
(2019) 03 CAL CK 0098

In the Calcutta High Court

Case No : Criminal Revision (CRR) No. 1159 Of 2016

Rajendra Kumar Goyal

APPELLANT

Vs

State Of West Bengal & Ors

RESPONDENT

Date of Decision : 28-03-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 200, 207, 207(A), 227, 228, 239, 244, 245, 245(1), 245(2), 397, 482
Indian Penal Code, 1860 — Section 120B, 406, 418, 420, 504, 506
West Bengal Apartment Ownership Act, 1972 — Section 3(b)
West Bengal Apartment Ownership Bye Laws, 1974 — Section 2(d)

Citation : (2019) 03 CAL CK 0098

Hon'ble Judges : Shivakant Prasad, J

Bench : Single Bench

Advocate : Avik Dutta, Syed Julfikar Ali, Sabyasachi Banerjee, Aafreen Panveer

Final Decision : Dismissed

Judgement

Shivakant Prasad, J

This is an application under Section 397/401 read with Section 482 of the Code of Criminal Procedure 1972. Petitioner has prayed for setting aside of the Order dated 18.02.2016 passed by the learned Judicial Magistrate, (1st Class), 4th Court Alipore, South 24 Parganas in connection with complaint Case No. 2794 of 2012.

Petitioner's case in brief is that being attracted by the advertisement in reference to the description of the South City Club in the Souvenir promising a resort like experience, the South City Club is a perfect get away for the entire family, spread over 3 acres (180 Cottahs), the multi facility club offering, social and entertainment activities, along with an air conditional sports centre, guest room, banquet facilities for function with parking space for members and guests and being eager to stay in an upscale complex with the advertised club facilities and landscape garden bigger than the Eden garden, the petitioner submitted an

application in the prescribed form along with the application money of Rs. 1,00,000/- paid on 29.01.2004 duly acknowledged by the concerned authority of the South City Project (Kolkata) Ltd. through money receipt being nos. 672 & 673.

An allotment offer being Memo No. UN/1/0194 dated May 7, 2004 was issued in the name of the petitioner and his wife, namely, Chanda Goyal and by that Memo the petitioner and his wife were informed by the authorized signatory of South City Projects (Kolkata) Ltd subject to Standard Terms and Conditions (STC) of sale" regarding description of the unit allotted, price, extras and deposits, nomination and balance payable were explained in details vide allotment offer letter dated 7th May, 2004 by which the petitioner and his wife were asked to pay 50% club membership fees of Rs. 60,000/- i.e. Rs. 30,000/-along with first installment money through three separate cheques amounting to Rs. 5,42,407/-, Rs. 30,000/- and Rs. 5,500/- and the petitioner paid advance Club Membership Fees of Rs. 30,000/- through Cheque No. 696321 dated 06.6.2004 which was duly acknowledged on behalf of the South City Project (Kolkata) Ltd. through Memo Receipt No. C/T-1/60 dated 23.6.2004.

It is submitted that the private opposite parties were duty bound to construct the South City Club on the portion of land earmarked for such City Club on the land of 180 Cottahs and to deliver the facilities of said South City Club by providing its membership and for creating landscaped garden bigger than the Eden garden of Kolkata on the land of 90 Cottahs but the opposite parties have not constructed the South City Club and failed to comply with the promise made in the souvenir depriving the petitioner and his wife of the facilities of South City Club since long period of time as a result they have suffered monetary loss and harassment.

The petitioner after full and final payment of Club Membership Fees in the year 2006 and 2008 and after taking possession of the Unit/Flat waited for the enjoyment of South City Club till December 2011 but the opposite parties neither provided the Club Membership nor arranged for use of South City Club and as such your petitioner several occasion demanded and requested the private opposite parties to provide Club Membership as well as recreational facilities of full fledged South City Club but each and every occasion it was orally expressed that the Club facilities will be provided within short period of time but in vain.

