
(2010) 10 CAL CK 0060

In the Calcutta High Court

Case No : C.R.R. 2814 of 2009 and C.R.A.N. 2073 of 2010

Smt. Nupur Bose and Another

APPELLANT

Vs

The State of West Bengal and Another

RESPONDENT

Date of Decision : 06-10-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 173, 239, 482
Penal Code, 1860 (IPC) — Section 34, 406, 420, 494, 494A

Citation : (2010) 10 CAL CK 0060

Hon'ble Judges : Syamal Kanti Chakrabarti, J

Bench : Single Bench

Advocate : Sudipta Moitra, Ashok Das and Rajiblal Moitra, for the Appellant;Sk. Kasem Ali Ahmed, for the Respondent

Judgement

Syamal Kanti Chakrabarti, J.—The present revisional application is directed for quashing the proceeding being G. R. case No. 753/07 u/s 420/506/34 IPC arising out of Nimta Police Station case No. 11/07 dated 28.02.2007 now pending before the Learned Judicial magistrate, First Court Barrackpore, District - North 24 Parganas.

2. The petitioners contend that the opposite party No. 2 Mira Chatterjee filed a complaint before the Learned Additional Chief Judicial Magistrate, Barrackpore who directed the Nimta Police Station to treat the said complaint as FIR u/s 156(3) Cr.P.C. to proceed with the aforesaid case. After due investigation charge sheet was filed in the aforesaid case u/s 420/506/34 IPC against the petitioners along with another and the Learned Magistrate took cognisance of the offence and proceeded for trial.

3. Prior to this the opposite party No. 2 filed a suit being T. S. No. 29 of 2007 before the Learned Civil Judge (Junior Division), Third Court at Sealdah against the petitioner No. 1 praying for a decree for declaration in respect of a flat of 300 square feet and for payment of balance money towards consideration. She also

filed an application u/s 8 of the Arbitration and Conciliation Act for a reference to the arbitrator in terms of the agreement. The petitioners contend that from the petition of complaint as well as the result of investigation made no prima facie offence punishable u/s 420/506/34 IPC appears to have been made out against the present petitioners which may at best give rise to a civil dispute arising out of part performance of contract and during pendency of civil proceeding over the same issue the instant criminal proceeding should not be allowed to continue which will be abuse of the process of law. Therefore, they have urged for quashing the said proceeding. Initially there was a stay of further proceeding of the said case for a limited period which was sought to be extended by filing another application being C.R.A.N. 2073 of 2010 which is now under consideration.

4. Learned lawyer for the state has opposed the move and contended that at this stage there is no scope for exercising the inherent power of this Court u/s 482 Cr.P.C since sufficient prima facie materials are forthcoming against the accused persons. He has relied upon the principles laid down in the following six cases:

- i) (2010) 2 C Cr LR (SC) 108;
- ii) 2009 (1) Crimes 216 (SC);
- iii) REPL Engineering Limited and Others Vs. ICDS Limited and Another,
- iv) Jayant Kumar Jaiswal and Another Vs. Bihar State Financial Corporation and Another,
- v) State of Bihar Vs. Rajendra Agrawalla, and
- vi) AIR 2000 SC 1869.

5. Learned lawyer for the petitioner on the contrary has relied upon the principles laid down in the following ten cases,

- i) 2006 (2) C Cr LR (SC) 118;
- ii) 2000 SCC (Cr) 615;
- iii) B. Suresh Yadav Vs. Sharifa Bee and Another,
- iv) All Cargo Movers (I) Pvt. Ltd. and Others Vs. Dhanesh Badarmal Jain and Another,
- v) 2001 SCC (Cr) 565;
- vi) Suryalakshmi Cotton Mills Ltd. Vs. Rajvir Industries Ltd. and Others,
- vii) Veer Prakash Sharma Vs. Anil Kumar Agarwal and Another,
- viii) 2006 (2) SCC (Cr) 49;
- ix) 2005 SCC (Cr) 1600 and

x) 2006 (2) SCC (Cr) 430.

to substantiate his contention that in the midst of pending civil litigation and in absence of sufficient prima facie materials constituting offence u/s 420/506/34 IPC, the Court is justified to invoke provisions of 482 Cr.P.C. to prevent miscarriage of justice and harassment of the parties who are forcibly attracted in the criminal courts for putting pressure upon them to achieve their object and the reliefs sought for in pending civil litigation.

