

Ram Awtar And 3 Others vs State Of U.P. And Another on 5 February, 2019

Author: Siddharth

Bench: Siddharth

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Reserved on 10.12.2018

Delivered on 05.02.2019

Case :- APPLICATION U/S 482 No. - 37860 of 2018

Applicant :- Ram Awtar And 3 Others

Opposite Party :- State Of U.P. And Another

Counsel for Applicant :- Samit Gopal

Counsel for Opposite Party :- G.A., Indra Kumar Chaturvedi, P.C. Srivastava

Hon'ble Siddharth, J.

Heard Shri G.S. Chaturvedi, Shri Navin Sinha, learned Senior Advocates assisted by Sri Samit Gopal, learned counsel for the applicants and Shri I.K. Chaturvedi, Advocate appearing for the opposite party no.2 and Shri Vinod Kant, learned Additional Advocate General assisted by Sri Nikhil Chaturvedi, learned A.G.A. for the State.

This application under Section 482 Cr.P.C has been filed praying for quashing of the proceeding of Complaint Case No.24736 of 2018, Anjula Nagpal Vs. Ram Awtar and others, under Sections 420,

467, 468, 471, 120-B I.P.C, Police Station Indrapuram, District Ghaziabad pending in the Court of Chief Judicial Magistrate, Ghaziabad and prayer for quashing of the order dated 20.09.2018 passed by Chief Judicial Magistrate, Ghaziabad in the aforesaid case has also been made.

At the very outset learned counsel for the opposite party no.2 has raised an objection that this Court does not have jurisdiction to hear the proceeding arising out of complaint case and the prayer in this case is for quashing the further proceeding of a complaint case.

Learned Senior Counsel appearing on behalf of the applicants has submitted that the proceeding of this case arise out of first information report. After submission of final report, protest petition filed by opposite party no.2 has been allowed by the impugned order and the applicants have been summoned to face trial and therefore, it is not a complaint case but a case arising out of police report and therefore, this Court has jurisdiction to hear this application. The jurisdiction of this court pertains to State Cases and proceedings pertaining to offence against property (Chapter XVII of I.P.C).

Therefore, the objection on behalf of opposite party no.2 is not correct and is turned down. The proceedings in dispute do not arise out of cognizance taken on complaint as per Section 190(1)(a) Cr.P.C nor the procedure under Chapter XV Cr.P.C has been followed in this case.

The brief facts of the case are that the first information report dated 09.05.2012 was lodged by opposite party no.2 against the applicants alleging that the applicants made her Director of a company, named ABL Builders Private Limited, on the assurance that she will get handsome returns. On 14.03.2006 written memorandum of understanding was made wherein it was stated that in the project named as Orange County flats would be constructed and sold and 25% of the profits shall belong to opposite party no.2. Applicants convinced opposite party no.2 that they will distribute the profits of the corporate business. After investment of Rs.98 Crores, 10 acres of land was purchased whereon the flats as per project of Orange County were made. All the terms and condition about the distribution of profits were incorporated in the memorandum of understanding dated 14.3.2006. Opposite party No.2 made huge investments in the project which was successful and huge profits accrued. However, the opposite party No.2 was kept out of affairs of the company. The affairs of the company were looked after by the applicants and they did not informed her about profits from the project and no accounts were shown by the applicants to her, but her estimate is that the applicants earned crores of rupees from the project. Thereafter the applicants came to the house of the opposite party No.2 and informed that the ABL Builders is taking up a new project named as 'Olive County' Vasundra, Ghaziabad, in 13 acres of land and she will again be having 25 % in the profit of project and the profits coming from 'Orange County' projects was invested in Olive County project by the applicants.

However, the applicants did not paid 25 % of profit as per the memorandum of understanding dated 14.3.2006 to the opposite party No.2 when they earned profits of hundreds of crores of rupees. They committed fraud, cheating and betrayal of trust. They concocted the documents only to defraud her. They have also made false documents regarding the project and sale of the flats. They did not disclosed the opposite party No.2 as Director of Company and Promoter as per memorandum of

understanding. They have used fraudulent documents as genuine and violated different sections of the Companies Act also. Since opposite party No.2 is also a share-holder therefore she filed a case No. 777 of 2010 before the Company Law Board, under Sections 388, 397, 398, 399, 401, 402, 403, 404, 405 of the Companies Act, which is still pending and the first information report is being lodged only for violating the conditions of memorandum of understanding dated 14.3.2006 against the applicants and offence under Sections 420, 460, 466, 468, 471, 120-B IPC is made out against the applicants.

