

Naresh Kumar Babbar and Others Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Jan-21-2011

Judge : S.C. Agarwal, J.

Appeal No. : Criminal Revision No.198 of 2010

Appellant : Naresh Kumar Babbar and Others

Respondent : State of U.P. and Others

Judgement :

1. This revision under section 397 / 401 Cr.P.C. is directed against order dated 27.11.2009 passed by Chief Judicial Magistrate, Gautam Budh Nagar in criminal case no.16013 of 2009, State Versus Ramesh Chandra and others arising out of case crime no.701 of 2009, P.S. Sector 39, Noida, District Gautam Budh Nagar whereby, on the basis of charge sheet submitted by the police, cognizance was taken by the Magistrate and the revisionists were summoned to face trial under sections 406, 420, 467, 468, 471, 323, 504, 506 IPC.

2. In brief, the facts of the case are that on 8.10.2009, opposite party no.3 Vinay Khaitan moved an application under section 156 (3) Cr.P.C. in the Court of Chief Judicial Magistrate, Gautam Budh Nagar against the revisionists Ramesh Chandra, Sanjai Chandra, Naresh Kumar Babbar and one Anupam Singh (non-applicant) for having committed offences punishable under sections 323, 406, 420, 467, 468, 471, 504, 506 IPC. On orders of the Magistrate, F.I.R. was lodged at

P.S. Sector 39, District Gautam Budh Nagar. F.I.R. was registered on 14.10.2009 at 9:30 p.m. It was alleged in the F.I.R. that the complainant Vinay Khaitan is the Director of M/s. Vrindavan Info Solution Pvt. Ltd. whereas, the accused persons namely Ramesh Chandra, Sanjai Chandra, Naresh Kumar Babbar and Anupam Singh were the Chairman, Managing Director, Accounts Manager and Sales Manager respectively of M/s. Unitech Hi-tech Developers Ltd. It was alleged that on 15.7.2007, Ramesh Chandra, Sanjai Chandra and Naresh Kumar Babbar came to complainant and represented that they were constructing few VIP and VVIP (Super Luxury) Apartments on Express Highway in Sector 96, 97 and 98, Noida by the name of 'Unitech Grande'. They offered such an Apartment to the complainant, who told them to come on 17.7.2007 for registration. On 17.7.2007, all the four accused named in the F.I.R. came to the house of the complainant and talked about Apartment No.2101, Floor 21, Tower No.5 of Block No.3 of 'Unitech Grande' measuring 5309 square feet. The price was disclosed to be Rs.4,33,29,753/-. It was promised that the Apartment and the Society would have Super Luxury facilities. Believing the promises made by the accused persons, the complainant paid a sum of Rs.41,33,204/- to the accused persons in presence of one A.K. Singhal through four cheques and receipts were issued by the accused persons. Allotment order was issued in favour of the complainant and balance 80% amount was also demanded by the accused persons and it was promised that possession shall be handed over and sale deed would be executed shortly. A further sum of Rs.3,72,41,627/- was demanded by the accused persons. When the complainant expressed his inability to pay such a large amount at a short notice, the accused persons promised to get him a loan from H.D.F.C. Bank on execution of few documents. They also got documents of loan executed by the complainant and further disclosed that clearance has already been obtained from Noida Authority. H.D.F.C. Bank sanctioned a loan of Rs.3,72,41,627/- in favour of the complainant and the amount was paid to the accused persons, in respect of which, a receipt was issued by the accused persons on 1.9.2007. The complainant further paid a sum of Rs.50,000/- by cheque to the accused persons on 26.10.2007 as membership fee. When the complainant asked the accused persons to deliver possession and to execute sale deed of the Apartment, the accused persons started lingering on and did not give a clear reply. When the complainant went to

the office of the accused persons, it was found that they had changed their address. The notice dated 28.3.2008 sent by the complainant was not even replied. The complainant inquired from the Noida Authority about the Apartment and it was revealed that no sanction has been granted by Noida Authority. Then the complainant became aware of the fact that fraud has been committed with him. The complainant went to the office of the accused persons frequently and with great difficulty, managed to meet the accused on 29.9.2009. The complainant demanded either to deliver possession of the Super Luxury Apartment and to execute sale deed or to refund his money. On this, the accused persons abused the complainant, assaulted him and threatened him with death and said that his money would not be returned. The police did not lodge F.I.R. and, therefore, application under section 156 (3) Cr.P.C. was moved.

