

(2023) 09 CAL CK 0014
In the Calcutta High Court

Case No : Criminal Revision No. 1264 Of 2022, CRAN/4/2023

Avik Ghosh & Ors.

APPELLANT

Vs

State Of West Bengal & Anr.

RESPONDENT

Date of Decision : 05-09-2023

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 420
Consumer Protection Act, 1986 — Section 12
Transfer of Property Act, 1882 — Section 54
Indian Contract Act, 1872 — Section 202

Citation : (2023) 09 CAL CK 0014

Hon'ble Judges : Bibek Chaudhuri, J

Bench : Single Bench

Advocate : Sandipan Ganguly, Manaswita Mukherjee, Satadru Lahiri, Sourav Paul, Safdar Azam, Sudip Ghosh, Bitasok Banerji

Judgement

Bibek Chaudhuri, J

1. By filing the instant application under Section 482 of the Code of Criminal Procedure the petitioners being the accused persons of G.R Case No.1130 of 2013 under Section 420 of the Indian Penal Code pending before the learned Judicial Magistrate, 4th Court at Howrah arising out of Shibpur Police Station Case No.84 of 2015 dated 18th February, 2015, have prayed for quashing of the above mentioned criminal case on the ground that continuation of the criminal proceeding against the petitioner would be a glaring instance of abuse of the process of the court and they should be immediately discharged to secure ends of justice.

2. The opposite party No.2 as defacto complainant had entered into an agreement for development dated 19th August, 2011 with one Nemai Chand Ghosh and on the basis of such development agreement he developed a residential property being Premises No.73A, Atindra Mukherjee Lane within the police station Shibpur. As per the development agreement the opposite party

No.2 had already delivered allocated area of 780 sq. ft to the said Nemai Chand Ghosh. The defacto complainant also paid a sum of Rs.9 lakhs to the said Nemai Chand Ghosh but unfortunately he died intestate on 28th November, 2013 leaving behind his widow namely Munmun Ghosh, one son and one daughter who are the petitioners of the instant revision. It is alleged by the defacto complainant that during his life time, the said Nemai Chand Ghosh executed one registered and one notarial power of attorney along with the aforesaid agreement for development, on the same date of execution in favour of the defacto complainant for smooth progress in the work of the development. Though, on the death of Nemai Chand Ghosh both the power of attorneys ceased to have its effect, but the development agreement remains in force and applicable to the legal heirs and representatives of deceased Nemai Chand Ghosh. It is the case of the defacto complainant that the opposite party No.2 allegedly approached the petitioners to execute a fresh power of attorney in his name so that he can discharge his duty towards the intending purchasers. On such request the legal heirs of the said Nemai Chand Ghosh claimed a sum of Rs.1 lakh from the opposite party No.2. That on 28th February, 2013 the opposite party No.2 paid a sum of Rs.1 lakh to the petitioners. However, the petitioners have failed and neglected to pay the promised sum of Rs.2000/- per sq. ft. for the excess area, possession of which they delivered to Nemai Chand Ghosh by the opposite party No.2. Again on 29th December, 2013 the petitioners No.1 and 3 left their flat disclosing that they are going to visit their relative's house but all of a sudden petitioner No.3 executed a power of attorney in favour of her mother Munmun Ghosh and fled away to United State of America. The petitioner No.1 also went away to Bangalore. The opposite party No.2 came to know about their departure only on 17th January, 2014. It is also alleged by the opposite party No.2 that Mummun Ghosh petitioner No.2 herein lodged a complaint before the District Consumer Redressal Forum, Howrah which was registered as Consumer Case No.444 of 2014 by practicing fraud and cheating upon the opposite party No.2. The petitioner No.2 also obstructed the masons and labourers of the opposite party No.2 from bringing the building materials from premises No.73A, Atindra Mukherjee Lane. She also demanded rent from other apartment owners who purchased flat in the said premises from the opposite party No.2.

3. On the basis of the said complaint, police registered Shibpur Police Station Case No.84 of 2015 dated 18ty February, 2015 and finally submitted charge-sheet against the petitioners under Section 420 of the IPC before the learned Chief Judicial Magistrate at Howrah. The learned Chief Judicial Magistrate, Howrah upon receipt of the charge-sheet took cognizance of offence under Section 420 of the IPC against the petitioners and transferred the case to the 4th Court of the learned Judicial Magistrate, Howrah for trial and disposal.

