceeding is liable to be quashed.

11. Finally, the Learned Advocate for the petitioner argued that the time barred claimed by the complainant cannot be revived by this criminal proceedings. The mala fide intention of the complainant is well found from the facts and circumstances of this case. He argued that the present complainant being preferred a proceeding before the Consumer Court in respect of the non-compliance of the proposal of the petitioner company. The lodgement of case before the Consumer Court was intentionally suppressed

by the complaint thus the instant criminal proceedings are mala fide and liable to be quashed.

12. Learned Advocate for the Complainant /OP No. 2 submits that the fact of the complaint discloses that the complainants and his family members were induced by the petitioner company to purchase membership on the false believe that the Holiday Resorts were being constructed and the members would be able to achieved exclusive facilities. On the basis of such false representations the complainant and his family members entrusted money to the petitioner company. He argued that this evident from the conduct of the petitioner company that from the very inception of the transaction they have the intention to deceive the complainant and their family members. Ultimately when it appears that the Holiday Resorts were not at all constructed the complainant demanded the refund of the amount paid but the petitioner with an ulterior motive and only to defraud the complainant and their family members did not refund the money ultimately. He argued that such unlawful and illegal conduct of the petitioner company gave rise to a cause of action to initiate the criminal proceeding. He further argued that the criminal proceedings are entirely separate in nature, the father of the complainant proceeded the District Consumer Dispute Redressal Forum Calcutta in respect of his membership No. 48986. The instant criminal proceedings were initiated on the basis of separate membership, principally, it cannot be said that the complaints are same and selfsame allegations are made. He further argued that the uncontroverted facts of this case clearly disclose that Petitioner Company have criminally

misappropriated the same of money which was entrusted by the complainants and their family members and thus the petitioner as thereby committed the offence of criminal breach of trust punishable u/s 406 of IPC. He further argued that the disputes between the parties are not at all civil in nature. Initially, the petitioner company had admittedly offered to adjust the amount through food vouchers which the present complainant did not agree to, thereafter complainant demanded refund along with interest. The petitioner company has assured that the matter will be settled but ultimately they have adopted dilatory practice only to defraud the complainant. However, first time in the year 2017 it appears to the complainant that the petitioners shall not refund the money and which they misappropriate on the pretext of false promise and thereby received unlawful gain by cheating the present complainant. He further argued that in lodging the FIR the provision u/s 154(3) of Cr.P.C. has been properly followed. On receive the complaint the Learned Magistrate had directed the OC of Posta Police Station to submit a report as to whether any specific case has been started or not, the OC of Posta Police Station has submitted a report. On perusing such report the Learned Magistrate has initiated the proceeding. He argued that thus the order dated 11th October 2018 regarding taking cognizance of the offence by the Magistrate concern is not liable to be set aside for non-compliance of section 154(3) Cr.P.C. He further argued that in a case of **Rajesh Bajaj Vs. State of Delhi (1999)3 SCC 254.** The Hon'ble Apex Court has held that if the fact of the complaint revealed a commercial transaction or money transaction that does not mean that it is hardly a reason for holding that the offence of cheating would delude from such transaction.

13. Learned Advocate for the complainant further argued that the Hon'ble Apex Court in State of **Orisa Vs. Saroj Kumar Sahoo (20050 13 SCC 540** opined that :-

ii. The Hon'ble Apex court in State of Orissa vs Saroj Kumar Sahoo (2005) 13 SCC 540 opined:

"8. Exercise of power under Section 482 of the Cr.P.C. in a case of this nature is the exception and not the rule. The Section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Cr.P.C. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Cr.P.C., (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice..........Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. ......When a report is sought to be quashed, it is permissible to look into the materials to assess what the report has alleged and whether any offence is made out even if the allegations are accepted in toto.

9. In R. P. Kapur v. State of Punjab AIR (1960) SC 866 this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings.......

