

(2009) 02 CAL CK 0025

Calcutta High Court

Case No: C.R.R. No. 1234 of 2008 with C.R.A.N. No. 1428 of 2008

Bengal Shrachi Housing
Development Limited and
Others

APPELLANT

Vs

Shekhar Housing Private Limited
and Another

RESPONDENT

Date of Decision: Feb. 17, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 200, 482
- Penal Code, 1860 (IPC) - Section 420

Hon'ble Judges: Sadhan Kumar Gupta, J

Bench: Single Bench

Advocate: Sekhar Basu, Mr. Jaymalya Bagchi and Mr. Kaushik Chatterjee, for the Appellant; Sudipto Moitra and Mr. Achinta Banerjee for the Opposite Party Nos. 1 and 2, for the Respondent

Judgement

Sadhan Kumar Gupta, J.

The revisional application has been filed by the petitioners u/s 482 of the Code of Criminal Procedure praying for quashing of the proceeding of Case No. C-7401 of 2007, which is pending in the Court of the learned Metropolitan Magistrate, Kolkata.

2. The C.R.A.N. No. 1428 of 2008 has been preferred by the complainant/opposite Party for vacating the stay order that has been passed in connection with the revisional case and both the revisional application and the application praying for vacating of the stay order, are taken up together for passing order.

3. The fact leading to the filing of the said complaint case by the complainant/opposite party is that, pursuant to an advertisement issued by the petitioners/accused, he intended to purchase a flat/shop from the petitioners/accused persons and in the process deposited a sum of Rs.11,48,000/- as

advance. As per terms and conditions total amount to be paid by the complainant/opposite party was fixed at Rs. 68,88,000/- by instalments. However, when the last instalment was tendered by the complainant/opposite party to the petitioners by way of Bank Draft, they refused to accept the same and instead of giving delivery of possession of the said flat, the petitioners/accused persons made arrangements to transfer the said flat illegally in favour of another person. When the opposite party/complainant requested the petitioners/accused persons to execute the deed of conveyance, such request was turned down and at that time the opposite party/complainant came to know that the petitioners/accused persons had from the very inception the intention not to deliver the flat in favour of the complainant and in the process to persuade the complainant, part with his money with false assurance. As such, being cheated, the complainant/opposite party had to file the petition of complaint before the learned Chief Judicial Magistrate against the petitioners/accused persons. The learned Magistrate took cognizance and upon due compliance of the provisions of Cr PC, issued process against the accused persons u/s 420 of the Indian Penal Code.

4. Being aggrieved by the issuance of such process, the petitioners/accused persons have preferred this revisional application praying for quashing of the proceeding, as is pending against them in the Court of the learned Magistrate. This prayer of quashing was contested by the opposite party/complainant.

5. Mr. Sekhar Basu, learned senior advocate appearing on behalf of the petitioners/accused persons argued that from the bare reading of the petition of complaint as well as from the statement as made u/s 200 Cr PC, it cannot be said that the complainant could make out a case that from the very beginning the accused persons had an intention to cheat or defraud the complainant. According to the learned Advocate, since that element of cheating is absent in the petition of complaint itself or in the statement, so the learned Magistrate was not at all justified in issuing process against the accused persons. He further argued that the transaction which took place in between the parties was purely civil in nature and there is no elements of criminality in it and the dispute as is prevailing in between the parties can only be sorted out in the Civil Court and as such if the criminal case, which is pending before the learned Magistrate against the petitioners, is allowed to be continued, then in that event that will be an abuse of the process of the Court. As such, he submitted that the said criminal case, as is pending against the accused persons should be quashed immediately.