4. It is alleged by the petitioners that they are completely innocent. They have been falsely implicated in the said case out of grudge and ill motive. It is the specific case of the petitioners that the father of petitioners No.1 and 3 and the

husband of the petitioner No.2 during his lifetime had entered into a development agreement dated 19th August, 2011 with the opposite party No.2 being the developer. It was agreed that opposite party No.2 would contract a G+2 building at the premises owned by the said Nemai Chand Ghosh at 73A, Atindra Mukherjee Lane and as per the development agreement the said Nemai Chand Ghosh would be provided with a flat and also a sum of Rs.12 lakhs. The opposite party No.2 constructed G+2 building without following the sanction plan, without the knowledge of owner of the said premises. This resulted in Howrah Municipal Corporation issuing a notice dated 6th November, 2012 requiring the said Nemai Chand Ghosh to attend before the Howrah Municipal Corporation. The petitioners came to learn about the said notice from the opposite party No.2 in the month of February, 2023. The petitioners thereafter procured the necessary documents and came to know that the opposite party No.2 paid lump sum fine to the Howrah Municipal Corporation to cover up his wrongful act of construction of building in consonance with the sanction plan and obtained a fresh sanction plan from the corporation. The opposite party No.2 despite verbal requests from the said Nemai Chand Ghosh did not amend the owners and developers allocation as the increased area by executing a fresh agreement of development. He also willfully neglected to complete the construction work and obtained the completion certificate from the Howrah Municipal Corporation. After the death of Nemai Chand Ghosh the petitioners repeatedly requested the opposite party No.2 to complete the remaining construction work as the petitioner No.1 was settled in Bangalore for his employment and the petitioner No.3 was married in the United States of America. Both of them executed power of attorney in favour of their mother, petitioner No.2 herein to perform all acts and take all steps regarding the development work of the said premises on behalf of them. In the mean time, the opposite party No.2 made illegal requests to the petitioners requesting them to permit him to construct an additional floor in the said premises, which the petitioners flatly denied. It is stated by the petitioners that the opposite party No.2 has also not honoured the development agreement. He did not make payment of Rs.12 lakhs. On installment basis up to 2014, the petitioners received Rs.10 lakhs from the opposite party No.2. The petitioners filed a case before the District Consumer Dispute Redressal Forum, Howrah on 8th August, 2014 under Section 12 of the Consumer Protection Act and the Tribunal passed an order to complete the remaining construction work within one month and to pay the remaining amount as per the development agreement dated 19th August, 2011 to the petitioners. It is submitted by the petitioners that the criminal proceeding is a retaliatory act by the opposite party No.2 against the petitioner's action of filing the above mentioned case under the Consumer Protection Act against the opposite party No.2. The dispute between the parties arose out of a contractual obligation on the issue as to whether the petitioners are entitled to get an additional area of owner's allocation because of the fact that the opposite party No.2 made excess construction and coverage area in the said premises deviating from the original sanction plan. It is also a bone of

contention as to whether the petitioners received a sum of Rs.12 lakhs from the opposite party No.2 or not for the land at the said premises.

5. The opposite party No.2 has filed an affidavit-in-opposition controverting entire allegation made out by the petitioners in their petition under Section 482 of the said Act. It is stated by the opposite party No.2 that the genesis of the prosecution case is that in spite of receipt of Rs.1 lakh for execution of fresh power of attorney, the petitioners refused to execute the same and did not refund the said amount. The petitioners wrongfully withheld the building materials of the opposite party No.2 and refused to hand over the same. The opposite party No.2 delivered possession of 879 sq. ft. of covered area in the said premises which is 279 sq. ft. more than agreed measurement as owner's allocation. However, the petitioner refused to pay Rs.2000/- per sq. ft. for the extra allocation though they promised to pay the said amount. It is contended on behalf of the opposite party No.2 that taking advantage of their superior position, the petitioners failed and neglected to give due honour to the development agreement and thereby committed cheating punishable under Section 420 of the IPC.

6. At this stage, the criminal case cannot be quashed specially after submission of charge-sheet upon due investigation of the case.

7. At the time of hearing of the instant revisional application the learned Advocates for both the parties agreed on the following facts:-

That on 19th August, 2011 development agreement was executed between Nemai Chand Ghosh and the opposite party No.2 in respect of the premises lying and situated at 73A Atindra Mukherjee Lane, Police Station-Shibpur. Up to May 2013 the opposite party No.2 paid Rs.8 lakhs to Nemai Chand Ghosh. In the month of May, 2013 a sum of Rs.1 lakh was deposited by a cheque in the bank account of petitioner No.1 by the opposite party No.2. On 28th November, 2013 Nemai Chand Ghosh died intestate leaving behind the petitioners as his legal heirs and successors in respect of the property left by the said Nemai Chand Ghosh. Though, out of total Rs.12 lakhs, Rs.9 lakhs was paid by the opposite party No.2, the petitioner filed the Consumer Case No.444 of 2014.