10. In dealing with the last category, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where

> **there is legal evidence which, on appreciation, may or may not support the accusations....... The scope of exercise of power under Section 482 of the Cr.P.C. and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal, (1992) Supp 1 335......**
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> **11. As noted above, the powers possessed by the High Court under Section 482 of the Cr.P.C. are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles...... When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings. "**

14. Learned Advocate for the complainant also cited several decisions on the point that the inherent power of this court can only be exercise sparingly, carefully and with extreme caution for the purpose of prevent of abuse of process of court on such points he cited several decisions reported in:-

(i) **P R Kapoor Vs. State of Punjab AIR 1960 SC 866**

(ii) **Indian Oil Corporation Vs. NEPC India Limited (2006) 6 SCC 736.**

(iii) **Suryalakshmi Cotton Mills Limited Vs. Rajvir Industries Limited (2008) 13 SCC 678**

(iv) **R. Kalyani Vs. Janak C. Mehta (2009) 1 SCC 516**

(v) **Arun Bhandary Vs. State of UP (2013) 2 SCC 801.**

15. Learned Advocate for the complainant/ OP No. 2 submits that the criminal revisional applications are misconceived and was filed only to delay the legitimate criminal proceeding. There are no merits in such criminal revision. Thus the said proceeding cannot be quashed.

16. Heard the Learned Advocates.

17. Perused the observation of Hon'ble Apex Court as referred by the Learned Counsels before this court. The Criminal Proceedings were initiated u/s 406/420/120B IPC against the petitioner company. The facts suggests that the petitioner company approached the complainant and their family members to purchase Holiday membership.

18. In pursuance of their representations the complainant and their family members had received the Heritage memberships in lieu of some payment. The fact suggests that the said project of Holiday Resorts were not finalise and it was thereafter agreed between the parties that the money for purchasing the membership would be refunded to the complainants and their family members. The offer of refund through the food voucher was not accepted by the complainants and it was ultimately assured by the complainant company that the matter would be resolved. So the entire facts goes to show that there was a promise between the parties which was not materialised and it has been alleged in the petition of complaint that the complainant company has illegally not refunded a single money to the demand of the complainant.

19. Let me consider whether the complainant disclosed any ingredients of offence punishable u/s 420 of IPC. In **Md. Ibrahim Vs. State of Bihar** the Hon'ble Apex court has observed that to constitute on offence u/s 420 of IPC. The following ingredients are required to be satisfied

> **18. Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows:**
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> **(i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission;**
>
> **(ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and**
>
> **(iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.**
>
> **19. To constitute an offence under section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived**
>
> **(i) to deliver any property to any person, or**
>
> **(ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security)."**

20. So in this case there are no initial deceptions by the present petitioner company by making a false or misleading representation. It is the admitted fact by the parties that the project for Holiday Resorts were not

materialised due to the order of Hon'ble Apex Court. so in this case the ingredients of offence punishable u/s420 IPC is missing.

21. The offence punishable u/s 406/417 and 418 IPC is also alleged to have been committed by the present petitioner company. It is the admitted fact that the alleged transaction was completed in the year 1996-98, the complaints were filed on 2018, that after 20 years and the alleged incident. Thus the complaint u/s 406/417 and 418 IPC barred by limitation u/s 468 of Cr.P.C. Moreover there is no proper explanation for delay in lodging the instant complaint.

22. It further appears to me that the family member of the complainants has lodged a complaint before the Learned District Consumer Dispute Redressal Forum Calcutta against the petitioner company and the other family members that is the present complainant has lodged the instant criminal complaint. It appears to me that the legal notice issued by the complainant through his Learned Advocate clearly disclosed the demand of money from the petitioner company. The said legal notice may culminated into a civil proceeding but not the instant criminal proceeding. I find no ingredients of offence of IPC as alleged in the body of the petition of complaint.