Petitioner informed the matter by a written complain to the Officer-in-charge of Jadavpur Police Station on 25.4.2012 but no action was taken by the concerned Police Officer. As such finding no other alternative a complaint case being no. C/2793 of 2012 was filed under Sections 418/420/406/504/506 of Indian Penal Code against the Managing Director of South City Project (Kolkata) Ltd. and South City Recreation Private Ltd. in the Court of the learned Chief Judicial Magistrate, South 24 Parganas, Alipore and learned CJM after taking cognizance transferred the case to the file of learned 7th Judicial Magistrate, Alipore for trial and disposal.

It is further contended that the learned Magistrate issued process under Sections 420/406/120B of I.P.C. against the opposite parties fixing a date on 27.9.2012 for service return and appearance vide order dated 01.9.2012 after the petitioner and his one witness, namely, Amiyo Chatterjee were examined under Section 200 Cr.P.C.

It is submitted that on receipt of summons, the opposite party nos. 3 to 9 instead of appearing before the learned 7th Judicial Magistrate, Alipore filed a revisional application being C.R.R. No. 3431 challenging the process of the Magistrate and the proceeding in the complaint case was stayed by interim order which was ultimately disposed of declining to quash the proceedings in complaint case no. 2794 of 2012 along with CRR 718 of 2013 in which proceeding in case no C2144 of 2012 was analogously taken up for decision and disposed of with the observation that only allegation in the complaint in connection with explicit act under said sections is against accused no. 9 who was not the petitioner to the CRR 718 of 2013. So the said charges pertaining to intentional insult and provocation to breach of peace and criminal intimidation cannot be fastened on to each of the petitioners except the accused no. 9 and as such, the proceeding in case no. C 2144 of 2012 pending in the Court of 10th JM Alipore, qua the petitioners was not interfered with save and except quashing the charges under Section 504 and 506 I.P.C. by the judgment dated 20.8.2014 and the CRR 3431 of 2012 was also disposed of on a parity of the reasoning by declining to quash the proceedings in complaint case no. 2794 of 2012 pending in the Court of the learned 7th CJM, Alipore.

Thereafter, complainant, and his two witnesses, namely, Amiyo Chatterjee and Vinod Kumar Goyal were examined before the charge and after the closer of the evidence before charge date was fixed for consideration of the charge but the accused persons were discharged under Section 245(1) read with Section 245(2) of the Code vide order dated 18.02.2016 in complaint case No. 2794 of 2012 which has been assailed in this revisional application.

At the outset Mr. Avik Dutta learned Counsel for the petitioner submitted that at the time of framing of charge the learned Magistrate ought to have considered a prima facie case against the accused but instead he endeavoured to hold roving and fishing inquiry at the stage of framing of charge by discharging the accused persons, opposite parties under Section 245(1) or under Section 245(2) of Cr.P.C. It is also submitted that the learned Magistrate has failed to consider that the evidence of P.W. 1 who in unequivocal term deposed before the charge that there has been no club in place on the land of 180 cottahs as per the promise which the opposite parties had given in the souvenir promising south city club as a get way for entire family. My attention is invited to South City brochure promising a resort like experience with the South City Club. It is depicted that the South City Club will have the largest swimming within a residential complex in the city along with a children's pool, sports pool and a leisure pool. It will also have a tennis and squash courts, an indoor cricket arena, billiards and pool tables besides a

card room. There will be a fine dining restaurant with banquet facilities, pub lounge, health club, spa and a crèche for toddlers. Being attracted by the brochure the petitioner applied for allotment of a flat and by allotment offer dated May 7, 2004, the petitioner was given allotment of unit subject to Standard Terms and Conditions (STC) of sale for unit no. L floor no. 13 Tower-1 OAK with built up area 1206 sqft and super built up area 1580 sqft and a car park open one at a consideration of Rs. 29,86,200/- only for the unit and Rs. 1,75,000 only for car park. Club membership of Rs. 60,000 only was to be deposited out of which club membership of Rs. 30,000 was payable with the first installment.