The Investigating Officer recorded the statement of opposite party No.2 wherein she repeated the allegations made in the first information report. The Investigating Officer investigated the case and submitted a final report dated 10.6.2012 stating that the opposite party No.2 has taken her share in the profit of the company and only for harassing the applicants false first information report has been lodged. Opposite party No.2 has not been able to produce any document/evidence to prove allegations against the applicants and hence the final report is being submitted.

The opposite party No.2 filed a protest petition dated 03.10.2012 before the C.J.M., Ghaziabad, wherein she stated number of facts, which were not part of the first information report and by the order dated 10.5.2013, the C.J.M., Ghaziabad directed Investigating Officer to conduct further investigation regarding the alleged fraudulent documents whereon signature of opposite party No.2 were alleged to have been forged. The Investigating Officer was directed to obtain report from the Central Forensic Science Laboratory regarding the signatures of opposite party No.2 on the documents.

The Investigating Officer again submitted another closure report dated 05.12.2013 stating that the signatures of opposite party No.2 on the alleged forged documents have been sent to the CFSL, Hyderabad. No evidence against the accused have come to the light till date and therefore, the earlier final report was correct and the dispute between the parties is of civil nature and hence final report was again submitted.

Opposite party No.2 again filed a protest petition dated 10.7.2014. The report of CFSL, Hyderabad dated 26.02.2014 was received. After the submission of the final report dated 05.12.2013 wherein the expert found that the sample of signatures of opposite party No.2 are the same as on the disputed documents, by the order dated 31.7.2017, the Chief Judicial Magistrate, Ghaziabad, allowed the application of the applicants for transferring the investigation from District Ghaziabad to District Meerut. The Investigation Officer at Meerut recorded the statement of opposite party No.2 wherein she admitted that the case before the Company Law Board at Kolkata, has been finalized and she has settled all her disputes with the ABL Builders Limited. She stated that the recital regarding settlement of all disputes with the company was also forged by the applicants before the company court and the amount of Rs.12,03,47,715/- directed to be paid to her by the company court is not related to the dispute regarding the memorandum of understanding in dispute. The Investigating Officer also recorded the statement of Sri Sukumar Jain, Standing Counsel (Crl.) and Company Prosecutor (Government of India), wherein he clearly stated that memorandum of understanding regarding sharing of profits between five Directors which was made on his advice is absolutely illegal as per the provisions of Companies Act. The affairs of the company are carried out

as per the memorandum and article of association and legally the profits of company are distributed amongst the share-holders on the basis of the profits shown in the balance sheet and the memorandum of understanding in dispute has been made only to defraud the opposite party No.2. The Investigating Officer of Police Station Ganga Nagar, Meerut submitted charge-sheet dated 06.7.2017 against the applicants. The charge-sheet was cancelled by the SSP, Meerut and the Crime Branch, Meerut was directed to investigate the case further. The Crime Branch Meerut submitted a final report dated 09.12.2017 and again a third protest petition was filed on 13.02.2018 by opposite party No.2. The aforesaid protest petition dated 13.02.2018 filed by opposite party No.2 has been allowed by order dated 20.9.2018 and the final report 9.12.2017 has been rejected. The applicants have been summoned for facing trial under Sections 420, 467, 468, 471 and 120-B IPC, hence there are before this court.

Learned counsel for the applicant has submitted that from the perusal of the first information report itself, it is clear that the opposite party No.2 entered into memorandum of understanding dated 14.03.2006 wherein there was agreement between the applicants and the opposite party No.2 that 25 % of the profit shall be paid to opposite party No.2. Once she has admitted entering into such a memorandum of understanding she cannot be permitted to take contradictory stand alleging that the memorandum of understanding was forged by the applicants by concocting the signatures thereon. In case the memorandum of understanding was not executed by her, she cannot have any grievance against the applicants. In case her earlier stand that she entered into such a memorandum of understanding then the memorandum of understanding being illegal and against the provisions of the Companies Act as admitted by Sri Sukumar Jan, Advocate also in his statement before the Investigating Officer, she cannot get any benefit arising out of the memorandum of understanding. The above memorandum of understanding being a void document cannot be enforced through any court of law and therefore, the entire case of the opposite party no.2 is absolutely false and prompted by ulterior motives. It has further been submitted that the Company Law Board, Kolkata Branch, Kolkata directed the Company to deposit Rs. 12,03,47,715/- towards to the principal amount of shares along with interest to be deposited before the Company Law Board and an application dated 03.03.2014 was moved by opposite party no.2 for release of the aforesaid amount which was directed to be released on 31.03.2014. A settlement dated 17.09.2011 was arrived at before the Company Law Board and the opposite party no.2 filed the same on affidavit stating that she has no dues against the company left and all the dues have been settled. However, later she denied the aforesaid settlement and filed an affidavit but her stand was not appreciated and against the same opposite party no.2 approached the Kolkatta High Court and Apex Court unsuccessfully. It has been submitted once the proceeding of the Company Law Board have been upheld upto the Hon'ble Apex Court and the dues of the opposite party no.2 settled before the Company Law Board, Kolkatta in Company Petition No.777 of 2010 is held to be final, there remains no dispute between the parties to be agitated before the Criminal Court.

