IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

CRR 2276 of 2022

Sri Barun Chandra Niyogi

Vs.

The State of West Bengal & Anr.

With

CRR 2279 of 2022

Sati Neogi

Vs.

The State of West Bengal & Anr.

With

CRR 2280 of 2022

Siddhartha Neogi

Vs.

The State of West Bengal & Anr.

With

CRR 2283 of 2022

Aniruddha Neogi

Vs.

The State of West Bengal & Anr.

With

CRR 2460 of 2022

Avisek Neogi

Vs.

The State of West Bengal & Anr.

For the petitioners	:	Mr. Dipanjan Chatterjee Ms. Dipika Banu Mr. Subhadip Chakraborty Ms. Bolivia Roy
For the O.P. No. 2 In CRR 2276 of 2022	:	Mr. Somyopriya Chowdhury Mr. Kaushik De Ms. Mohini Majumder Mr. Raghav Munshi
for the O.P. No. 2 In CRR 2279 of 2022 In CRR 2280 of 2022 In CRR 2283 of 2022 In CRR 2460 of 2022	:	Mr. Kaushik De Ms. Mohini Majumder Mr. Raghav Munshi
For the State	:	Ms. Faria Hossain Mr. Anand Keshari
Heard on	:	14.11.2024
Judgment on	:	12.02.2025

Dr. Ajoy Kumar Mukherjee , J.:

1. This application has been preferred challenging the impugned proceeding being G.R case no. 162 of 2020 pending before learned ACJM , Searampore. In the first information report it has been alleged *interalia* that the petitioner and five others canvassed that they are the owners of a particular plot of land and they are willing to sell out the said plot of land to intending purchasers. The opposite party no. 2 and his wife approached the petitioner and expressed their willingness to buy the said plot of land at a total consideration of Rs. 8,15,00,000/- Accordingly an agreement was entered into by and between the parties on march 13, 2019 when the opposite party no. 2 and his wife paid a sum of Rs. 1,00,00,000/- to the petitioners through RTGS. However at the time of preparation of the sale deed, the opposite party no. 2 and his wife noticed that the share of one daughter of original owner, deceased Prafulla Dhan Niyogi was not properly disclosed in respect of her title in the said property. On being asked the petitioners took the plea that they are the owners like ostensible owners and also owners by adverse possession. But they did not provide any document to sustain their claim. Thereafter the petitioners forfeited Rs. 9 lakhs from the earnest money and have done so intentionally to cheat the opposite party no. 2 and his wife. It is further alleged that the petitioners had entered into the agreement only to cheat the opposite party no. 2 and his wife knowing fully well that their title in the said plot of land is totally defective. Now the petitioner and his other partners are not returning the aforesaid sum of Rs. 9 lakhs to the opposite party no. 2, nor they are receiving his phone calls. On January 27, 2020 the opposite party no. 2 visited the residence of the petitioner to collect the money, but he was driven away. The investigation has already been culminated into a charge sheet under section 420 /406/120B of the Indian Penal Code against the petitioners of CRR 2276/2022, CRR 2279 of 2022, CRR 2280 of 2022, CRR 2283 of 2022 and CRR 2460 of 2022.

2. Being aggrieved by the impugned proceeding the petitioners state that the transaction between the opposite party no. 2 and the petitioners is a civil contract and therefore complainant/opposite party ought to have approached before the civil court seeking appropriate remedy. Petitioners' further contention is that petitioners had acted totally in terms with the conditions engrafted in the agreement mentioned in the FIR and have refunded the earnest money to the opposite party no. 2, after retaining the amount agreed upon. The said sum of money was forfeited as the opposite party no. 2 and his wife had failed to complete the sale within the time specified in the agreement. At this juncture, if the opposite party no. 2 or his wife has any claim, then the same is recoverable only through civil proceeding and no criminal prosecution is maintainable in present set of facts.