In second fold argument, Mr. Dutta submitted that the ingredients of Sections 420, 406 and 120B of I.P.C. prima facie available from the evidence before charge have not been considered and argued that even existing a civil flavor in the dispute it cannot jettison the petitioners remedy in the criminal proceeding. Lastly, it is argued that the learned Magistrate has committed an error by passing impugned order of discharge under Section 245(1) in conjoint reading with Section 245(2) of Cr.P.C., at the stage of framing of the charge under Sections 227 and 228 of Cr.P.C..

Mr. Dutta appearing for the petitioner further submitted that the learned Magistrate failed to appreciate the evidence of PW1 wherein he has stated in clear term that South City Club was not constructed on the land measuring 180 cottahs earmarked for the club rather a tower by name 'Cypress' in that land and the learned Magistrate should not have held a mini trial at the time of framing of charge as not permissible under the provision of Sections 227 and 228 of the Code. It is further argued by Mr. Dutta that at the time of framing charge, the trial court is precluded from holding a roving and fishing inquiry and in support of his contention reliance is placed in case of State of Orissa Vs. Debendra Nath Padhi reported in AIR 2005 SC 359 to the following paragraphs reproduced hereunder-

"11. In State of Bihar v. Ramesh Singh [(1977) 4 SCC 39] considering the scope of Sections 227 and 228 of the Code, it was held that at the stage of framing of charge it is not obligatory for the Judge to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. At that stage, the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion, at the initial stage of framing of charge, is sufficient to frame the charge and in that event it is not open to say that there is no sufficient ground for proceeding against the accused.

18. We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced. The scheme of the Code and object with which Section 227 was incorporated and Sections 207 and 207 (A) omitted have already been noticed. Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a

mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police."

A reference is also made to a decision in case of State of Tamil Nadu Vs. N. Suresh Rajan And Others reported in (2014) 11 SCC 709 to argue that the law does not permit a mini trial at this stage of framing of charge. It is observed that "at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post-office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage (para 29)."

It has been held that the Criminal Procedure Code, 1973 (Cr.P.C.) contemplates discharge of the accused by the Court of Session under Section 227 Cr.P.C. in a

case triable by it; cases instituted upon a police report are covered by Section 239 Cr.P.C. and cases instituted otherwise than on a police report are dealt with in Section 245 Cr.P.C.. From a reading of the aforesaid sections it is evident that they contain somewhat different provisions with regard to discharge of an accused. Under Section 227 Cr.P.C., the trial Court is required to discharge the accused if it "considers that there is not sufficient ground for proceeding against the accused". However, discharge under Section 239 Cr.P.C. can be ordered when "the Magistrate considers the charge against the accused to be groundless". The power to discharge is exercisable under Section 245(1) Cr.P.C. when, "the Magistrate considers, for reasons to be recorded that no case against the accused has been made out which, if unrebutted, would warrant his conviction". Sections 227 and 239 Cr.P.C. provide for discharge before the recording of evidence on the basis of the police report, the documents sent along with it and examination of the accused after giving an opportunity to the parties to be heard. However, the stage of discharge under Section 245 Cr.P.C., on the other hand, is reached only after the evidence referred in Section 244 Cr.P.C. has been taken. Thus, there is difference in the language employed in the provisions of whichever provision may be applicable, the Court is required at this stage to see that there is a prima facie case for proceeding against the accused.

Yet Mr. Dutta relied on a decision in case of State of Rajasthan Vs. Fatehkaran Mehdu reported in 2017(2) AICLR 612 (S.C.) to argue that at the stage of framing of a charge, the Court is concerned not with the proof of allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt. Framing of charge is not a stage, at which stage final test of guilt is to be applied. It has been observed thus-

"26. The scope of interference and exercise of jurisdiction under Section 397 of Cr.P.C. has been time and again explained by this Court. Further, the scope of interference under Section 397 Cr.P.C. at a stage, when charge had been framed, is also well settled. At the stage of framing of a charge, the court is concerned not with the proof of the allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt. The framing of charge is not a stage, at which stage final test of guilt is to be applied. Thus, to hold that at the stage of framing the charge, the court should form an opinion that the accused is certainly guilty of committing an offence, is to hold something which is neither permissible nor is in consonance with scheme of Code of Criminal Procedure."

