Kapil Agarwal vs Sanjay Sharma on 1 March, 2021

Equivalent citations: AIR 2021 SUPREME COURT 1241, AIRONLINE 2021 SC 99

Author: M.R. Shah

Bench: M.R. Shah, Dhananjaya Y. Chandrachud

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 142 OF 2021

Kapil Agarwal and others …Appellants

Versus

Sanjay Sharma and others …Respondent

JUDGMENT

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 08.09.2017 passed by the High Court of Judicature at Allahabad in Criminal Miscellaneous Writ Petition No. 18308 of 2017, by which the High Court has dismissed the said writ petition preferred by the appellants herein, filed under Article 226 of the Constitution of India, for quashing the first information report registered as Case Crime No. 790 of 2017, under Sections 420/406 IPC, Police Station Loni Border, District Ghaziabad, the original writ petitioners/accused have preferred the present appeal.

2. The relevant facts necessary for deciding the present appeal are as under:

> That one M/s Varun Beverages Ltd. (for short, 'VBL') is a licensed franchisee of PepsiCo India Pvt. Ltd. and engaged in the manufacture and sale of carbonated sweetened water, fruit juice, packaged drinking water under the PepsiCo brand. That in the year 2013, the VBL appointed the firm of the complainant – Sanjay Sharma as a Distributor in the area of Loni, District Ghaziabad to sell and distribute the products manufactured by the company. That in the year 2014, the company terminated the contract of distributorship, which according to the appellants was due to non-payment of dues by respondent no.1 herein – original complainant. According to the appellants, thereafter on reconciliation of accounts and as per the statement of

accounts maintained by the company, after adjusting of all claims and security deposit, a sum of Rs.9,46,280/- was found to be outstanding upon the complainant, towards the material supplied to him. The complainant issued a cheque dated 15.09.2014 in favour of the company – VBL. The said cheque was presented for encashment on 22.09.2014. The same was dishonoured and returned unpaid by the banker of the complainant due to "insufficient funds". That thereafter, due to non-payment after the issuance of the statutory legal notices, appellants herein filed a criminal complaint under Section 138 of the Negotiable Instruments Act on 07.11.2014 against R1 and his company Thakur Trading, in the Court of Chief Judicial Magistrate, Ghaziabad being Complaint Case No. 7652/2014. R1 has been summoned to face the trial. The said complaint is presently pending for disposal. R1 filed a complaint against one of the officers of the company-VBL being FIR No. 1565/2014 dated 15.09.2014 alleging misappropriation of Rs.6,00,000/- by one of the officers of the company, namely, Vipul Verma. That after investigation by the police, the investigating officer submitted a negative final report No. 47/2015 dated 20.01.2015. 2.1 R1 also filed one another case on 09.02.2015 for misappropriation of Rs.31,12,375/- by the appellants. That thereafter R1 filed a complaint/application under Section 156(3) Cr. P.C. in the Court of learned Additional Chief Judicial Magistrate-I, Ghaziabad for issuance of direction to the Police Station Loni to register FIR against the appellants herein and two other officers of the company alleging misappropriation of an amount of Rs.31,12,375/-. The learned Magistrate, instead of directing the police to register FIR, decided to enquire into the matter by treating the same as a complaint case. That vide order dated 23.03.2015, the learned Magistrate treated the application of R1 under Section 156(3) Cr.P.C. as a complaint case and an opportunity was granted to R1 to record his statement under Section 200 Cr.P.C.

2.2 Feeling aggrieved by order dated 23.03.2015 treating the application under Section 156(3) Cr.P.C. as a complaint case, R1 filed a criminal revision application No. 70/2015 before the learned Sessions Court, Ghaziabad. That the learned Sessions Judge, Ghaziabad allowed the said revision application and quashed and set aside order dated 23.03.2015 passed by the learned Magistrate and remanded the matter back to the learned Magistrate to consider the material on record and pass speaking order afresh for assigning reasons for considering application under Section 156(3) Cr.P.C. as a complaint case. That thereafter the learned Magistrate sought an action report from the concerned police station. That the concerned police officer submitted the report before the learned Magistrate on 09.08.2015. That the said proceedings are pending before the learned Magistrate.