23. By virtue of decisions of Hon'ble Apex Court in **Lalit Chaturvedi & Ors** the criminal proceeding cannot be degenerated into the recovery proceeding. In the instant case the complaint wanted to recover the money

from the petitioner company by using the instant criminal proceeding. In **Lalit Chaturvedi (supra)** the Hon'ble Apex Court has held that

> **9. We will assume that the assertions made in the complaint are correct, but even then, a criminal offence under Section 420 read with Section 415 of the IPC is not established in the absence of deception by making false and misleading representation, dishonest concealment or any other act or omission, or inducement of the complainant to deliver any property at the time of the contract(s) being entered. The Ingredients to allege the offence are neither stated nor can be inferred from the averments. A prayer is made to the police for recovery of money from the appellants. The police is to investigate the allegations which discloses a criminal act. Police does not have the power and authority to recover money or act as a civil court for recovery of money.**
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> **10. The charge sheet also refers to Section 406 of the IPC, but without pointing out how the ingredients of said section are satisfied. No details and particulars are mentioned. There are decisions which hold that the same act or transaction cannot result in an offence of cheating and criminal breach of trust simultaneously. For the offence of cheating, dishonest intention must exist at the inception of the transaction, whereas, in case of criminal breach of trust there must exist a relationship between the parties whereby one party entrusts another with the property as per law, albeit dishonest intention comes later. In this case entrustment is missing, in fact it is not even alleged. It is a case of sale of goods. The charge sheet does refer to Section 506 of the IPC relying upon the averments in the complaint. However, no details and particulars are given, when and on which date and place the threats were given. Without the said details and particulars, it is apparent to us, that these allegations of threats etc. have been made only with an intent to activate police machinery for recovery of money.**
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> **11. It is for the respondent no. 2/complainant Sanjay Garg to file a civil suit. Initiation of the criminal process for oblique purposes, is bad in law and amounts to abuse of process of law.**

> **12. In view of the aforesaid discussion, the impugned judgment is set aside and the present appeal is allowed quashing the FIR and resultant proceedings, including the charge sheet.**

24. The Hon'ble Apex Court in **Paramjit Batra Vs. State of Uttarakhand (2013) 11 SCC 637** has held that

> **"12. While exercising its jurisdiction under Section 482 of the Code the High Court has to be cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions 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. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash the criminal proceedings to prevent abuse of process of the court."**

25. In **Suryalakshmi Cotton Mills (supra)** the Hon'ble Apex Court has held that ordinarily a defence of an accused although appears to be plausible should not be taken into consideration for exercise of jurisdiction of the High Court under 482 of the Code of Criminal Procedure. In this case the complaint does not disclose any offence punishable u/s 420 IPC and other offences of IPC are barred by limitation. Thus the observation of Hon'ble Apex Court in **Suryalakshmi Cotton Mills Limited (supra)** is not applicable in this case. I have also examined the petition of complaint in the light of decision of Hon'ble Apex Court in **R. Kalyani (supra)** wherein the Hon'ble Apex Court fixed some guideline before quashing a criminal proceeding. In following **R. Kalyani (supra)** I am of a view that the allegation

discloses a civil dispute in the instant proceeding, the ingredients of criminal Offences as alleged are missing in this case.

26. Considering the entire facts and circumstances of this case I am of a view that the petition of complaints are disclosed some disputes which is only civil in nature. The complainant cannot adapt a criminal proceeding for the purpose of recovery of money demand which they may have legitimately entitled against the accused persons. Considering the entire aspect I am of a view that the instant criminal proceedings being Posta Police Station Case No. 279 of 2018 dated 14.10.18 u/s 406/420/120B of the Indian Penal Code, and CN Case No. 36 of 2018 u/s 406/417/418/420/120B of the Indian Penal Code pending before the Learned Magistrate's concern if allowed to be continued, that would tantamount to be an abuse of process of court. I find justification to invoke the inherent jurisdiction of the court to quash the said criminal proceedings.

27. The CRRs are appears to me meritorious and they are allowed.

28. The Criminal Proceedings being Posta Police Station Case No. 279 of 2018 u/s 406/420/120B of the Indian Penal Code, and CN Case No. 36 of 2018 u/s 406/417/418/420/120B of the Indian Penal Code pending before the Learned Additional Chief Metropolitan Magistrate (I) Calcutta and Learned MM 8th Court, Calcutta respectively, against the present petitioners are hereby quashed.

29. Both the CRRs are disposed of, Connected applications if pending are also disposed of.

30. Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.

(Subhendu Samanta, J.)