I am unable to agree with such argument advanced on behalf of the petitioner as the learned Magistrate was called upon to consider the framing of the charge on the basis of evidence already adduced before charge under Section 244 of the Code and the discharge of the accused persons has not been considered under the provision of Section 227 and the Magistrate is not called upon to consider the

framing of the charge under Section 228 of Cr.P.C. because the provision of Section 227 deals with discharge of an accused before a Court of Sessions when a Sessions Judge upon consideration of the record of the case and the documents before him after having given hearing to both the accused and the prosecution considers that there is no sufficient grounds for proceeding against the accused, he can discharge the accused. Whereas, the provision of Section 228 of the Indian Penal Code applies in conjoint reading with 227 of the Code while a Sessions Judge after consideration is of the opinion that there is ground for presuming that accused has committed an offence which is exclusively triable by the Court of Sessions, he shall frame the charge in writing against the accused and in case he is of the opinion that the offence so alleged is not exclusively triable by Court of Sessions, he may frame the charge and transfer the case for trial to the CJM or any other Judicial Magistrate of the 1st Class and direct the accused to appear before the Court concerned on a date fixed by him. It would be useful to reproduce the provision of Section 245(1)(2) of Cr.P.C. which read thus -

"245. When accused shall be discharged. (1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

It follows that after the evidence of the complainant/petitioner and his two witnesses were examined before charge as per provision of Section 244 of Cr.P.C., next procedure is required to be undertaken by the Magistrate as per the provision of Section 245 of the Code for discharge of the accused persons when the Magistrate consider for reasons recorded that no case has been made out against the accused persons. This is what has been followed and done by the learned Magistrate. Therefore, I am of the considered view that the conjoint reading of the provisions under Section 227 and Section 228 of the Cr.P.C. pertaining to Chapter XVIII are to be dealt with by the Court of Sessions and they do not apply in warrant procedure case instituted on the basis of a private complaint like the present case in hand. So I am unable to agree with Mr. Dutta and reiterate that provision under Sections 227 and 228 of the Cr.P.C, the scope for consideration is in sessions trial offences. I find there is no dispute as regards their allotment of the unit and the deed of declaration registered on 31st August, 2005. On behalf of the petitioner a demand notice was given on 22.2.2012 on the letter head of Mr. Syed Julfikar Advocate for getting a full fledged club for recreational activities as entailed at para 2.81 providing that South City Kolkata Project Ltd as per the said terms and conditions would arrange a full-fledged club for recreational activities to the petitioner as well as to other flat owners ventilating that though the petitioner paid Rs. 30,000 advance amount of 50%

admission fees for club membership in the year 2004 but no such facilities have been provided since 2004.

In this regard Mr. Dutta invites my attention to a reply to the said notice dated March 5, 2012 given by Mr. Atanu Mitra legal head for South City Project Ltd which reflects that the said club was to continue to belong to the South City Project and flat owners were to be only members of the club without any right of property. Therefore, the flat owners would have had only a very limited right of club. It was informed to the petitioner about the fact that the Committee representing the flat owners have already negotiated and concluded that the club property will be the absolute property of the flat owners, entitling thereby, right and interest to an undivided share in the club property to each of them and huge amount has been spent for the the club structure and for internal decoration which will inure to the benefit of the flat owners and the members of their family and it is also reflected that the petitioner was informed that the work of club premises is in progress.