6. I have carefully considered the submissions made by both the parties concerned, principles laid down by them in support of their respective contentions, the relevant CD and other collected materials on record.

7. It appears from the petition of complaint that the complainant is the landlady in respect of 478 Chittaks 29 square feet of land with building thereon in holding No. 153 M. B. Road, P.S. Nimta, Kolkata - 700 049. Accused No. 1 Nupur Bose is the proprietor of a housing construction company running the business in the name and style of M/s. Amarnath Construction for constructing multistoried buildings and for sell of of the flats thereafter to intending purchasers for profit. Accused No. 2, Bholanath Bose is the husband of the accused No. 1 who actually run such business in the name of his wife and he is a permanent railway employee. But both of them are directly responsible for day to day running of the said business.

8. It is further alleged that they executed a deed of agreement on 04.05.2003 for developing a multistoried building at the aforesaid premises on the condition that the accused No. 1 will give one small flat measuring about 300 square feet at the third floor of the said premises with a consideration money of Rs. 9,50,000/- to the complainant under certain terms and conditions. In paragraph 5 of such petition, it is further admitted that in terms of such agreement she has received Rs. 7,00,000/- from the accused Nos. 1 and 2. In terms of the agreement dated 04.05.2003 she was not given a flat measuring 300 square feet rather after completion of the construction work they have already sold out the same to another person. Thus both the accused in connivance with accused No. 3 deprived her from payment of the balance dues of contractual amount as well as from delivery of one small flat on the third floor of the said premises. It is further alleged that the accused Nos. 1, 2 and 3 jointly deceived the complainant fraudulently or dishonestly by procuring a fake signature of the complainant and misappropriated a sum of Rs. 1,50,000/- only.

9. The main contention of the learned advocate for the state is that at this stage the Court should not exercise its inherent power. He has also relied upon the ratio enunciated by the Hon"ble Apex Court in paragraph 11 of the case of K. Neelaveni v. State Represented by Inspector of Police (2010) 2 C Cr LR (SC) 108 which is quoted below:

It is relevant here to state that offences under Sections 406, 494 and 498A are triable by a Magistrate, First Class and as all these offences are punishable with

imprisonment for a term exceeding two years, the case has to be tried as a warrant case. The procedure for trial of warrant case by a Magistrate instituted on a police report is provided under Chapter XIX Part A of the Code of Criminal Procedure, 1973. Section 239 inter alia provides that if upon considering the police report and the document sent with it u/s 173 and making such examination, if any, of the accused and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused and record his reasons for so doing. It seems that the accused persons even before the case had reached that stage filed an application for quashing of the charge sheet under Sections 406 and 494 of the Indian Penal Code. In our opinion, the High Court ought not to have interfered after the submission of the charge sheet and even before the Magistrate examining as to whether the accused persons deserved to be discharged in terms of Section 239 of the Code of Criminal Procedure.

10. The Investigating Officer collected a copy of the deed of agreement dated 04.05.2003 in course of investigation. Drawing my attention to paragraph 10 of such agreement the learned lawyer for the petitioner has contended that in the said provision the owners' allocation has been specified including proportionate share in the common facilities or amenities on pro rata basis which is particularly set out in Schedule B, i.e., 300 square feet constructed area at the third floor of the proposed building save and except 300 square feet constructed area and Rs. 9,50,000/-. The owner shall have no right to claim any other portion of the proposed building over which the developer shall have absolute right to transfer the same to any intending purchaser in exchange of money. Therefore, in terms of such clause after construction of the building the owner will get 300 square feet constructed area at the third floor of the proposed building which is set out in Schedule B to the agreement and Rs. 9,50,000/- only. In Schedule B thereof it is also stipulated that the owner shall be allotted one small flat at the third floor measuring 300 square feet including super built up area in addition of the consideration of Rs. 9,50,000/-.

