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

+ **CRL.M.C. 1297/2019 & CRL.M.A. 5144/2019**

SH. VIJAY GUPTA

.....Petitioner

Through: Ms. Jyoti Taneja &
Mr. Varun Raghavan,
Advs.

versus

THE NCT OF DELHI & ANR

.....Respondents

Through: Mr. Sunil Kumar Gautam,
APP for the State
SI Mandeep, PS- Saket

CORAM:

HON'BLE MR. JUSTICE AMIT MAHAJAN

ORDER

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12.09.2024

1. The report indicates that Court notice has been served on the learned counsel who were representing Respondent No. 2 before this Court.
2. Despite service, none has appeared on behalf of Respondent No. 2.
3. The present petition is filed challenging the order dated 22.11.2018 (hereafter '**the impugned order**'), passed by the learned Additional Chief Metropolitan Magistrate, South District, Saket Courts, New Delhi ('**ACMM**'), in Case No. 15865/2018. The petitioner also prays for quashing of the CC No. 15865/2018.
4. The learned ACMM, by the impugned order, had taken cognizance of the criminal complaint and had issued summons dated 20.12.2018 and 10.01.2019 to the petitioner as an accused



for commission of offences under Sections 409/420/420B/34 of Indian Penal Code, 1860 ('IPC').

BRIEF FACTS

5. The complaint is filed by Respondent No.2 under Section 200 of the CrPC against M/s ABW Infrastructure Ltd. (hereafter '**the accused company**') and others. It was stated that the accused company is a builder developer company operating through its directors, namely, Atul Bansal and Ravi Shankar.

6. It is alleged that Respondent No.2 was looking for a residential apartment in Gurugram for his self-use and came across an advertisement in regard to the project in the name and style of 'Verona Hills' to be developed at Kherki Daula, Sector-76, Sohna, district Gurugram, Haryana.

7. It is alleged that Respondent No.2 booked a residential apartment for a total sale consideration of ₹75,16,012/- and made an initial payment of ₹10,30,900/-. It is alleged that accordingly, an apartment was allotted to the respondent *vide* allotment letter dated 28.04.2014.

8. It is alleged that Respondent No.2 was misled, induced and allured to opt for construction link payment plan on the promise that the possession of the apartment will be delivered within 42 months, that is, by 12.11.2017. It is alleged that in view of the promise, Respondent No.2 opted for the construction link payment plan and obtained loan from State Bank of India.

9. It is alleged that up to the filing of the complaint, the complainant made a total payment of ₹58,27,441/- to the accused company.

10. It is alleged that despite the written and verbal assurances, the accused persons failed to give the possession of the apartment to the respondent in spite of having received almost the entire sale consideration.



11. It is alleged that Respondent No.2 also sent various emails asking about the update on project but no reply was received from the accused company.

12. It is alleged that Respondent No.2 with his family visited the construction site and found that no construction is taking place and that the accused company has abandoned the project.

13. It is mentioned in the complaint that the accused are – “*whole-time directors, managing directors, directors representatives of the directors respectively*” and were fully aware from the very beginning that they are not going to deliver the possession of the said apartment and they have misappropriated the money of Respondent No.2.

14. Respondent No.2 served a legal notice dated 15.06.2018 asking for refund of the amount with interest. However, no reply was received. Subsequently, on 10.08.2018, Respondent No.2 received a letter from the accused company wherein they admitted to having received a sum of ₹58,15,260/-. It was also stated that the account of the accused company is frozen by the Central Bureau of Investigation due to an ongoing investigation and this High Court has been pleased to order winding up of the company.

15. The learned Trial Court, by order dated 22.11.2018, in Case No.15865/2018, observed that a *prima facie* case for commission of offences under Sections 409/420/120B/34 of the IPC is made out against all the accused persons, including the petitioner, and therefore summoned the accused persons.

16. The learned counsel for the petitioner submits that no specific role has been assigned to the petitioner which may constitute the offence under Section 420 of the IPC. She submits that the petitioner has been wrongly arrayed as an accused in the complaint filed by the complainant.



17. She submits that it is the case of Respondent No.2 that he had himself visited the office of the accused company and met the marketing team to understand more about the project as he was looking for a residential accommodation.

18. She submits that no inducement or luring can be alleged on part of the petitioner.

19. She further submits that to constitute an offence of cheating under Section 420 of the IPC, it is essential that the accused had a guilty intent at the time of making a promise.

20. She further vehemently submits that the petitioner was neither a director nor a shareholder in the accused company and is in no manner the beneficiary of any alleged cheated amount. It is pointed out that in the criminal complaint leading to the impugned summoning and subsequent orders being passed, the petitioner is vaguely referred to (in paras 1 and 11), amongst the directors and representatives of the accused company, and in the pre-summoning evidence, the role to the effect of “advice” is attributed to the petitioner.

21. She submits that the petitioner in any case could not have been summoned for offences of cheating and criminal breach of trust together as the same cannot co-exist in regard to the same transaction.