It emerges that the petitioner's moot contention is that in spite of standard term condition of sale in the deed of declaration dated 31st October, 2005 the club membership was not given to the petitioner in spite of the several assurances by the opposite party. Mr. Dutta pointed out that the order dated 01.9.2012 issuing process under Sections 420, 406 and 120B of Indian Penal Code in C 2794 of 2012 by the learned 7th Judicial Magistrate against the opposite parties was assailed in revisional application being CRR 3431 of 2012 but a coordinate bench of this Hon'ble High Court declined to quash the proceedings in complaint case no. 2794 of 2012 pending in the Court of learned 7th Judicial Magistrate, Alipore along with order dated 30th May, 2012. Specific case of the complainant is that the Club facilities were advertised with artistic impression along with swimming pool and indoor game facilities and the complainant was induced to part with the consideration money for both the flats and the facilities such as the club attached to the residential complex in existing area of land of 3.1 acres demarcated within the project area for construction of the independent club segment. If any construction was contemplated within South City Project in addition to the four independent segments namely, residential complex, the school, the junction and the gallery and the club, then in terms of Clause 10.10 (supra) such additional construction would take place in area of land which are either contiguous or adjacent to the existing land, provided such contiguous and additional lands are acquired and amalgamated with the existing land of the project. It is alleged that a new residential tower of 15 floors was constructed on the land earmarked for the club by the name and style of 'Cypress' not being part of the initial offer made to the prospective allottees and failed to construct and deliver the club facilities within the earmarked portion of land for the club.

Mr. Dutta has therefore submitted that in order to legitimize the subsequent action by departing from the original promise, the opposite parties 2 to 10 unilaterally created a new Deed of Declaration in 2009 revising the plans for the

club segment, although, argued that the company was within its rights to alter the original STC. Deed of Declaration of the year 2009 provides that the new residential tower 'Cypress' shall be constructed in the club segment part of the open areas of the club segment will now be sold by the company to the purchaser of apartments in 'Cypress'. Admittedly, the club is in a different form but not in the form as originally represented to the complainant.

In compliance of the direction passed in the said revisional application, learned Magistrate proceeded to take evidence of the complainant as per Section 244 of the Cr.P.C.

In rebuttal, Mr. Sabyasachi Banerjee learned Counsel for the opposite parties contended that documents of Deed of Declaration by and between the parties are not pocket documents of the opposite parties or that the petitioner was not in the knowledge.

Two allotment letters both dated 07.5.2004 were issued to the petitioner allotting the flats in tower-1 Oak along with club facilities and membership which were to be assigned at appropriate time to the petitioner as evidenced from letter P3. The said allotment of the flat as well as the club facilities were subject to standard terms and conditions of sales which was registered by a deed of declaration dated 31.8.2005 forming part of a deed of conveyance. Subsequently, there were two further declarations each qualifying the previous one. The first declaration as per para 6.4.2 and 10.9 provided that the first declarant shall have within its right to any time alter or modify and to add to the terms and conditions in accordance with law and with approval under WB Act XX of 1993 which the allottees, the unit owners and the utility room owners shall accept without any demur and shall be bound by the same.

It would be evident from letter P5 dated 17.3.2007 that the petitioner accepted the similar club facilities temporarily at Princeton Club while the construction of the project was being completed in 2007. The second declaration was executed on 30.01.2009 P6 declaring STC for the Cypress tower of South City which provided the revision of original STC as under:

"the company has revised the plans for the club segment as it is entitled to do under the original STC and has decided that a 5th tower/building to be named 'Cypress' will be constructed in the club segment. Cypress will have a double basement for parking, a ground and another fifteen upper floors. The club will be

housed in the ground, first and second floors of Cypress. The other upper floors of Cypress would be independent from the rest of the building and will consist of residential apartments. The car parking rights in the basement of Cypress and part of the open areas of the club segment will be sold by the company to the purchasers of apartments in Cypress as also to other apartment owners in the Residential Segment. The club will be segregated and separated from Cypress and the Residential Segment and its approach, security etc will be provided in a manner that the same are in between the Residential Segment and Cypress."

The third declaration was signed and executed on 3.9.2010 (P7) which brought changes in the STC with the consent and concurrence of the apartment owners entitling the apartment owners right to the Cypress tower area providing that the club will be housed in the ground and first floor of the 5th tower and such portion of the residential complex area as will be allocated to it with separate entrance for the club and unit comprised therein and further provided that the club shall become the property of the apartment owners and form part of the common parts and portions for all of them. Thus, Apartment Owners Association becomes the owner of the club.