3. The F.I.R. was challenged by the revisionists before this Court by means of criminal misc. writ petition no.21771 of 2009, Naresh Kumar Babbar & others Versus State of U.P. & others wherein by order dated 24.10.2009 arrest of the petitioners - revisionists was stayed. The police investigated the case and after investigation, charge sheet was filed by the police against revisionists Ramesh Chandra, Sanjai Chandra and Naresh Kumar Babbar. On receipt of the charge sheet, the learned Magistrate, by impugned order, took cognizance, registered the case and issued summons to the accused fixing 23.12.2009. Hence, this revision.

4. Counter affidavit and rejoinder affidavit have been exchanged between the parties.

5. Heard Sri Dhiraj Srivastava, learned counsel for the revisionists, learned A.G.A. for the opposite parties no.1 & 2 and Sri V.P. Srivastava, senior advocate assisted by Sri S.B. Kochar, learned counsel for the complainant - opposite party no.3.

6. Learned counsel for the revisionists submitted that the dispute between the parties is of civil nature and relates to a contractual matter. The company of the revisionists is a reputed construction company carrying on business on a very large scale. A contract was executed between M/s. Unitech Hi-tech Developers Ltd. and the complainant. The contention is that no criminal offence is made out. At the most, it is a case of breach of contract. The contract contains arbitration

clause as well as clause relating to return of money with 10% simple interest and the revisionists are prepared to return the money of the complainant with interest, as stipulated in the contract. It was further submitted by the learned counsel for the revisionists that land was allotted to the company of the revisionists in the year 2006 and layout plan was sanctioned in the year 2008 and there was some delay in starting constructions due to unavoidable circumstances and now construction work is in full swing.

7. Reliance has been placed on the letter of Noida Authority dated 29.8.2008 sanctioning the layout plan (annexure 3). Reliance has also been placed on the following clauses of the contract.

DEFAULT

8. If any reason the Developer is not in a position to offer the Apartment altogether, the Developer shall offer the Allottee (s) an alternative property or refund the amount in full with Simple Interest @ 10% per annum without any further liability to pay damages or any other compensation on this account.

DISPUTE RESOLUTION

9. All disputes or differences arising out of, in connection with or in relation to terms and conditions mentioned herein and/or the allotment of the Apartment hereunder shall, in the first instance, be mutually discussed and settled between the Allottee(s) and the Developer.

10. All disputes or differences arising out of, in connection with or in relation to terms and conditions mentioned herein and/or the allotment of the Apartment hereunder, which cannot be amicably, shall be finally decided by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996. Arbitration as aforesaid shall be a domestic arbitration under the Applicable Laws.

11. It was further submitted by learned counsel for the revisionists that the complainant also lodged a claim before the Consumer Forum. In nutshell, the crux of the argument is that it is a civil dispute and no criminal offence is made out. It was further submitted that learned Magistrate, while passing the impugned order,

has not applied his mind to the facts of the case and has passed the summoning order in a mechanical manner.

12. Learned A.G.A. supported the impugned order and submitted that during investigation, the allegations made by the complainant were found correct and charge sheet was rightly submitted by the investigating officer and the revisionists floated the scheme even without obtaining proper clearances and sanctions from the Development Authority. It was further submitted that after submission of the charge sheet by the police, the writ petition, filed earlier, has been dismissed as infructuous.

13. Sri V.P. Srivastava, learned counsel for the complainant submitted that due to misrepresentation of the revisionists, the complainant has been put to heavy financial loss and is paying a sum of Rs.4.21 lacs per month as interest to the Bank in respect of the money borrowed from H.D.F.C. Bank towards payment of price of the Apartment to the revisionists. It was further submitted that though the Apartment was booked in the year 2007, but during spot inspection on 20.10.2009, the investigating officer did not find any construction on the spot and the land of Sector 96, 97 & 98, whereupon the construction was to be made, was lying vacant. It was further submitted that the sanction granted by Noida Authority was only for developing the land and not for making constructions. The scheme was floated without getting the layout plan and construction plan sanctioned from the requisite authority and, therefore, from the very beginning, the intention of the revisionists was dishonest and the complainant was cheated and put to a very heavy loss. It was further submitted that the papers filed by the revisionists were never brought to the notice of the investigating officer and the Magistrate and have been filed for the first time in revision in this Court and the defence papers cannot be looked into for the purposes of disposal of the revision and the revision has to be decided on the basis of material available on the record before the Magistrate. The contention is that if any additional material is being brought before the Court, it must first be brought before the Magistrate along with an application for discharge and the summoning order cannot be quashed on the basis of papers, which were never before the Magistrate. Further contention is that at summoning stage, the defence papers cannot be looked into.