6. Mr. Sudipto Moitra, learned advocate appearing on behalf of the opposite party/complainant argued that from the petition of complaint itself it is very clear that a case has been made out to the effect that the accused persons from the very beginning had the intention to cheat the complainant. According to him, even if the claim of the petitioners is accepted to the effect that in the statement made u/s 200 Cr PC the allegation that the accused persons had from the very beginning the

intention to cheat was lacking, that will not be considered to be a material factor for allowing a prayer for quashing as made by the petitioners. When it is sufficiently established prima facie from the petition of complaint that such intention was there from the very inception, then even if such statement is lacking in the statement made u/s 200 Cr PC that will not help the accused persons at all in order to establish that there was no element of cheating when the process was issued by the learned Magistrate. According to him, when the cognizance was taken by the learned Magistrate he was prima facie satisfied about the existence of element of cheating and as such the prayer for quashing at this stage should not be allowed and the learned Magistrate should be permitted to consider the case of the complainant at the time of consideration of charge. He has prayed for dismissal of the revisional application.

7. I have taken into consideration the submissions made by the learned advocate for both the sides. It is the well-established principle that the power given to the High Court u/s 482 Cr PC should be exercised in circumstances. Such prayer for quashing can only be allowed when the Court is absolutely satisfied that no prima facie case whatsoever has been made out from the petition of complaint and as such further continuation of the criminal proceeding will be an abuse of the process of the Court. In this respect, both the sides cited several decisions. The learned advocate for the petitioners cited decisions reported in [Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others](#), (2005) 10 SCC 336: Uma Shankar Gopalika v. State of Bihar & Anr.; (2005) 13 SCC 699: Murari Lal Gupta v. Gopi Singh; (2006) 1 SCC (Cri) 746: Anil Mahajan v. Bhor Industries Ltd. & Anr. ; (2008) 1 SCC (Cri) 573 : Anil Ritolla alias A.K. Ritolia v. State of Bihar & Anr.; (2008) 1 SCC (Cri) 259: [G. Sagar Suri and Another Vs. State of U.P. and Others](#), G. Sagar Suri & Anr. v. State of U.P. & Ors.; 2000 SCC (Cri) 786 : Hridaya Ranjan Prasad Verma & Ors. v. State of Bihar & Anr.; (2006) 3 SCC (Cri) 176: Ram Biraji Devi & Anr. v. Umesh Kumar Singh & Anr. and (2007) 7 SCC 373 : Vir Prakash Sharma v. Anil Kumar Agarwal & Anr.

8. As against this the learned advocate for the complainant/opposite party cited the following decisions:

1. (2003) 1 CHN Cri 297 (Dipak Ghosh Dastidar v. Sanat Kr. Mukherjee);
2. [Jagdish Ram Vs. State of Rajasthan and Another](#),
3. [Tara Dutta Vs. The State and Another](#),
4. [Jumrnan and Others Vs. State of U.P. and Another](#),
5. [Smt. K. Janaki Manoharan and Another Vs. Gayatri Sugar Complex Limited and Another](#),
6. (2001) 4 AICLR 333 (N. Krishnan v. Vijay Singh);

7. 2000 SCC (Cri) 615 (Medchi Chemicals and Pharma (P) Ltd. v. Biological E. Ltd. & Ors.);
8. 1999 SCC (Cri) 401 (Rajesh Bajaj v. State NCT of Delhi & Ors.);
9. [Shivnarayan Kabra Vs. The State of Madras,](#)
10. [Tulsi Ram Vs. State of U.P.,](#)

9. I have gone through the decisions reported cited by the learned advocates for both the sides. It appears that the sum and substance of the ratio as decided in those decisions are almost same. The Courts while passing those judgments clearly observed that there cannot be any hard and fast rule for allowing a prayer for quashing. What is to be established in order to allow such prayer, is that it must appear to the Court that there is no prima facie case at all made out from the petition of complaint and that the further continuation of a criminal proceeding will be an abuse of the process of the Court. It has also been pointed out in those decisions that if a dispute in between the parties appear to the Court to be of civil in nature then criminal proceeding should not be allowed to continue and necessary order of quashing can be passed. At the same time, the Hon'ble Apex Court also held in the decision reported in 1999 SCC (Cri) 401 (supra) to the effect:

"It is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the complaint, is not the need at this stage: If factual foundation for the offence has been laid in the complaint the Court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence. In State of Haryana v. Bhajan Lal this Court laid down the premise on which the FIR can be quashed in rare cases. The following observations made in the aforesaid decisions are a sound reminder: (SCC p.379, para 103)

"103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice."