Thereafter, two deeds of conveyance were executed and registered on dated 20.9.2010 (P8) with the Office of ADSR, Alipore being no. 08049 and 08063 both for the year 2010 between the company and the complainant in which the opposite party no.10 signed and executed being duly authorized on behalf of the company wherein the club has been provided as the part of the common portion described in the schedule A of the deed of conveyance as the undivided, indivisible and proportionate share and/or interest in the common portions as per Clause 5.10.2 with the confirmation clause 6.4 whereby the purchaser/petitioner confirmed and agreed that he has no and shall have never any claim whatsoever against either of the vendors regarding constructions/completion of the unit, the tower comprising it, the Cypress Tower or to the terms of any of the Declaration and agreed not to raise any claim or objection at any time in future. It is depicted that the deed of conveyance were executed and registered in the registry in presence of the petitioner.

It is urged by Mr. Banerjee that despite the execution and registration of the said deed of conveyance by and between the parties before the Registrar, the petitioner lodged a complaint with Jadavpur P.S alleging delay in providing club facilities. It is submitted that the learned Magistrate has rightly opined that no case has been made out on appraisal of evidence before charge in discharging the opposite party no. 2 to 10 by the impugned order since South City authority provided all facilities including club facilities with no mens rea of the opposite parties from the beginning of the agreement. Mr. Banerjee invites my attention to an Agreement dated 2nd February, 2015 P13 between the South City Company Project Kolkata Ltd, South City Property Management Private Ltd and the South City Apartment Owners' Association to argue that Rs.30,000 as earnest money towards club facility collected from each apartment owners was refunded and given to the Owners' Association to resolve the disputes and differences which arose between South City and the Apartment owners with regard to expectation/performance gap in the residential segment including the club. The Agreement reflects that South City has paid a compensatory amount of Rs.9.6 crores to the Association and the Apartment Owners Association waived any further claim against South City, inter-alia, on account of delay in handing over the club to the Association and consequential delay in enjoyment of the club facilities by the apartment owners and for providing the club of a smaller size than promised. In addition South City has also paid a sum of Rs.40 lakhs to the

Association for purchasing equipment and appliances for the club and as such Association shall have no claim against South City on account of not providing the equipment and appliances.

Complainant PW1, his employee PW2 and his brother PW3 were examined before consideration of charge upon taking all the evidence adduced by the complainant under the provision of Section 244 of the Code. So, obviously the learned Magistrate took up the matter for consideration of charge by appraising the evidence before the charge to find as to whether any case was made out against the accused persons/ opposite parties 2 to 10 or the charge brought against them are groundless.

It would also reveal from the order no.2 passed in Title Suit no.71 of 2015 by the Civil Judge (Junior Division) 1st Court Alipore, that the present petitioner/ complainant as the plaintiff filed the said suit for declaration and injunction, praying for temporary injunction and interim injunction thereto but the learned Civil Judge refused to grant any relief on the finding that the title deeds of the plaintiffs specifically mentioned that the defendant no.3 being the South City Authority had decided to construct another tower named Cypress which contained club and the plaintiffs have acquiesced to such construction at the time of purchase of their flats and that too, at the stage when the entire building has been put in place with the completion of the construction. It is axiomatic from the order dated 17.3.2015 passed in Misc. Appeal no. 89 of 2015 by the District Judge Alipore that prayer for an interim injunction was refused too. It is curious to note that the Secretary South City Apartment owners' Association by its letter dated 23.04.2015 had informed South City Project Kolkata Ltd that the petitioner has been regularly using the club facilities as per the records of club usage charges from October 2015 to till April 2016.