14. It was further submitted by learned counsel for the complainant that the revisionists have not come before this Court with clean hands. Revisionist no.1 earlier filed a criminal revision no.1 of 2010 before Sessions Judge, Gautam Budh Nagar against order dated 23.12.2009 issuing bailable warrants against him by the Magistrate and the said revision was dismissed by III Additional Sessions Judge, Gautam Budh Nagar vide judgment and order dated 22.2.2010. The contention is that after a subsequent order having been challenged before Sessions Judge and the revision having been dismissed, it was not open for the revisionist to approach this Court for quashing the earlier order of the Magistrate summoning the revisionists. The layout plan for development of Express City over the land of Sector 96, 97 and 98, Noida was sanctioned by the Noida Authority on 2.9.2008, but even before the sanction of the layout plan, the revisionists advertised their project for developing the Township over the land of Sector 96, 97 and 98, which shows their dishonest intention and even a particular Pent House Apartment was provisionally allotted in favour of the complainant and till the time of filing of the charge sheet, no construction activities were going on. At the time of signing of the agreement, it was not disclosed to the complainant that Noida Authority had not sanctioned any layout plan for developing a Township on the aforesaid land. Instead of raising constructions, the revisionists diverted the funds collected from vulnerable customers. Even after demand of return of money, the same has not been returned by the revisionists. On the other hand, after receiving the notice sent by the complainant, the revisionists started harassing and threatening the complainant in respect of which several representations were given to the police authorities and life of the complainant was threatened.

15. It was next submitted that the writ petition no.21721 of 2009 filed by the revisionists, which challenged the F.I.R., has been dismissed by a Division Bench of this Court on the ground that after investigation charge sheet has been filed by the police. The cognizance has been taken by the Magistrate after carefully perusing the evidence collected by the investigating officer and the said order cannot be said to be a mechanical order. It was further submitted that after filing of the charge sheet, the investigating officer moved an application on 23.12.2009 before Chief Judicial Magistrate concerned for seeking permission for further investigation for filing some additional evidence against the revisionists and the

said application has been allowed.

16. Learned counsel for the revisionists has relied on the following case laws :

17. In *Devendra & Others Versus State of U.P. & Another* (2009) 7 Supreme Court Cases 495, the Apex Court held that if a dispute is purely of civil nature and no offence is made out from the allegations contained in the F.I.R., then exercise of jurisdiction under section 482 Cr.P.C. is justified and the Magistrate ought to have applied his mind to the contents of the charge sheet.

18. In *Inder Mohan Goswami & Another Versus State of Uttaranchal & Others*, AIR 2008 Supreme Court 251, the Apex Court held that the dispute about cancellation of agreement to sell property is a civil dispute and institution of criminal proceedings under sections 420, 120-B, 467 IPC against vendor is an abuse of process of Court.

19. In *V.Y. Jose & Another Versus State of Gujarat & Another* (2009) 3 Supreme Court Cases 78, the Apex Court held that a matter, which essentially involves dispute of civil nature, should not be allowed to become subject matter of criminal proceedings, which may be resorted to as a shortcut to execution of a non-existent decree.

20. Learned counsel for the complainant has relied on the following case laws :

21. In *Dy. Chief Controller of Imports & Exports Versus Roshanlal Agarwal & Others*, 2003 Supreme Court Cases (Cri.) 788, the Apex Court held as under -

22. In determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not, whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. This question was considered recently in *U.P. Pollution Control Board v. M/s Mohan Meakins Ltd. & Ors.*, AIR 2000 SC 1456 and after noticing the law laid down in *Kanti Bhadra Shah v. State of West Bengal*, AIR 2000 SC 522, it was held as follows :

"The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons. The process issued to accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order."

In *State of Orissa Versus Debendra Nath Padhi* 2005-SCC-1-568, the Apex Court in para 23 of the judgment held as under :

23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. *Satish Mehra's* case holding that the trial court has powers to consider even materials which accused may produce at the stage of Section 227 of the Code has not been correctly decided.