ANALYSIS

22. A bare perusal of the complaint reflects that the accused persons allegedly have taken a sum of ₹58,15,260/- against the total sale consideration of ₹75,16,012/- from Respondent No.2, however, the possession of the apartment has not been handed over. It is also alleged that a false promise was made that the possession of the apartment will be delivered within 42 months. It is further alleged that on the visit to the construction site, Respondent No.2 found that no construction has taken place. It is



alleged that the accused persons, from the very beginning, had no intention to handover the possession of the apartment.

23. The petitioner has filed an affidavit pointing out that he is neither a director in the accused company nor has he signed any document.

24. The summoning of an accused in a criminal case is a serious matter and the criminal machinery ought not to be set in motion as a matter of course. The order of Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the satisfaction of the Court with regard to the existence of a *prima facie* case on the basis of the allegations must be recorded. The learned Magistrate while issuing summons *vide* summoning order dated 22.11.2018 noted as under:-

“From the perusal of the pre-summoning evidence adduced by the complainant, a prima facie case for commission of offences U/s 409/420/120B/34 IPC is made out against all the accused persons and there are sufficient grounds for proceeding against them. Complainant is directed to file list of prosecution witnesses and PF. Upon filing of the same, all the 5 accused be summoned. Process be served through SHO, PS Saket.”

25. It is pertinent to note that while no specific allegation was made against the petitioner in the complaint, Respondent No.2 in the pre-summoning evidence also only stated that *“the same payment plan was advised to me by accused namely Mr. Atul Bansal, Mr. Ravi Shankar, Mr. Vijay Gupta, Mr. Vijay Khurana and through their representatives also”*.

26. From the perusal of the complaint, it is apparent that the allegations have been made against the accused company and other officers. The role of petitioner in inducing the complainant on behalf of the accused company to part with the consideration amount has not been mentioned.



27. The name of the petitioner is mentioned in the pre-summoning evidence as one of the persons who had advised the payment plan to the respondent. Merely advising the payment plan *sans* any other allegation does not constitute an offence of cheating or misappropriation of funds. It is relevant to note that even in the pre-summoning evidence, it is not mentioned or alleged as to in what capacity the petitioner has represented the accused company. It is not clear from the complaint or the pre-summoning evidence that in what capacity the petitioner has been made vicariously liable for the offences. While only generic and overarching allegations have been made against the petitioner, even if the same are taken to be a gospel truth, the same would not constitute any offence under Section 420 or 409 of the IPC.

28. Although the order issuing summons records that the learned Magistrate is satisfied about the existence of a *prima facie* case, however, as discussed above, on a bare perusal of the complaint as well as the pre-summoning evidence, the said observation seems to be without any application of mind. As discussed above, the complaint as well as the pre-summoning evidence fail to disclose the role played by the petitioner which would constitute the offences under Sections 420/409 of IPC. The complaint, in the opinion of this Court, lacks the necessary ingredients of Sections 409 and Section 420 of the IPC. No allegation has been made to substantiate the offence of conspiracy either except for a bald generic averment that the accused persons had no intention of giving the possession of the property to the respondent.

29. It is an admitted case that money was paid by the respondent to the accused company. It has also not been pointed out as to in what manner the petitioner is beneficiary of the



amount received by the accused company. In the absence of any allegation of the petitioner misleading, inducing or luring the respondent, no liability can be fastened on him. In such circumstances, summons should not have been issued against the petitioner.

30. The Hon'ble Apex Court in *Sunil Bharti Mittal v. Central Bureau of Investigation* : 2015 4 SCC 609 had set aside the processes issued against the petitioner therein, who was the Director in the accused company, holding that without ascribing any incriminating role, the petitioner could not have been made an accused solely for the reason of being the Director of the company. It was held that when the company is made an accused, its Directors can be roped in only if there is sufficient incriminating evidence against them coupled with criminal intent or when the statutory regime attracts the doctrine of vicarious liability. It was held that in the absence of the same, the processes ought not to have been issued.

31. In the opinion of this Court, the case of the present petitioner stands on a better footing since the petitioner is neither a director nor a shareholder of the accused company who has accepted the money from the respondent.

32. It is also settled law that if the accused is able to furnish incontrovertible material of sterling quality, the same can be accepted and proceedings can be quashed by the High Court in exercise of the inherent power under Section 482 of the CrPC. The accused ought not to be relegated to face the trial in every case when the undisputed evidence points towards his innocence.

33. Therefore, considering the fact that no specific role has been ascribed to the petitioner in regard to the offences under Sections 409 and 420 of the IPC and that the petitioner was not a



beneficiary of alleged offence, I am of the opinion that the present is a fit case for exercising the power under Section 482 of CrPC.

34. In view of the above, the proceedings in relation to Complaint Case no. 15865/2018 are quashed *qua* the petitioner.

35. The present petition is allowed in the aforesaid terms.

AMIT MAHAJAN, J

SEPTEMBER 12, 2024
“SS”