In this context Mr. Banerjee refers to a decision in *State of Punjab vs Davinder Pal Singh Bhullar* reported in 2011 (14) SCC 770 to argue that conduct of the petitioner by agreeing to all terms as entered by and between the South City Apartment Owners' Association of which the petitioner himself being a member of that Association having entered into all conditions as embodied in the Agreement and his deeds of conveyance, his claim is absolutely barred by principle of acquiescence and waiver arguing that though waiver cannot always and in every case be inferred merely from the failure of the party to take the objection but it can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question. It would be in paragraphs 39 to 42 of the citation which are reproduced hereunder for useful consideration-

39. In *M/s. Power Control Appliances & Ors. v. Sumeet Machines Pvt. Ltd.*, (1994) 2 SCC 448 this Court held as under:-

"Acquiescence is sitting by, when another is invading the rights.... It is a course of conduct inconsistent with the claim... It implies positive acts; not merely

silence or inaction such as involved in laches. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant..... "

40. Inaction in every case does not lead to an inference of implied consent or acquiescence as has been held by this Court in *P. John Chandy & Co. (P) Ltd. v. John P. Thomas*, AIR 2002 SC 2057. Thus, the Court has to examine the facts and circumstances in an individual case.

41. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (Vide: *Dawsons Bank Ltd. v. Nippon Menkwa Kabushihhi Kaish*, AIR 1935 PC 79; *Bashesar Nath v. Commissioner of Income-tax, Delhi and Rajasthan & Anr.*, AIR 1959 SC 149; *Mademsetty Satyanarayana v. G. Yelloji Rao & Ors.*, AIR 1965 SC 1405; *Associated Hotels of India Ltd. v. S. B. Sardar Ranjit Singh*, AIR 1968 SC 933; *Jaswantsingh Mathurasingh & Anr. v. Ahmedabad Municipal Corporation & Ors.*, (1992) Suppl 1 SCC 5; *M/s. Sikkim Subba Associates v. State of Sikkim*, AIR 2001 SC 2062; and *Krishna Bahadur v. M/s. Purna Theatre & Ors.*, 42. This Court in *Municipal Corporation of Greater Bombay v. Dr. Hakimwadi Tenants' Association & Ors.*, AIR 1988 SC 233 considered the issue of waiver/acquiescence by the non-parties to the proceedings and held:

"In order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case. There is no question of estoppel, waiver or abandonment. There is no specific plea of waiver, acquiescence or estoppel, much less a plea of abandonment of right. That apart, the question of waiver really does not arise in the case. Admittedly, the tenants were not parties to the earlier proceedings. There is, therefore, no question of waiver of rights, by Respondents 4-7 nor would this disentitle the tenants from maintaining the writ petition..

I have respectfully gone through the decision and I agree with Mr. Banerjee that with the full knowledge of the recitals in the deed of conveyance the petitioner executed and registered those deeds waiving the claim in respect of the club issue as per the Agreement embodying the terms and conditions and no claim term by the Apartment Owners' Association, therefore, the petitioner allegation cannot be sustained in view of the statement on oath deposed by the complainant and his witnesses because the claim of the petitioner is barred by the principle of acquiescence and waiver.

Mr. Banerjee refers to a decision in *Anil Mahajan Vs Bhor Industries Ltd and Anr.*

reported in (2005) 10 SCC 228 to submit that for mere failure of a person to keep up promise, he cannot be said to nurture culpable intention from the very beginning to hold him guilty of cheating . It has been held that "From mere failure of a person to keep up promise subsequently, a culpable intention right at the beginning, that is, when he made the promises cannot be resumed. A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction. The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence."

In the said judgment decision in case of Nagawwa Vs. Veeranna Shivalingappa Konjalgi reported in (1976) 3 SCC 736 was noticed wherein it has been held that the Magistrate while issuing process should satisfy himself as to whether the allegations in the complaint, if proved, would ultimately end in the conviction of the accused.

Reference is also made to a decision in case of Thermax Limited and Others Vs. K.M. Johny and Others reported in (2011) 13 SCC 412 wherein it has been held that if there is flavour of civil nature, same cannot be agitated in form of criminal proceeding. It is settled law that the essential ingredients for an offence under Section 420 is that there has to be dishonest intention to deceive another person.

Taking cue from the above cited decisions and having perused the order impugned and considered the factual aspects of the case as discussed above,

I am of the view that opposite parties cannot be held to be guilty of nurturing dishonest intention from very beginning as the dispute pertains to contractual obligations between the parties which the petitioner was entitled to cancel the offer. Therefore, the prosecution initiated by the petitioner is untenable in law and in fact as the same is merely a breach of contract and the same cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction which is well reflected from the various documents pressed in service.