24. I have carefully considered the submissions advanced by learned counsel for the parties. Essentially, the question before the Court is whether the dispute between the parties is purely of a civil nature or criminal offence is made out. Initially, Noida Authority, in the year 2006, floated a Scheme for allotment of land at Sector 96, 97 and 98, Noida for developing Residential and Institutional Complexes called "Express City Group Housing". The company of the revisionists and one M/s. CIG Infrastructure Pvt. Ltd. formed a Consortium and offered their bid, which was accepted by Noida vide allotment letters dated 26.6.2006 and finally on 28.12.2006. Lease deed was executed on 28.12.2006. Lease deed was required to be corrected as the name of M/s. CIG Infrastructure Pvt. Ltd. was not mentioned in the lease deed. The correction deed was executed on 7.8.2008, which is annexure 2. Original lease deed is annexure 1. The aforesaid two documents show that though the lease was executed in the year 2006, but the same was defective and required correction and even before the execution of correction deed in the year 2008, the revisionists and their company floated the Scheme and started booking flats even though their title was not perfect. A sum of more than Rs.4 crores was obtained from the complainant. Construction work was not started at all at least till the date of inspection by the investigating officer, who

inspected the land of Sector 96, 97 and 98, Noida on 20th October, 2009 and found that all the plots were lying vacant and no construction activity was going on. The copies of the case diary and site plan prepared by the investigating officer are annexed with the counter affidavit.

25. Though at the time of argument, learned counsel stated that the office bearers of the company of the revisionists have returned from Abroad and they intend to pay the amount of the complainant, but intention never culminated in action. Mere expression of intention is not sufficient, some more action is to be required. If the revisionists intended to repay the money as per the contract, they would have offered the same to the complainant or at least should have sent the cheque or bank draft to the complainant, but that was not done even though money had been demanded by the complainant through notice.

26. I find sufficient force in the submissions advanced by learned counsel for the complainant that documents filed by the revisionists could not be looked into by the Magistrate at the time of taking cognizance as these documents were not handed over by the revisionists to the investigating officer and, therefore, these documents could not have been considered by the investigating officer as well as by the Magistrate at the time of taking cognizance. At this stage, it would not be proper to consider the material placed before the Court, as the same material was not placed before the Magistrate at the time of taking cognizance. The contract can be filed before the Magistrate at the appropriate stage along with an application for discharge and the Magistrate shall consider the same at the time of framing of the charge.

27. In view of the aforesaid undisputed facts, I have come to the conclusion that it does not appear to be a case of purely civil nature and it can also not be said that no criminal offence is made out. The revision has to be decided on the basis of material available on the record of the Magistrate i.e. the F.I.R. and the case diary and the same cannot be considered on the basis of material filed along with the memo of revision which were not part of trial court's record. On the basis of material available on the record of the trial court, no case for quashing or setting aside impugned summoning order is made out.

28. In the year 2007, when even the lease deed was not perfect and correction deed was still to be executed by Noida Authority and layout plan or construction plan were not sanctioned by the Noida Authority, the revisionists managed to persuade the complainant to part with a sum of more than Rs.4 crores, part of which was paid by taking loan from the Bank. The complainant is under liability to pay more than Rs.4.21 lacs per month as interest to the Bank without any hope of return of his money. The revisionists never disclosed to the complainant at the time of booking of the Apartment that their lease deed was yet to be corrected and layout plan was to be sanctioned. These are the factors to be considered by the Magistrate during trial. At this stage, I do not want to make any observations regarding merits of the case lest it may influence the trial court. Suffice it to say that it cannot be said at this stage that no criminal offence is made out. At the time of taking cognizance, the Magistrate is not required to pass a detailed order. The impugned order passed by the Magistrate taking cognizance on the basis of charge sheet submitted by the police does not suffer from any illegality. The revisionists will have an opportunity of praying for discharge at the appropriate stage. I do not find any merit in this revision, which is liable to be dismissed.

29. The Revision is dismissed.

30. Interim order dated 19.1.2010 stands vacated.

31. However, in the facts and circumstances of the case, it is directed that if the revisionists surrender before the Magistrate concerned within a period of three weeks from today and apply for bail, their prayer for bail be considered by the courts below on the same day keeping in view a Full Bench decision of this Court in the case of Amrawati and another v. State of U.P. 2004 (57) ALR 290 as affirmed by Hon'ble Apex Court in Lal Kamendra Pratap Singh v. State of U.P. 2009 (3) ADJ 322 (SC).

32. For a period of three weeks, no coercive steps shall be issued against the revisionists.