3. The petitioners further argued that the averments made to constitute the FIR, fails to spell out the ingredients necessary to constitute any cognizable offence which can be alleged to have been committed by the petitioners herein warranting the registration of the FIR. From the materials on record, there is nothing to show that at the time of execution of the alleged agreement by and between the parties, there was any criminal intention on the part of the petitioners. If at all the petitioners have caused any breach of contract, then the remedy of the opposite party lies in civil proceeding. The ingredient necessary to constitute any cognizable offence are essentially absent from the materials on record to the present case. Therefore, continuance of further proceeding shall tantamount to abuse of the process of law. Accordingly the petitioner has prayed for quashing the impugned proceeding.

4. Mr. Choudhury and Mr. Dey learned counsel appearing on behalf of opposite party no. 2 argued that since charge sheet has already been submitted by the investigation agency in the instant case which relates to disputed question of facts, the High court may not entertain the instant application and should remanded the matter back to the trial court asking the petitioner to agitate all these points at the time of framing of charge. In this context they relied upon judgment of ***Iqbal @ Bala and others Vs. State of U.P and others*** reported in **(2023) 8 SCC 734**.

5. They further submitted that at the time of agreement dated 13th March, 2019 entered between the accused persons and the opposite party no. 2, there was no discloser of any encumbrance in the property or the share of any other person, by the accused persons. According to agreement for sale dated 13th March 2019, in case any defect in title is found during search, the accused persons were duty bound to either cure the defect or return the entire earnest money with 9% interest thereon but inspite of the same, the accused persons misappropriated Rs. 9 lakhs. In fact much after the agreement for sale, on 01.5.2019 the accused persons handed over a family settlement cum partition deed form which it was exposed that the entire property was earlier owned by Prafulla Dhan Niyogi, the father of Barun Chandra Niyogi, Arun Chandra Niyogi. During search of such partition deed the existence of daughter of Mr. Prafulla Dhan Niyogi was found. The petitioners never disclosed about the partition deed at the time of the agreement of sale and it was handed over by a separate mail on 1st may 2019. Even in the partition deed, there is no mention of the name of co-sharer Sankari Mondal. The remotest reference made in a single line of the said partition deed, is existence of a daughter of Prafulla Dhan Niyogi, who according to the said partition deed had relinquished her right in a portion of the property mentioned in schedule A only when her father Prafulla Dhan Niyogi owned all the three lands mentioned in schedule "A", "B" and "C". If Prafulla Dhan Niyogi had died intestate leaving one daughter, a wife and three sons, then all five of them are natural successor of equal share to all the said properties of Prafulla Dhan Niyogi. Even the purported partition deed contains fraudulent statement to the effect that the daughter of Prafulla Dhan Niyogi had a meager percentage of one anna in one of the properties of Prafulla in as much as Prafulla died intestate leaving all the three schedule mentioned properties which is also admitted in the partition deed and the daughter of Prafulla can not have the share of one anna only. Accordingly the partition deed disclosed by the accused persons subsequent to the agreement to sale is a fraudulent instrument.

6. Further case of opposite party is When the share of said daughter of Sankari came into light and the accused persons were requested to explain the same, they took a completely dishonest an unlawful stand and stated that there might be some other person who have interest in the land but they are the ostensible owner for the share which were not disclosed earlier. Accordingly the fraudulent intention of the accused persons since inception of the transaction is very much apparent as they were fully conscious that there are other co-owners and after deceiving opposite party no. 2, they put up a claim thereat that they are ostensible owner.

7. It was further argued that nobody can claim himself to be ostensible owner and in this context he relied upon ***Gurbaksh Singh Vs. Nikka Singh and another*** reported in **AIR 1963 SC 1917** to demonstrate that section 41 of Transfer of Property Act actually protects the transferee from voiding of the deed of conveyance, when the existence of such real owner could not have been found by the transferee inspite of his best efforts.

