(2012) 05 AHC CK 0315

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 4833 of 2009

Vimal Tiwari APPELLANT

Vs

State of U.P. and Another RESPONDENT

Date of Decision : 13-05-2012

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 482
Penal Code, 1860 (IPC) — Section 406, 420

Citation : (2012) 9 ADJ 579

Hon'ble Judges : S.C. Agarwal, J

Bench : Single Bench

Advocate : Anoop Trivedi, for the Appellant; Ayub Khan and A.G.A., for the Respondent

Final Decision : Allowed

Judgement

Hon''ble S.C. Agarwal, J.—This Application u/s 482 Cr.P.C. has been filed with a prayer to quash the charge-sheet submitted in case crime No. 1302 of 2008 registered in the Court of Chief Judicial Magistrate, Gautam Budh Nagar as criminal case No. 13878 of 2008, State v. Vimal Tiwari, under Sections 406, 420 IPC, P.S. Sector-20, Noida, Gautam Budh Nagar. Heard Sri Anoop Trivedi, learned counsel for the applicant, learned A.G.A. for the State and Sri Ayub Khan, learned counsel for the complainant - opposite party No. 2.

F.I.R. in this case was lodged on 25.9.2008 at P.S. Sector-20, Noida, Gautam Budh Nagar on the basis of application u/s 156(3) Cr.P.C. moved by the complainant Arvind Kumar (opposite party No. 2) against the applicant -Vimal Tiwari. It was alleged in the F.I.R. that Plot No. A-82, Sector-80, Noida was allotted to M/s. B.V. Engineers Pvt. Ltd. and accused Vimal Tiwari was the Director of the said Firm. The complainant entered into an agreement for sale of the said Plot on 21.7.2004 for a consideration of Rs. 9,11,000/- and a sum of Rs. 20,000/- in cash and Rs. 80,000/- through cheque No. 595057 of Punjab National Bank, Malviya Nagar, New Delhi was paid as earnest money. The complainant entered into contract on behalf of his mother Smt. Sushma Ghai. Part of the remaining payment was to be made by 15.8.2004 and remaining amount was to be paid by the complainant by 31.8.2004 and the accused was to obtain permission for transfer from Noida Authority and to execute the sale-deed in favour of mother of the complainant. On 14.8.2004, the accused refused to accept part payment on the ground that the proceedings for permission to transfer were pending. When the accused failed to transfer the property in favour of mother of the complainant, she gave a notice to the accused on 23.8.2004 through counsel to execute the sale-deed on 31.8.2004 after receiving the balance sale consideration. The accused did not turn up to execute the sale-deed and gave a false reply cancelling the contract and offered to return the money, but neither Plot was transferred nor money was returned. It was also alleged in the F.I.R. that Vimal Tiwari committed breach of trust and fraud with the mother of the complainant and legal action be taken against him. After investigation, charge-sheet was submitted by the police.

2. When the case was taken up as fresh on 6.3.2009, Hon''ble Ravindra Singh, J., while issuing notice to the opposite party No. 2, directed as under :

Considering the submissions made by learned counsel for the applicant that applicant is ready to return the amount of Rs. One lac with simple interest, it is directed that in case the applicant deposits the amount of Rs. One lac with simple interest in the Court of learned C.J.M. Gautam Budh Nagar, within one month from today, the further proceedings of criminal case No. 13878 of 2008 under Sections 420 and 406 IPC pending in the Court of learned C.J.M. Gautam Budh Nagar shall remain stayed till the next date of listing.

In default this interim order passed by this Court shall be automatically vacated.

It is further directed that the aforesaid amount, if so deposited as directed by this Court shall be paid to O.P. No. 2 Arvind Kumar and his mother Smt. Sushma Ghai.

List after four months for orders.

In pursuance of order dated 6.3.2009, a sum of Rs. 1,16,400/- has been deposited by the applicant in cash on 31.3.2009 in the Court of Chief Judicial Magistrate, Gautam Budh Nagar. A photo stat copy of the receipt was filed by learned counsel for the applicant on 1.4.2011.

3. Sri Anoop Trivedi, learned counsel for the applicant submits that it is a case of civil nature and does not amount to cheating or criminal breach of trust. He further submits that no written agreement was executed between the parties and only a receipt was issued. The money was never entrusted to the applicant as deposit, but was paid by way of earnest money or part payment of sale consideration and, therefore, there is no question of any criminal breach of trust. The further submission is that it is nowhere alleged either in the F.I.R. or in the statement of the complainant or his mother that at the time of alleged

agreement, the intention of applicant was mala fide and, therefore, the ingredients of offence of cheating punishable u/s 420 IPC are also not attracted.

4. Learned counsel for the applicant further submitted that the complainant or his mother was never approached by the applicant, but it was the complainant who made a proposal to pay a sum of Rs. 9,11,000/- for the Plot and paid Rs. 20,000/-in cash and Rs. 80,000/- by cheque as earnest money and no agreement to sell was executed. Subsequently, the complainant started delaying the matter and did not make further payment and, therefore, the applicant offered to return his money back, but the complainant did not turn up to receive money and sent legal notice on 23.8.2004 (Annexure 1 to the application) on behalf of his mother. Since the balance sale consideration was never paid to the applicant, there was no question of executing any sale-deed in favour of the complainant or his mother.

