
(2015) 02 CAL CK 0073
In the Calcutta High Court
Case No : C.R.R. No. 3319 of 2014

Rakesh Kumar Agarwal and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 23-02-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 120B, 420

Citation : (2015) 02 CAL CK 0073

Hon'ble Judges : Ashim Kumar Roy, J.

Bench : Single Bench

Advocate : Uday Chandra Jha and Maheswari Sharma, for the Appellant

Judgement

Ashim Kumar Roy, J.—In connection with G.R. Case No. 88 of 2010, now pending before the Learned Metropolitan Magistrate, 12th Court, Kolkata arising out of Shakespeare Sarani P.S. Case No. 13 of 2010, the petitioners have been charge sheeted under Sections 420/120B of the Indian Penal Code. After charge hearing, the learned Magistrate came to a definite finding that a prima facie case for the offences punishable under Sections 420/120B of the Indian Penal Code has been made out against the petitioners and a date is fixed for framing of charge.

2. Aggrieved by such order, the petitioners have come before this court challenging the same.

3. The learned counsel appearing on behalf of the petitioners vehemently contended that dispute if any is absolutely civil in nature and there was no criminality. He further submitted sometime in August 2007, an agreement for sale was executed between the petitioners, a developer and the de facto complainant and in the said agreement it was agreed that a flat being Flat No. 401 situated at the 4th Floor of the premises No. 86A/2, Suren Sarkar Road, P.S. Beliaghata, Kolkata-700010 with two car parking space, be sold to the de facto complainant against payment of Rs. 15 lakhs. It is further contended in the said

agreement there was a clear stipulation that if the developer fails to deliver khas vacant and peaceful possession of the flat to the de facto complainant within 30 days from the date of execution of agreement then the entire amount of Rs. 15 lakhs will be returned to him with an interest @ 24% per annum and the de facto complainant in such an event will also be entitled to damage. It is then contended therefore in the event of failure of the petitioner to deliver the flat to the de facto complainant he is obliged to pay back the consideration amount with interest and damage and on his failure, the remedy available to the de facto complainant is to approach a competent civil court for his remedy and not by lodging the FIR. He further submitted even if it is accepted that before selling of the flat in question, the same was not free from all encumbrances and was held under lease by a third person then in that case, it was for the de facto complainant to satisfy about the title of the property before entering into the sale agreement then in that case it was for the de facto complainant that the buyer to be satisfied about the good title of the property before he entered into the sale agreement and when same was not done, he cannot now allege any criminality against the seller. It is further submitted during the pendency of the application for anticipatory bail of the petitioner they have paid back Rs. 5 lakhs to the petitioner out of the total consideration amount of Rs. 15 lakhs. It is further submitted after lodging of FIR, the de facto complainant filed a money suit but finally the suit was withdrawn with a liberty to file afresh suit but till date no other suit has been filed.

4. Heard the learned counsel appearing on behalf of the petitioners. Considered his respective submission. Perused the materials on record.

5. It is well settled that no F.I.R. or charge sheet can be quashed unless it is shown accepting the allegations made therein to be true, no case is made out. Now, going through the case of the de facto complainant as is transpired from the content of the F.I.R. and the materials gathered during investigation, it is found that the petitioner, a developer obtained a sum of Rs. 15 lakhs from the de facto complainant for selling of a flat and on the very day the said amount was received by the accused/petitioner, an agreement for sale was executed. Finally, the flat was neither delivered to the de facto complainant nor the consideration amount was returned and the de facto complainant subsequently on enquiry came to learn before the agreement for sale was executed, the said flat was leased out to a third party but such facts were deliberately concealed by the petitioners and he was told that the flat in question was free from all encumbrances and if such facts were known to him, he would not have booked the flat and paid anything.

6. On the allegations made in the F.I.R. and materials collected as above, undoubtedly, a case for cheating is made out. On the face of the allegations that a flat which is already leased out to a third party was sold out to the de facto complainant by the petitioner concealing such fact to him and claiming the same was free from all encumbrances and when neither the possession of the flat was

given nor the amount paid has been refunded, it cannot be claimed that no offence for cheating is made out. Even if the de facto complainant fails to verify the title of the property that would not exonerate the petitioner from his obligations to disclose to him before obtaining the advance about the status of the property. In any event, the contention of the learned counsel of the petitioner since the agreement for sale contained a specific stipulation that in the event the flat is not delivered to the buyer then in that case the seller will be obliged to return the amount with the interest and therefore the remedy of the buyer is to approach the civil court when the buyer failed to keep his promise, is equally not tenable. The mere fact the dispute arose over the breach of contract and for that civil remedy is available or has been availed of, is not by itself a ground for quashing of a criminal case, when the allegations and the materials collected in support of the same constituted criminal offence. In a case of this nature, the test is to examine whether the materials collected against the accused constitutes a criminal offence or not, if constitutes, the mere availability of civil remedy is of no consequences.

7. In this regard reliance may be placed in the observation of the Apex Court in the case of Indian Oil Corporation Vs. NEPC India Ltd. and Others, . Merely because a fact as a civil profile is not sufficient to denude it of its criminal outfit unless the allegation falls short in making out a criminal case. A clause contained in the agreement for sale as to how the purchaser shall be compensated in the event of failure to perform the agreement by the seller is not an effective substitute for a criminal prosecution when the facts of the case constitutes a criminal offence. In this regard the decision of the Apex Court in the case of Trisuns Chemical Industry Vs. Rajesh Agarwal and others, be well referred. There is hardly any dispute that when a complaint does not disclose any offence it can very well be quashed. But merely because on the self-same facts a civil claim is maintainable that does not mean the criminal complaint cannot be maintained. A fact made give rise to both a civil claim as well as the criminal offence. In this regard reference may be made on the decision of the Apex Court in the case of Lalmuni Devi Vs. State of Bihar and Others, .

8. Having regard to above, the question of quashing of the F.I.R. does not at all arise. This criminal revision has no merit and accordingly stands dismissed.

9. Office is directed to immediately communicate this order to the court below as well as to the opposite party No. 2 at his address mentioned in the cause title.