It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions."

10. So, it appears that simply because a particular transaction appears to be civil in nature that cannot be a bar for institution of a criminal proceeding. If it is established by a complainant that the accused had from the very inception the intention to cheat the complainant, then even if the transaction appears to be civil in nature, a criminal proceeding can also be instituted. So, it appears from the ratio as decided in those decisions, as cited at the Bar, that the prayer for quashing should be considered in the light of the facts and circumstances of a particular case and there cannot be any straight jacket formula in this respect. Keeping all these things in mind let us now see whether from the petition of complaint it can be said that the complainant had been able to make out a prima facie case for the offence of cheating, it is obligatory upon the complainant to establish that the accused persons had, from the very inception, the intention to cheat the complainant. Let us now examine the petition of complaint and to see whether any such case has been made out or not. It appears from the petition of complaint at paragraphs 13, 14 and 15 that clear averments have been made therein to the effect that the accused had, from the very inception, the intention to cheat. It is further stated in it that the complainant was deceived by the inducement made by the accused in accepting the offer and in parting with the huge sum of money. As such, it cannot be said that the petition of complaint did not make out any prima facie case, so far as the offence of cheating is concerned.

11. Mr. Basu, the learned Advocate for the petitioner/accused pointed out that not a single sentence is there in respect of the alleged offence of cheating, in the statements, as made by the complainant u/s 200 of the Cr PC. I have perused the said statement and it appears that the claim of Mr. Basu in this respect is correct. However, simply because any such statement is lacking in the statement made u/s 200 of the Cr PC, that does not mean that the statement, as made in the petition of complaint should be thrown away. After all, the petition of complaint is the main basis of the case of the complainant. The claim, as made therein can only be tested during evidence. If after recording the evidence before charge, it is established that no prima facie evidence of cheating could be established, then certainly the accused is entitled for an order of discharge. At this stage, when the accused has already entered appearance and his personal appearance is dispensed with, then I think that it will not be proper to quash the criminal proceeding on the basis of the statement made u/s 200 of the Cr PC when there is prima facie allegation of cheating in the petition of complaint. In fact, such statement cannot form the basis of the final decision of the Court. It can only be used for corroboration or for the purpose of discrediting a witness during trial.

12. From the materials, as discussed above, I am of opinion that it is not an exceptional case where the criminal proceeding should be quashed, as prayed for. As such, I have no hesitation to hold that it is not a fit case where the prayer for quashing, as made by the petitioner, should be allowed. In my considered opinion, the complainant should be given opportunity to prove his case by way of adducing evidence and if at the time of consideration of charge, it appears to the Court that no prima facie case has been made out, then appropriate order for discharging the accused persons can be passed.

13. Considering all these things, the revisional application is dismissed on contest but without cost. The prayer for quashing is rejected. The learned Magistrate is directed to take expeditious steps for holding the trial and the petitioners/accused persons are given liberty to agitate all these points, as raised in this revisional application, at the time of consideration of charge and upon hearing the parties at that time, the learned Magistrate is to pass appropriate order in respect of prayer for discharge on the basis of the evidence as available before charge. In doing so, the learned Magistrate shall not be influenced by the observation as made in this revisional application and he will pass appropriate order independently.

14. The interim order of stay, as passed in this revisional application, stands vacated. The C.R.A.N. No. 1428 of 2008 is also disposed of.

Let a copy of this order be sent to the Court below at once for information and taking necessary action.

Xerox certified copy of this order be handed over to the parties, if applied for, on urgent basis.