Time was granted to opposite party no.2 to file counter affidavit on 01.11.2018 but learned counsel for opposite party no.2 did not wants to file counter affidavit. It has been submitted that by Sri I. K. Chaturvedi, learned counsel appearing on behalf of opposite party no.2 that the application filed by the applicants is not maintainable as there is no misuse of process of law by the Trial Court in passing the impugned order against the illegal acts of fraud, cheating and forgery committed by the

applicants regarding which the opposite party no.2 lodged the first information report. The aforesaid offence were committed by the applicants in pursuance of memorandum of understanding dated 14.03.2006 and they induced the opposite party no.2 to sign the aforesaid memorandum of understanding showing it to be valid and legal document and for the purpose of investment opposite party no.2 invested huge amount on its basis in the company. The aforesaid memorandum of understanding is an illegal document having no force in the eyes of law. Therefore, the applicants have committed fraud against opposite party no.2. The applicants are trying to mislead this Court on the ground that the dispute between the parties is of civil nature and no criminal offence is made out against the applicants. The order passed by the learned Magistrate is a speaking order. The dispute before the Company Law Board at Kolkatta was against the acts of mismanagement of the company and the opposite party no.2 along with three other companies, as share holders of M/s ABL Builder, filed the Company Petition No.777 of 2010 before the Company Law Board and it had nothing to do with the profits from the project of Orange County and the execution or enforceability of memorandum of understanding dated 14th March, 2006. There is no connection between the company petition and the first information report which is confined only to the fraud and cheating committed by the applicant which are criminal offences and required to be tried and investigated by the criminal court.

Learned counsel for opposite party no.2 has relied upon the following case laws :-

1. Gangadhar Janardan Mhatre Vs. State of Maharastra and others, (2004)7 SCC 768.

" Now well-settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(l)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(l)(b) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officers gives an opinion that the investigation has made out a case against the accused.' The Magistrate can ignore the conclusion arrived at by the Investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(l)(b and direct the issue of process to the accused."

2. Jagdish Ram Vs. State of Rajasthan and others, (2204) 4 Scc 432.

"At this stage, the Magistrate had only to decide whether sufficient ground exists or not for further proceeding in the matter. It is well settled that notwithstanding the opinion of the police, a magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied 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."

3. Sushil Suri Vs. Central Bureau of Investigation and another (2011)5 SCC 708.

"As afore-stated, in the Chargesheet, the accused are alleged to have committed offences punishable under Section 120B, read with Sections 420, 409, 468 and 471IPC. We feel that at this preliminary stage of proceedings, it would neither be desirable nor proper to return a final finding as to whether the essential ingredients of the said Sections are satisfied. For the purpose of the present appeal, it will suffice to observe that on a conspectus of the factual scenario, noted above, prima facie, the Chargesheet does disclose the commission of offences by the appellant under the afore-noted Sections."

4. Rumi Dhar Vs. State of West Bengal (2009)6 SCC 364.

"18. It is now a well settled principle of law that in a given case, a civil proceeding and a criminal proceeding can proceed simultaneously. Bank is entitled to recover the amount of loan given to the debtor. If in connection with obtaining the said loan, criminal offences have been committed by the persons accused thereof including the officers of the bank, criminal proceedings would also indisputably be maintainable. When a settlement is arrived at by and between the creditor and the debtor, the offence committed as such does not come to an end. The judgment of a tribunal in a civil proceeding and that too when it is rendered on the basis of settlement entered into by and between the parties, would not be of much relevance in a criminal proceeding having regard to the provisions contained in Section 43 of the Indian Evidence Act.

After considering the rival submissions, it is clear that the basis of dispute between the parties is memorandum of understanding dated 14.03.2006. The stand of opposite party no.2 is that the aforesaid memorandum of understanding was entered into by her on the assurance of the applicants that she will be given 25% share of profit on her investment. However, she was not given any share of profit and therefore, she lodged first information report.