5. It was further submitted that opposite party No. 2 instituted a Civil Suit in the Court of Civil Judge (S.D.), Gautam Budh Nagar on 28.4.2005 being Original Suit No. 286 of 2005 praying for a decree of mandatory injunction directing the applicant - defendant to transfer the disputed Plot in his favour and also praying for a decree of permanent injunction not to transfer the suit property to any other person.

6. Learned counsel for the applicant submitted that there being no registered agreement to sell, no suit for specific performance of the contract could be filed by the complainant or his mother and, therefore, the suit for mandatory injunction directing the applicant-defendant to execute the sale-deed was not maintainable at all and was simply a pressure tactic. Even the notice dated 23.8.2004 was not addressed to applicant Vimal Tiwari, but was addressed to M/s. B.V. Engineers Pvt. Ltd.

7. The crux of the submissions made by learned counsel for the applicant is that the matter, being of civil nature, can at best be said to be breach of contract, but does not amount to criminal breach of trust or cheating and, therefore, criminal proceedings are abuse of the process of law and are liable to be quashed.

8. Per contra, Sri Ayub Khan, learned counsel for the complainant-opposite party No. 2 filed counter-affidavit on behalf of the complainant and submitted that unregistered agreement to sell was executed between the parties and opposite party No. 2 was always ready to pay the balance sale consideration. It was further submitted that the complainant never demanded his money back and the applicant obtained a sum of Rs. 1 lac from the complainant and his mother on false pretense of executing the sale-deed and, therefore, charge-sheet has been rightly submitted by the police.

9. The alleged unregistered agreement to sell filed as Annexure CA-1 is as follows:

A-82, Sector-80, 450 Sq. M.

Total Deal = 2024 x 450 = 911000/-

Paid Token Advance = 20,000/-

(Rupees Twenty Thousand Only)

Balance earnest money Rs. 80,000/- (Rs. Eighty Thousand Only) will be given by 22.7.2004. Part payment will be given by 15.8.2004. Final payment will be given by or before 31st August - 2004.

Sd./- (Arvind Kumar Ghai)

Sd./- (Vimal Tiwari) 21.7.204

The aforesaid document at best can be said to be a receipt of money, but cannot be said to be an agreement to sell. Moreover, agreement to sell has to be executed incorporating the terms of the contract and the same is required to be compulsory registered. Admittedly, no written contract much less registered written agreement to sell was executed. Simply there was an oral contract and a receipt was issued by the applicant on 21.7.2004. This receipt does not even indicate whether it was being issued in favour of the complainant or his mother.

10. The facts are more or less admitted. When parties entered into an agreement to sell and the vendor does not execute the sale-deed, it simply amounts to breach of contract and he cannot be said to have cheated the complainant, more so when the applicant offered the repayment of the sum received by him as earnest money. Admittedly, the applicant offered to return the money. This offer was made again at the time when this Application u/s 482 Cr.P.C. was filed and in pursuance of order passed by Hon''ble Ravindra Singh, J., the amount of Rs. 1,16,400/- was deposited by the applicant in the Court of Chief Judicial Magistrate, Gautam Budh Nagar, which includes interest also. It was also made clear by order dated 6.3.2009 that the amount, so deposited, shall be paid to the complainant Arvind Kumar and his mother Smt. Sushma Ghai. In these circumstances, it cannot be said that the applicant committed breach of trust or cheating.

11. For the offence of breach of trust, there must be entrustment of property and failure to pay the amount deposited when demanded. It is the case of the complainant that he never demanded back his money. Firstly, the amount of Rs. 1 lac was not given to the applicant for deposit or as entrustment. The amount was paid by way of part sale consideration and secondly, there was no demand to return the money and, therefore, offence punishable u/s 406 IPC is not made out.

12. As far as the offence of cheating is concerned, to prove the same, it must be shown that the intention of the offender must be dishonest at the time when the aggrieved person was persuaded to part with the money. It is not the case of opposite party No. 2 that intention of the applicant at the time of agreement was dishonest. The factum of oral agreement is admitted to applicant also. He never

denied the same. In these circumstances, non-execution of sale-deed simply amounts to breach of contract and does not amount to cheating as the applicant was ready to return the sale consideration and has, in fact, deposited the same in the Court of the Magistrate in the year 2009. In view of the above, this Court is of the view that in the facts and circumstances of the case, no case of cheating or criminal breach of trust is made out, even if all the facts alleged in the F.I.R. are deemed to be taken at their face value. The matter is purely of civil nature and is simply breach of contract without any criminal intent. Therefore, this Court is of the considered opinion that the present criminal proceedings are abuse of the process of law and no criminal offence is made out against the applicant. The Application deserved to be allowed.

The Application u/s 482 Cr.P.C. is allowed.

The impugned charge-sheet as well as the entire proceedings of criminal case No. 13878 of 2008 arising out of case crime No. 1302 of 2008 (State v. Vimal Tiwari), under Sections 406, 420 IPC, P.S. Sector-20, Noida, Gautam Budh Nagar pending in the Court of Chief Judicial Magistrate, Gautam Budh Nagar are quashed.