8. He further submitted that fraudulent intention of the accused persons would also be disclosed from the fact that till the very end they went on repeating their false and fraudulent claim of exclusive ownership. In this context accused persons though annexed a photocopy of an unregistered document claiming to be a 'Nadabi patra' (relinquishment deed) executed by aforesaid Sankari Mondal to claim that Sankari had relinquished her share in the ancestral property and therefore there was no reason to disclose her share in the property, while entering into the agreement for sale but under section 49 read with section 17 of the Registration Act 1908 such deed of relinquishment, which remains unregistered cannot transfer any right title interest of the executant to the beneficiary and that too photocopy of such unregistered deed of settlement has been introduced for the first time as an annexure in the affidavit of reply. Therefore, Mr. Chatterjee argued that both from facts and in law the accused persons have committed fraud, cheating and criminal breach of trust by not disclosing the share of Sankari Mondal and the encumbrance in the property and when the said fact was exposed during search of title, they illegally mis appropriated a portion of the earnest money, claiming that they have a right of forfeiture being ostensible owners.

9. I have considered submission made by both the parties.

10. It is not the case of the prosecution that the accused persons had approached the opposite party no. 2 for the impugned sale and on the contrary complainant has stated that he came to learn from his source that the petitioners were the joint owners of the property concerned and as such he approached the petitioners with an offer to purchase it. It is also the case of the accused persons that the original deed of partition was handed over to the opposite party no.2 and the said partition deed discloses that Sankari Mondal is one of the heir of the deceased. It is further case of the petitioners that said co sharer relinquished her portion of land in favour of petitioners. Accordingly it can hardly be said that there was any initial deception by the accused persons.

11. It is true that the claim of the accused persons that they became ostensible owner in respect of disputed property as their co sharer Sankari Mondal had relinquished her share in their favour, involves question of law but that question of law as well as question of fact is supposed to be adjudicated by a civil court and said issue cannot be criminalized by initiating the instant proceeding. It is also apparent from the facts and circumstances that the said agreement for sale was executed by and between the parties on March, 13 2019, which was to be concluded within June 30 2019. It is also submitted that after the expiry of the said time period on 26th July, 2019, the complainant had made an enquiry about the share of Sankari Mondal and the accused persons gave reply on the same date stating that said Sankari had relinquished her share in favour of the petitioners and as such they are the ostensible owners of the property. The legality and validity of such claim can only be determined by a civil court but such claim cannot attract any criminality over the issue.

12. The matter does not end here. Even thereafter the accused persons informed the complainant about termination of the agreement for sale and accordingly out of total earnest money Rs. 1,91,00,000/- was refunded to the complainant through RTGS on 31st August, 2019 after deducting 9% of the earnest money, which according to the accused petitioners they are legally entitled to deduct in view of agreement entered into by and between the parties. Even thereafter on September 2nd, 2019 the complainant/opposite party no.2 sent an email requesting the accused person /petitioners to extend the time period stipulated in the agreement which was acceded to and the time was also extended and the earnest money refunded back to the opposite party was again credited in favour of the accused persons. However, even within such extended time the agreement could not be concluded and as such the earnest money was again refunded to the opposite party after deducting 9% of the same allegedly interms of clause 8 of the agreement for sale.

13. From the aforesaid series of transactions it is quite clear that even after appraising that original owner since deceased, left behind legal heir namely Sankari also, along with petitioners, the complainant prayed for extension of the period for agreement. It is not in dispute that clause 8 of the agreement for sale executed by and between the parties speaks about forfeature of 9% of the earnest money. Now in the present facts and circumstances of the case, whether the accused persons/petitioners were legally justified in deducting said 9% of the earnest money or not over the issue of Sankari's alleged co-sharership in the disputed property and petitioners' claim of ostensible ownership due to alleged relinquishment of share by Sankari, is purely a civil dispute.