11. In Clause 9 of the agreement it is also clearly agreed by and between the parties that any dispute or difference arising out of such contractual obligation shall be referred to arbitration and they have appointed a sole arbitrator for the purpose which is quoted below:

9) It is further agreed by and between the parties (Owner and Developer) that all disputes and differences between the parties hereto arising out of this Agreement regarding construction or interpretation of any of the terms and conditions herein contained or determination of or any liability shall be referred for Arbitration to Sole Arbitrator Sri Biplab Kumar Chakraborty, Advocate, Calcutta appointed by both the parties and the same shall be deemed to be reference within the meaning of Indian Arbitration Act, 1940 or any other statutory enactment or modification thereunder and Award given by the said

arbitrator shall be binding and conclusive.

12. It is admitted fact that in terms of Clause 9 of such agreement the owner has already referred the matter to the said Arbitrator which is pending and she has also filed a title suit being T. S. No. 29 of 2007 which is still pending before the Learned Civil Judge (Junior Division), Third Court at Sealdah.

13. It is also an admitted fact that in terms of such agreement the complainant has already received a sum of Rs. 7,00,000/- from the accused Nos. 1 and 2 and the dispute relates to payment of the balance amount of Rs. 2,50,000/- of which payment of Rs. 1,50,000/- by them is denied. It is also alleged in the FIR that on good faith the complainant put her sign alone on some blank papers and the accused persons have forged the documents and misappropriated an amount of Rs. 20,00,000/- with the help of those forged documents. But the FIR is silent regarding the manner and break up of forgery of such documents and realisation of money by such documents in details.

14. As per CD in course of investigation the Investigating Officer has collected evidence to substantiate the claim of the petitioner made in the petition of complaint but regarding use of forged documents and blank papers containing only signature of the complainant the Investigating Officer has failed to collect any evidence or recover those blank papers containing her signature and show that any such document has been misused and exploited by the present petitioners for their wrongful gain.

15. From the basic ingredients of the offences u/s 420/506/34 IPC it will appear that there should be an element of fraud or misappropriation from the very inception of the transactions by and between the contending parties. In the instant case there is no such intention apparent in the petition of complainant or in the statement of the witnesses examined in course of investigation to believe that from the very inception of such written agreement between the parties there was an element of fraud or deception on the part of the present petitioners, rather after payment of Rs. 7,00,000/- they were allowed to construct the building and to dispose of the flats to the intending buyers for their profit. However, it is a pure question of fact whether the property mentioned in Schedule B referred to in such agreement is in actual physical possession of the defacto complainant who happens to be an aged lady and whether the blank paper signed by her were intended to deceive her to the extent of Rs. 20,00,000/- without any details. The investigation made by the Investigating Officer has yielded no fruitful result to disclose prima facie materials to substantiate such claim which, if unrebutted, would warrant any conviction. In the case of Ram Biraji Devi v. Umesh Kumar Singh 2006 (2) C Cr. LR (SC) 118 it has been held, inter alia, by the Hon'ble Apex Court that in the case of allegation of oral agreement for sale and payment of part consideration money denied by the appellants such allegations do not constitute any criminal offence since no ingredient of alleged offence made out. It is a fit case for quashing the proceeding in the interest of justice. Relying upon the above principle I hold that

cognizance in the instant case taken by the Learned Magistrate is bad in law since the materials collected by the Investigating Officer and disclosed in the petition of complaint have not disclosed any prima facie case against the present petitioners in the commission of alleged offence. Therefore, continuation of such a proceeding is abuse of the process of law and will be intended to harass the petitioners only to put them under pressure for conceding to the demands made before the learned Arbitrator and in the Civil Court which are pending in terms of agreement cited above. Therefore, to prevent such abuse of the process of law the proceeding being G. R. No. 573 of 2007 u/s 420/506/34 of the Indian Penal Code, pending in the Court of the Learned Judicial Magistrate, First Class, 1st Court at Barraackpore, District - North 24 Parganas, is hereby quashed and all the petitioners are discharged and released from their respective bail bonds. It is made clear that other persons arrayed as co-accused in the case will be entitled to get benefit of this order.

16. Return the CD.

17. Urgent photostat certified copy of this order, if applied for, be supplied to the respective parties, upon compliance of all necessary formalities.