In a private limited company the profit between the share-holders is distributed by way of "dividend" which has been defined under Section 2(35) of Companies Act, 2013. Dividend means profit of company, which is not retained in the business and is distributed among the share-holders in proportion to the amount paid up on the shares held by them. Dividend for a financial year are declared by the Company at its annual general meeting on the recommendation of the Board of Directors Chapter VIII of the Companies Act, 2017 deals with the declaration and payment of dividends.

The opposite party no.2 was one of the Director of the Company, as per her own case, and it was in the Board of Directors, which was competent to declare dividend regarding the Preference shares at fixed percentage and regarding Equity shares at rate decided by the Board of Directors. No private arrangement by way of Memorandum of understanding has the sanction of law regarding profit sharing of the business of a company. The Memorandum of understanding which was made the basis of first information report has no sanction of law and is an illegal agreement which is void and unenforceable in law.

If illegal agreement is un-enforceable, the law is that if a wrongdoer has benefited to the others detriment it does not matter since the others who entered into such agreement have also committed illegality.

As per section 23 of the Contract Act an agreement for commission of illegal act is void. An agreement is illegal if its compliance is not possible without disobedience of any law. Therefore the memorandum of understanding in dispute is void because it cannot be enforced without violating Chapter VIII of Companies Act, 2013.

Further from perusal of the first information report there is no whisper that aforesaid memorandum of understanding was illegal rather the allegations was that they created some forged documents regarding projects of the company and the sale of the flats and also concealed fact of the memorandum of understanding dated 14.03.2006 and the fact of opposite party no.2 being promoter of the project. This was done only to deprive her of share of profits in the company as per memorandum of understanding. The applicants used forged documents as genuine and are liable for punishment under Sections 420, 460, 466, 468, 471, 120-B. I.P.C.

In the first information report there is no allegation that the applicants ever induced her to sign the memorandum of understanding by way of any fraud or misrepresentation. The opposite party no.2 signed the illegal memorandum of understanding dated 14.03.2006 on the promise of 25% share profit of the company wilfully and lodged the first information report after more than six years on 09.05.2012.

The memorandum of understanding in dispute is legally a void document which cannot be enforced by court of law and the opposite party no.2 is also signatory to the same. Being signatory to the illegal document she cannot say that the illegality was committed only by the applicants who are admittedly, co-signatories of the memorandum and therefore, the applicants and the opposite party no.2 stand on equal footing in the eyes of law.

Learned counsel for the opposite party no.2 has argued that the memorandum of understanding is an absolutely illegal document not enforceable under the law and therefore, applicants have committed fraud against opposite party no.2 in getting her

sign on aforesaid document. He has not explained what would be the effect of signing illegal document and whether one signatory to any illegal agreement can allege at a later stage that other signatories got the same executed fraudulently and defrauded the complaining signatory thereby.

Even if the dispute, whether settlement before the Company Law Board between the applicants and the applicant no.2 was arrived at or not is discounted, no offence can be said to have been committed on account of non-enforcement of an illegal memorandum of understanding which could not have been executed as per law. The opposite party no.2 has not filed counter affidavit but has filed a number of documents with his written submissions which cannot be looked into by this court. The option of filing counter affidavit was not availed by the counsel for opposite party no.2 and therefore, the arguments made in the written submissions based on documents which are extraneous to the proceeding cannot be considered.

The case laws cited on behalf of opposite party no.2 are related to the procedure of taking cognizance by Magistrate on the final report submitted by the Investigating Officer and same is not in dispute. They have no application to the dispute involved in the present case i.e., whether, the memorandum of understanding dated 14.03.2006 can be made the basis of the offence alleged against the applicants regarding forging of some other documents. Again there is no submission on the issue as to how a document which was earlier made the basis of the first information report against the applicants and has been subsequently disowned can be made the basis of prosecution of the applicants.

The Apex Court in the case of State of Haryana Vs. Bhajan Lal, 1992 Supp(i) SCC 335, has enumerated the categories of cases which can be quashed in proceedings under Section 482 Cr.P.C in paragraph 102.

" 102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precises, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulate and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the un-controverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and made out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without any order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can even reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive or wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

The present proceedings against the applicants are covered by category (1) (3) & (5) of the above judgement of the Apex Court and therefore, deserve to be quashed.

The entire investigation and the summoning order of the Court below is based on the fact that the memorandum of understanding dated 14.03.2006 was forged for the purpose of cheating the opposite party no.2 when there is no such recital in the first information report. Therefore, the cognizance order and the entire proceedings before the Court below are absolutely illegal and are hereby quashed.

This application is allowed.

Order Date :- 05.02.2019 SS