
(2023) 08 GAU CK 0045

Gauhati High Court

Case No: Criminal Petition No. 422 Of 2023

Niloy Paul

APPELLANT

Vs

Putulia Devi Sarma

RESPONDENT

Date of Decision: Aug. 7, 2023

Acts Referred:

- Indian Penal Code, 1860 - Section 405, 406, 415, 420
- Code Of Criminal Procedure, 1973 - Section 200, 401, 482

Citation: (2023) 08 GAU CK 0045

Hon'ble Judges: Arun Dev Choudhury, J

Bench: Single Bench

Advocate: A Bhattacharya, P K Deka

Judgement

1. Heard Mr. A Bhattacharya, the learned counsel for the petitioner and Mr. PK Deka, learned counsel appearing for the respondent.

2. The present petition is filed under Section 482 Cr.P.C. read with Section 401 Cr.P.C. for quashing of the order dated 17.02.2022 whereby the

learned Judicial Magistrate First Class, Kamrup (M) at Guwahati had taken cognizance of offences under Section 406/420 IPC against the petitioner

on the basis of a complaint filed by the sole respondent, after considering the documents exhibited and recording statements of the sole respondent and

one witness under Section 200 Cr.P.C.

3. The learned counsel for the petitioner submits that reading as a whole the complaint petition as well as the initial deposition of the sole respondent

recorded under Section 200 Cr.P.C. makes out no case against the present petitioner to proceed or to take cognizance by the learned Magistrate and

therefore this is a fit case to interfere by this court in exercise of its power under Section 482 Cr.P.C.

4. It is the further contention of the learned counsel for the petitioner that the dispute is totally civil in nature inasmuch as reading of the complaint will

go to show that in fact a prayer is for specific performance of a contract in the guise of a complaint. Therefore, the learned counsel for the petitioner

submits that no case under Section 406/420 IPC is made.

5. Per contra, the learned counsel for the respondent argues the followings:

I. The brief facts of the present case is that, as per the Agreement dated 04.02.2009 (Annexure - 3, Page 31 to 38), Four (4) numbers of Flats

(Schedule-B of the Agreement) are to be handed over to the Complainant by the Partnership Firm of the Accused persons, namely M/S The Pearl

Shells Developers, in lieu of the land of the Complainant described in the Schedule-A of the Agreement. Even prior to the said Agreement dated

04.02.2009, the said Partnership Firm made a proposal to the Complainant on 02.12.2008 (Annexure 3, Page 39) intimating their decision to

give her the said Four (4) numbers of Flats with full specification of the Flats to be constructed against her land.

II. In the Complaint date 05.07.2021 lodged by the Complainant, it is clearly stated that out of the four (4) Flats as agreed to be delivered by the said

Firm, only two (2) numbers of Flats were actually handed over to the Complainant and the said Firm has been maintaining a stoic silence in the matter

of delivering the remaining two (2) Flats despite several approaches.

III. Now the Accused No. 2 (Sri Niloy Paul), who is one of the three partners of the said Partnership Firm, has approached this Hon'ble Court

seeking quashing of the said Complaint in respect of him. In his instant Petition at Paragraph No. 4, he has clearly stated that he "came to know

that the flats were already handed over to the Respondent (Complainant) way back in the year 2011.

That means, the Accused Petitioner is not denying the claim of the Complainant about her entitlement of four numbers of Flats as clearly mentioned in

the Agreement dated 04.02.2009, as well as the proposal dated 02.12.2008, and according to the said Petitioner / Accused No. 2, all the said four Flats

were already handed over to the Complainant / Respondent long back.

IV. From the above admission of the Accused Petitioner, it is the duty of the Criminal Court to find out whether such Four (4) numbers of Flats were

actually handed over to the Complainant or not. If the Accused Petitioner could prove that his Firm has already handed over the said Four (4) numbers

of Flats to the Complainant, then the accused persons are entitled for acquittal. However, if the accused persons fail to prove the said fact before the

Court of law, then they are liable to be punished for the offence of a pure case of cheating as well as for offence of criminal breach of trust under

sections 420 and 406 of the Indian Penal Code.