Contrary to what has been submitted on behalf of the opposite parties, Mr. Dutta appearing for the petitioner submitted that the resolution passed in the general body meeting is not binding on the petitioner as he is not a member of the association and the same agreement is subject to challenge in civil suit pending before the Civil Court Alipore and that the deed of conveyance was dealt with by the coordinate bench of this Hon'ble Court. It is pointed out that the club is a separate segment and under no circumstances of the land earmarked for South City club would be deviated in view of the promise given in the souvenir and accordingly it is submitted that the accused opposite parties have nurtured the intention in their mind from the very inception. It is also pointed out that the

petitioner is not a signatory of the resolution adopted by the south City Apartment Owners' Association.

I have respectfully considered decisions and rival contentions putforth by learned counsels for both the parties and I am unable to accept the contention of Mr. Dutta that the resolution passed in the general body meeting of the Association of Apartment Owners' is not binding on the petitioner as it cannot be held that he is not a member of the Association though the same may be subject to challenge in civil suit pending before the Civil Court at Alipore inasmuch as Association of Apartment Owners means the Association competent to contract in its own name and formed in accordance with the provisions made in the Bye-laws as defined in Section 3(b) of WB Apartment Owners' Act 1972 and further in view of definition in Section 2(d) of the WB Apartment Owners' Bye-laws 1974 which defines that Association means an Association of Apartment Owners and Apartment Owners means the person owning or deemed to be owning an Apartment under the Act and a Member means a Member of an Association, ergo, by virtue of the petitioner being an Apartment Owner he is a Member of the said Association and he cannot contend that he is not the Member of the Association. That apart, I find on appraisal of the evidence adduced before charge and the documents proved thereby that he has been enjoying the club facilities in South City Club fully taken over by the Apartment owners' Association and the petitioner is paying the subscription for the club membership. I hold that the claim of the petitioner is a squarely barred by the principle of estoppels, acquiescence and waiver since knowing fully well he voluntarily relinquished his right by execution and registration of a deed of conveyance in respect of his Apartment with all the recitals therein and conditions agreed upon by the parties forgoing any further claim whatsoever.

It is pertinent to take note of the fact that the petitioner had served Advocate letters dated 5.9.2014 and 27.9.2014 to the Association not to take possession of two floors of Cypress tower as South City Club and in reply the Association by it's letter dated 01.12.2015 made it clear about the taking over the Club which was discussed in the General Body Meeting of the Association held on 02.11.2014 adopting a resolution which is binding on all the Members of the Association including the petitioner. It is also important to take note of the fact that a complaint bearing no. 81 of 2012 was filed before the District Consumer Forum which was dismissed for lack of pecuniary jurisdiction by order dated 05.6.2013 and a fresh complaint being no. 312/2013 was filed which is still pending for decision.

I find that on provision of the order impugned that learned Magistrate on appraisal of the evidence before charge and taking cue from a decision in S.W. Palanitkar Vs State of Bihar reported in 2003 SCC 241 of the Hon'ble Apex Court, held that South City authority has provided all facilities to the complainant the present petitioner except the club but there is no mens rea of the accused/ opposite parties from the very beginning of the agreement and no loss can be

said to have been sustained by the petitioner. In the cited decision it has been specifically held that to constitute an offence of cheating the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating.

In the context of what has been discussed in the forgoing paragraphs, I am of the clear opinion and accordingly hold that there is absolute flavour of civil dispute and the issue involved in the civil dispute cannot be entertained in a criminal proceeding since dispute clearly pertained to contractual obligation between the parties which has already been resolved by way of resolution taken by the General Body of Apartment Owners' Association. It cannot be held that the opposite parties from very beginning nurtured the intention to cheat the petitioner, ergo, I do not find the order impugned passed by the learned Judicial Magistrate Alipore devoid of any merit to assail the same.

In the result the revisional application being no. CRR 1159 of 2016 fails and hereby dismissed.

Urgent certified photocopy of this Judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.