2.3 That after a period of approximately two years, R1 lodged the impugned FIR against the appellants for the offences under Sections 406/420 IPC at Police Station Loni, District Ghaziabad, dated 4.8.2017. The allegations in the said FIR are same/similar to the allegations levelled in the application under Section 156(3) Cr.P.C., which is pending consideration before the learned Magistrate since 2015.

At this stage, it is required to be noted that the said FIR is filed against Kapil Agarwal, appellant No.1 – Director, Sharad Garg, appellant No.2 – Multi Unit Manager and Deepak Sharma, appellant No.3 – Sales Head. That thereafter the appellants approached the High Court under Article 226 of the Constitution of India being Criminal Miscellaneous Writ Petition No. 18308 of 2017 for quashing the aforesaid FIR being Case Crime No. 790 of 2017, under Sections 420/406 IPC, Police Station Loni Border, District Ghaziabad. By the impugned judgment and order, the High Court has refused to quash the FIR observing that the impugned FIR, prima facie, discloses commission of cognizable offence.

2.4 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court refusing to quash the FIR being Case Crime No. 790 of 2017, under Sections 420/406 IPC, Police Station Loni Border, District Ghaziabad, the original accused have preferred the present appeal.

3. Shri K.V. Vishwanathan, learned Senior Advocate appearing on behalf of the appellants has vehemently submitted that the impugned FIR is an abuse of process of law to harass the appellants by converting a purely civil dispute into a criminal case.

3.1 It is submitted that the contents of the FIR show that it has been registered for recovery of commission and discounts on sale which alleged to have taken in the regular business transactions place over a period of 15 months between the parties. Hence, it is a purely contractual dispute on the face of it. 3.2 It is submitted that no civil proceedings have been filed by the complainant for recovery of the alleged due amount. It is submitted that the impugned FIR has been lodged solely with a view to arm twist and extort money from the appellants.

3.3 It is further submitted that there is not even a whisper about the pendency of the application under Section 156(3) Cr.P.C. pending before the learned Magisterial Court, in the FIR. Nor is there any mention of the fact that there is an ongoing case under Section 138 of the NI Act.

3.4 It is submitted that the police report in respect of Section 156(3) application has gone against him, R1 has left the earlier proceedings lying pending for two years without participating in it and has filed a fresh FIR with the same allegations. It is submitted that the fresh FIR on the same allegations has been filed only with a view to get the appellants arrested and extort the money from the appellants.

3.5 Relying upon the decisions of this Court in the cases of G. Sagar Suri v. State of U.P. (2000) 2 SCC 636 and Jetking Infotrain Ltd. v. State of U.P. (2015) 11 SCC 730, it is submitted that in view of the pendency of the complaint under Section 138 of the NI Act and the subsequent FIR is a counter-blast to the same, the present prosecution would be clearly an abuse of process of law and therefore the impugned FIR deserves to be quashed and set aside. 3.6 Relying upon the decision of this Court in the case of Uma Shankar Gopalika v. State of Bihar (2005) 10 SCC 336, it is submitted that as the dispute can be said to be a purely civil dispute, which has been given a criminal colour, the same deserves to be quashed and set aside.

3.7 It is further submitted that even taking the allegations in the impugned FIR at the face value, no offence under Sections 406/420 IPC is made out against the appellants. It is submitted that at best, the impugned FIR alleges that R1 entrusted certain monies to the company which the company did not pay to him at his request. It is submitted that the company – VBL is not even made an accused and the appellants are joined as an accused in their individual capacity as Director, Multi Unit Manager and Sales Head. It is submitted that in order to make out a case under Section 406 IPC against the appellants, there must be an allegation that R1 entrusted the appellants in their personal capacities, not as VBL officers, with the relevant commissions/benefits. 3.8 It is further submitted that even from the bare perusal of the contents of the impugned FIR, the essential ingredients of offence of cheating under Section 420 IPC are completely missing. It is submitted that there is no allegation that the appellants either, (a) deceived R1 by making any false or misleading representation; or dishonestly concealed some matter from R1; or by any other act or omission; (b) fraudulently or dishonestly induced R1 to deliver the cheques allegedly handed over as security, or to agree to entrust the claimed commissions/benefits to VBL; or to do or omit to do anything which R1 would not have done or omitted to have done if he were not deceived. Reliance is placed on the decisions of this Court in the case of Mohd. Ibrahim v. State of Bihar (2009) 8 SCC 751; in the case of Vesa Holdings (P) Ltd. v. State of Kerala (2015) 8 SCC 293; in the case of Robert John D'Souza v. Stephen V. Gomes (2015) 9 SCC 96; and State of Haryana v. Bhajan Lal, 1992 Supp. (1) SCC 33.