V. Therefore, to secure the ends of justice, the above Complaint of the Complainant may not be quashed in the light of the judgments pronounced by

the Hon'ble Apex Court in the case of State of Haryana vs. Bhajan Lal reported in AIR 1992 SC 604, M/s Neeharika Infrastructure Pvt. Ltd vs.

State of Maharashtra and Ors. reported in AIR 2021 SC 1918 and other cases. In the case of M/s Neeharika Infrastructure Pvt. Ltd (supra), it has

been observed that it is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will

not permit an investigation to go on. The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the 'rarest

of rare cases. While examining an FIR / Complaint, quashing of which is sought, the Court cannot embark upon an enquiry as to the reliability or

genuineness or otherwise of the allegations made in the FIR / Complaint. Criminal proceedings ought not to be scuttled at the initial stage. Quashing of

a Complaint / FIR should be an exception rather than an ordinary rule. Extraordinary and inherent powers of the Court do not confer an arbitrary

jurisdiction on the Court to act according to its whims or caprice. Moreover, it is not necessary that the FIR / Complaint should contain every details

and it would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it

amounts to abuse of process of law. Moreover, in the case of Bhajan Lal (supra), the Hon'ble Apex Court has observed that when there are

materials to indicate that a criminal proceeding is manifestly attended with mala fides and proceeding is maliciously instituted with an ulterior motive,

High Court will not hesitate in exercise of its jurisdiction under Section 482 CrPC to quash the proceeding. But in the present case, the complaint is not

instituted maliciously with any ulterior motive rather it is instituted purely to seek justice in the matter.

VI. However, in certain cases, such as Usha Chaktaborty & Anr vs- State of West Bengal & Anr. reported in 2023 SCC online SC 90, R.

Nagender Yadav vs- The State of Telangana and Anr reported in (2023) 2 SCC 195, Ramesh Chandra Gupta vs- State of U.P. & Ors.

(SLP(Crl) 39/2022), the Hon'ble Apex Court has exercised its jurisdiction under Section 482 of Criminal Procedure Code by quashing of the

Complaint / FIR to secure the ends of Justice, and to check abuse of process of law. In these cases, the Informant / Complainant had availed both the

civil as well as criminal remedies and the Hon'ble Supreme Court observed that once civil remedy is availed, therefore the parallel criminal

proceeding is an abuse of process of law. However, in the case of R. Nagender Yadav (supra), the Hon'ble Supreme Court, while quashing the

criminal proceeding, has clarified that there is no bar in instituting appropriate criminal proceedings in future in case the Civil Court comes to the

conclusion that the particular sale deed is forged. But in the present case, the Complainant has not availed the civil remedy and she has only filed the

present Complaint after being deceived by the accused persons in whom she reposed her trust.

VII. Moreover, in the case Hasmukhlal D. Vora and Anr. Versus State of Tamil Nadu reported in 2022 SCC Online SC 1732, wherein there was no

civil case instituted and the Hon'ble Supreme Court quashed the criminal proceeding on the ground that the contents of the Complaint do not prima

facie constitute any offence. But in the present case, the contents of the Complaint prima facie constitute an offence of cheating and breach of trust

and the ends of justice demands that the accused persons should face the regular trial. Moreover, out of the three partners of the said Firm, who are

accused in the present Complaint, only the accused No. 2 / Petitioner has approached this Hon'ble Court, and therefore, any order in favour of the

Petitioner may adversely affect the entire proceedings.

6. I have given anxious consideration to the submissions made by the learned counsel for the parties. For proper determination of the issue in hand the

paragraph and statement made in the complaint on the basis of which the learned counsel for the respondent argues that case under Section 406/420

IPC is made out quoted hereinbelow:

“4. That, the complainant most respectfully begs to state that the mother in law of the complainant the absolute owner of the mentioned plot of land

had entered into an agreement with a building developers group namely Pearl Shells Developers and thereby converted their terms and conditions into

writings which was, duly, registered, vide, agreement, dated, 04.02.09, bearing Registration No. 1289 before the Senior Sub Registrar

Kamrup, Guwahati.