14. Let me come back to the charge under section 415 punishable under section 420 of IPC. In view of the aforesaid agreement for sale and subsequent renewal of the agreement for sale and upon refund of 91% of the earnest money, clearly goes to show that there was no fraudulent or dishonest intention on the part of the petitioners at the beginning of the transaction as in order to attracts the offence of cheating under said section, it is the *mens rea* which is the crux of the offence. Here even if all the facts demonstrated in the complaint as well as the present application are taken on their face value, no such dishonest representation or inducement would be found or inferred. There is always a distinction between mere breach of contract, if any, arises due to petitioners claim of ostensible ownership in one part and the offence of cheating on the other part because the offence of cheating cannot be established unless fraudulent inducement and *mens rea* is shown. It is very much apparent that if there had been any guilty mind (mens rea) on the part of the petitioners /accused persons they would not have acceded to the renewal of agreement for sale nor they refunded 91% of the earnest money on two occasions. The legality or illegality of forfeiture of 9% of earnest money allegedly in terms of agreement, cannot be the subject matter of adjudication by a criminal court.

15. Similarly, the background principles in connection with the offence under section 405 read with 406 of IPC, it falls from the record that the real dispute between the parties is whether the petitioners/accused persons were justified in forfeiting 9% of the earnest money or not and/or who is responsible for not concluding the sale. Here the law clearly recognises a difference between simply payment of earnest money for execution of sale deed with that of entrustment of money or property. A mere breach of non refunding of 9% of earnest money in alleged violation of agreement for sale does not ipso facto constitute the offence of the criminal breach of trust contained in section 405 IPC, without there being a clear case of entrustment. There is nothing to point out the fact that any property was entrusted to the petitioners at all which they dishonestly converted for their own use, so as to satisfy the ingredients of section 405 punishable under section 406 IPC.

16. Here the main offence alleged by the complainant is that the petitioners committed the offence under section 420 IPC by not refunding the 9% earnest money and the case of the petitioners is that the sale could not be concluded due to the fault of the complainant and for which in terms of agreement the said amount was deducted. To 'deceive' under section 420 is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false and not only that it must also be shown that there existed a fraudulent and dishonest intention at the time of commence of offence.

17. Here as I have stated above that the petitioners' case is that they are the ostensible owner of the disputed property in terms of relinquishment document executed by Sankari and as such they believe that they are the exclusive owner of the property, which may or may not be a lawful claim but fact remains that believing the said fact to be true, the petitioners made the representation and executed the agreement for sale deed which also acceded by the complainant by making renewal of the agreement.

Accordingly there is no scope to say that the petitioners made any wilful misrepresentation over Sankari's share in the disputed property. According to the petitioners, knowing fully well about the said fact, they renewed the agreement for sale and extended time for execution for sale deed. While the said renewal of agreement was made, there was no allegation of practicing fraud or dishonest inducement on the part of the accused persons.

18. From the aforesaid facts and circumstances of the case, it is evident that there was no act of cheating or criminal breach of trust and there is nothing to show that the petitioners fraudulently induced or dishonestly deceived the opposite party no.2/complainant. A commercial transaction took place between the parties during which the parties consensually agreed for selling and buying the property and the complainant paid earnest money of Rs. 1 crore out of which 9% of the said amount had been forfeited by the petitioners allegedly in terms of agreement. In fact the delivery of the advance payment twice towards consideration was made in furtherance of an agreement to sale and it is not the case of the complainant that he was in anyway deceived or duped to make such payment to the appellant. The dispute is purely civil and at best could have given rise to the complainants right to resort to the remedies provided under civil law but the instant criminal proceeding cannot be allowed to continue any further only for the recovery of money or for creating pressure upon the accused persons.

19. Finding above **CRR 2276 of 2022** are allowed.

20. In view of the fact that the same issue are involved in the other applications, **CRR 2279 of 2022**, **CRR 2280 of 2022**, **CRR 2283 of**

2022, **CRR 2460 of 2022** are also allowed. The impugned proceeding being G.R case no. 162 of 2020 pending before learned ACJM , Searampore arising out of Uttarpara P.S. case no. 36 of 2020 is hereby quashed.

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.)