On 7th February, 2015 the petitioners lodged a complaint at Shibpur P.S alleging that the opposite party No.2 was blocking the common passage of the building without the knowledge or permission of the petitioner No.2. Subsequently, on the basis of a complaint submitted by the opposite party No.2 Shibpur P.S Case No.84 of 2015 dated 18th February, 2015 was instituted against the petitioners and charge-sheet was filed on 31st August, 2016 under Section 420 of the IPC. On 20th February, 2016, the District Consumer Dispute Redressal Forum passed an order directing the opposite party No.2 to pay the remaining part of the amount of Rs.2 lakhs and to complete the construction work within one month from the date of the order as agreement. The said order passed by the District Dispute Redressal Forum was upheld by the Hon'ble Supreme Court.

8. At the time of argument it is submitted by Mr. Sandipan Ganguly, learned Senior Counsel on behalf of the petitioners that the parties are engaged in fighting legal battle without any real and apparent disputes. As on this date, the opposite party No.2 raised construction and the building was completed. Possession of owner's allocation has also been handed over. However, due to dispute between the parties the infrastructural developments like construction of railing of the staircase, pucca path way, construction of common passage etc are left. The parties are at loggerhead because of the fact that the opposite party No.2 had to face trial in consumer proceeding and he had to pay the entire amount as per the agreement.

9. It is submitted by Mr. Satadru Lahiri, learned Advocate for the opposite party No.2 that at present the dispute between the parties revolves around the completion certificate to be granted by the Howrah Municipal Corporation with regard to the construction. However, it is a fact that the Howrah Municipal Corporation is issuing completion certificate to any of the building constructed within the territorial jurisdiction of the corporation for the best reason known to the corporation.

10. Be that as it may, this Court finds that the relationship between the developer and the owner of a property in the development agreement is in the nature of the relationship of principal and agent. Power of attorney executed by the owner in favour of a developer, pursuant to a development agreement has to be reconciled with Section 54 of the Transfer of Property Act; particularly, a power of attorney executed in pursuant of a development agreement creating an agency coupled with an interest in favour of developer-agent. Indian Law does not recognize the equitable title to land of a person, who has entered into an agreement to purchase the same. Thus, the final paragraph of Section 54 qualifies that an agreement for sale of an immovable property does not, of itself, create any interest in or charge on such land. Section 202 of the Contract Act, on the other hand, recognizes that the word "property" in Section 202 of the Contract Act would not mean the same property in the final paragraph of Section 54 of the Transfer of Property Act. In an agreement for sale of a land, the property is the land itself. In a power of attorney executed in pursuant of a development agreement of the kind that referred to herein, the property which forms the subject matter of the agency is not necessarily the part of the land that is envisaged to be transferred to the developer; it is the project itself.

11. In the context of the interest of the agent that is protected under Section 202 of the Contract Act, the authority of the principle has to be recorded as a kind of quality for the agent. It must also be appreciated that the power of attorney is always revocable. There cannot be any irrevocable power of attorney unless it creates the kind of interest that is envisaged in Section 202 of the Contract Act.

12. The relationship between the opposite party No.2 and Nemai Chand Ghosh, since deceased and after his death with the petitioners is the outcome of a

contract viz., development agreement. Since 2013 the parties are engaged in legal battle. Upon hearing of the learned Counsels for the parties this Court is of the opinion that the opposite party No.2 was never induced fraudulently or dishonestly to deliver any property. In the instant case, money or excess part of allocated owner's share in favour of the petitioners, he himself made additional construction deviating sanction plan. Therefore, his sanctioned plan was rejected and he had to get the sanction plan again on payment of find. At present the dispute centers around completion of infrastructural facilities in the said apartment.

13. Considering the nature of dispute, it appears to this Court that the dispute between the parties arises from breach of contract. Therefore, relying on the decision of Indian Oil Corporation vs. NEPC India Limited reported in (2006) 6 SCC 736 this Court is of the view that the complaint made by the opposite party No.2 upon which charge-sheet has been filed does not disclose any criminal offence under Section 420 of the IPC.

14. Accordingly, charge-sheet filed in Shibpur Police Station Case No.84 of 2015 corresponding to G.R Case No.1130 of 2015 be quashed.