9. That, the complainant most respectfully begs to state that, the agreement between the parties was executed in the year 2009 and as such a period

of 12 years has already passed over, it is pertinent to mention hereby that subsequently the accused handed over the 2nd flat in the first floor to the

complainant as per agreed terms and conditions of the parties. However, other 2 bedrooms flats were yet not delivered to the present complainant.

The complainant states that taking possession over the land property of the complainant's mother-in-law, the accused builders had started

construction of flats over the scheduled land and as per conditions of registered agreement they had handed over 2 flats to the complainant's mother-

in-law i.e. the original land owner and subsequently the accused completed constructions and sold out all the flats constructed over the suit premises

except the 2 flats belonging to the complainant as per executed agreement on the ground floor and second floor.

12. That, the complainant most respectfully begs to state that finding no way to communicate the accused, who malafidely turned back of the terms

and conditions of the registered agreement dated 04.02.2009 hence the original land owner served legal notice dated 12.01.2021 upon the accused. It

was advised to the accused either to construct the leftover 2 flats at earliest or to give entire construction expenses to the original owner so that it can

be constructed by the original owner at their own. However, neither communication nor reply had been received on the part of the accused.

Subsequently a reminder dated 25.02.2021 to the legal notice also been served upon the accused vide Indian Postal Service. To the utmost surprise of

the complainant and her family, the accused had not communicated or replied to the notices served upon them yet. The complainant further states that,

as per registered agreement between the parties the accused covenants to hand over ownership of 4 nos. of flats whereby specifically mentioned that

if either of the party violates any terms and conditions of the agreement or way back of commitment resulting loss or damage whatsoever financially

or otherwise to the other party undertakes to compensate lawfully the other party. The accused had not handed over the assured 2 flats to the

complainant's mother-in-law (the land owner) and also not responded to the several approachment made by the complainant and thus violates the

agreed terms and conditions as well committed offence under Section 405 and 420 of the IPC.

7. The Statement recorded under Section 200 Cr.P.C. is also quoted hereinbelow:

"I am the complainant of this case. My daughter in law has filed this case as my representative. This case has been filed against some builders. I

know them by face but I do not remember their name. About 15 years back, the accused persons approached me and said to me that they were

builders and were interested to develop my property as well. They also informed that they had developed the adjacent property to ours. I liked their

proposal and accepted their proposal. The accused persons asked for the land documents to get bank loan and I handed them the property papers to

them. The accused person did not execute any agreement with me. The accused persons had later constructed only half of the flats and subsequently

did not construct the remaining of flats. I tried contacting the accused persons but they kept avoiding me and till date have not developed the remaining

property. The accused persons had handed over three numbers of apartment to third parties. I was given one flat by accused persons. The accused

persons did not return me my original property papers which they had taken for getting the bank loan. The accused persons have cheated me and

taken away my property documents. They had also left my property half developed. I pray that the accused persons be brought to justice.~

8. The statement of the daughter-in-law is also quoted hereinbelow so as to determine whether a case Under Section 420/406 IPC is made out:

~“The complainant Smt. Putula Dev Sarma is my mother-in-law. The accused is a construction firm. The firm has three partners namely, Biplojit

Dey, Sanjay Paul and Niloy Paul. I am aware of the facts of this case. In 2009, the accused firm had made an agreement with the complainant to

develop the plot of land owned by her and as per the agreement the complainant would be given four flats to her. The accused had planned to

construct two blocks of apartments. Accordingly, in 2011, the firm had handed over two numbers of flat to the complainant on one block after

construction. However, the accused did not hand over the remaining two flats to the complainant in the other block and sold of all the remaining

apartments to buyers but the accused had not completed the construction of the two flats which was agreed to be given to the complainant. The

complainant had time and again asked the accused to complete the construction but to no effect. The accused had severed all forms of communication

with the complainant and her family. The complainant had even caused service of a legal notice to the accused to perform the agreement on

12.01.201 and had even issued a reminder on 25.02.2021 when no response was received from the accused. This is all I have to state.

9. Section 405 IPC defines the criminal breach of trust. A reading of the aforesaid provision of law, the essential ingredients of criminal breach of trust

can be summarized as below:

A. There must be an entrustment of property or dominion over it upon the accused.

B. The accused upon whom such property is entrusted has dishonestly used or disposed of the property in violation of any provision of law which

prescribed the mode in which such trust is to be discharged or of any contract made defining the discharge of such trust.

10. In the case of R K Dalmia Vs Delhi Administration reported in 1963 1 SCR 253, the Hon'ble Apex Court held that the definition as given

under Section 405 Cr.P.C. does not restrict the property to be movable or immovable one and the property used in the Cr.P.C. is having a much wider

sense than expression movable property. Accordingly, the Hon'ble Apex Court in RK Dalmia (supra) concluded that there is no good reason to

restrict the meaning of word 'property' to movable property only when it is used without any qualification under Section 405 IPC.

11. Section 415 IPC defines cheating. The essential ingredients of cheating are that deception of any person, fraudulent and dishonest inducement with

intent to deliver any property or to have consent to retain any property and also an intention whereby an inducement is made to a person to do or omit

to do anything which he would not or omit if he was so deceived.

12. The Hon'ble Apex Court in the case of Hriday Ranjan Prasad Verma Vs. State of Bihar and Anr. reported in 2000 4 SCC 168 clarified that

there is a very fine line while making a distinction between mere breach of contract and cheating, which is criminal one and breach of contract. Law

is by now well settled that breach of contract cannot give rise to criminal prosecution of cheating until and unless the fraudulent or dishonest intention

of cheating is made out in the complaint itself.

13. From the reading of the complaint as well as the deposition of the witnesses as discussed hereinabove, this court is of the considered opinion that

the applicant/ complainant has though been able to make out a case that there was an entrustment of property by handing over the land as well as by

handing over the property document, however, the aforesaid statement nowhere make out even remotely a case that the accused has dishonestly

disposed of the property in violation of the contract rather as discussed hereinabove it is a specific statement of the complainant that out of four flats

to which the complainant was entitled only two flats have been handed over to the complainant and though all the other flats are sold, two flats still

remain for the complainant. The case of the complainant reading as a whole from the complaint is that the complainant had entered into an agreement

for construction of a building over her plot of land against a consideration of four flats with a permission to the builder to mortgage the land and for

that purpose the documents were handed over. The builder was authorized to sale the other flats to third parties.

14. From the statement recorded under Section 200 Cr.P.C. it is revealed that the grievance of the petitioner is non-handing over of the two flats even

after 12 years of execution of the contract. This court is unable to find out any statement or whisper, which shows that the accused was having an

intention initially at the stage of entering into the contract to deceive the complainant.

Therefore, in view of the aforesaid, this court finds that no case

under Section 406 or 420 IPC is made out on a bare reading of the complaint as well as the initial deposition. For the aforesaid reasons, this court is of

the unhesitant view that the case of the complainant is a case of breach of contract and same cannot give rise to criminal prosecution for breach of

trust and cheating in absence of any ingredients of fraudulent and dishonest intention of petitioner being made out either in the complaint or in the

deposition made under Section 200 Cr.P.C. Same is the case in respect of cognizance under Section 406 IPC.

15. Therefore, in that view of the matter, this court is of the considered opinion that the impugned order dated 17.02.2022 is not legally sustainable so

far same relates to the present petition. Accordingly, same is interfered with and the proceeding being CR Case No. 1829/2021 pending before the

learned Judicial Magistrate 1st Class, Kamrup (M) at Guwahati stands set aside so far the same relates to the present petitioner. However, the

present order shall not prevent the complainant to seek any other remedy available and permissible under law to redress her grievances.