3.9 It is further submitted that even as per the allegations in the FIR, the amount is due from the company and not from the appellants. There is no entrustment or retention personally by any of the appellants. It is submitted that as held by this Court in the cases of S.K. Alagh v. State of U.P. (2008) 5 SCC 662, Sardar Singh v. State of Haryana (1977) 1 SCC 463 and Maksud Saiyed v. State of Gujarat (2008) 5 SCC 688, even when a case under Section 406 IPC is made out against a company, vicarious liability cannot be extended to the Directors or officers of a company.

3.10 It is submitted that as the main allegations are against the company and the company had not been made as an accused in the FIR, the same deserves to be quashed and set aside. Reliance is placed upon the decision of this Court in the case of Sushil Sethi v. State of Arunachal Pradesh (2020) 3 SCC 240. 3.11 Making the above submissions and relying upon the aforesaid decisions, it is prayed to allow the present appeal and quash and set aside the criminal proceedings and FIR being Case Crime No. 790 of 2017, under Sections 420/406 IPC, Police Station Loni Border, District Ghaziabad, as the same is nothing but an abuse of process of law.

4. The present appeal is opposed by Shri M.C. Dhingra, learned Advocate appearing on behalf of the respondent – original complainant. 4.1 It is submitted that as the FIR discloses commission of cognizable offence, the High Court has rightly refused to quash the FIR, in exercise of powers under Article 226 of the Constitution of India.

4.2 It is submitted that initially having failed to get the money due and payable to the complainant, the complainant was constrained to make an application under Section 156(3) Cr.P.C. before the learned Chief Judicial Magistrate at Ghaziabad. However, without referring to the allegations of the offences under Sections 420, 406, 467, 468, 471, 34/120-B IPC, the learned Magistrate vide a very cryptic order dated 23.03.2015 directed for treating the application under Section 156(3) as a

complaint case under Section 200 Cr.P.C. Aggrieved, the complainant preferred criminal revision before the learned Sessions Court, which on 8.7.2015 set aside order dated 23.03.2015 and remanded the case back to the learned Magistrate to consider the material on record and decide the complainant's application under Section 156(3) afresh by a reasoned order. It is submitted that once again a closure report was submitted by the very same investigating officer who earlier submitted the closure report. It is submitted that as the learned Magistrate did not pass any order on the closure report and kept the application under Section 156(3) under consideration for long, much to the agony of the complainant craving justice, the complainant was constrained to file the impugned FIR, making serious allegations against the company and its officers – appellants herein. It is submitted that, however, the police arrayed the appellants as an accused for the offences under Sections 420/406 IPC, although the facts therein disclosed commission of offences under Sections 467, 468, 471 IPC for forging complainant's blank cheque No. 038611, out of five blank cheques lying with the company as security and sought to encash it but could not succeed as the cheque was dishonoured. It is submitted that the company owed Rs.31,12,375.06 towards commission to be paid to the complainant – respondent which was lying in trust with it, but did not pay to him and thus by cheating him also committed breach of trust. It is submitted that in the FIR, it was also alleged that on demanding money they extended threats to get him killed and therefore the impugned FIR also discloses commission of an offence under Section 506 IPC as well.

4.3 Now so far as the submission on behalf of the appellants that there is an unexplained delay of two years in lodging the impugned FIR, it is submitted that as such there is no delay in registration of the FIR. It is submitted that delay is a mixed question of fact and law and a plea of defence. It can be explained at the trial. It is submitted that belated registration of FIR is always not fatal to the prosecution in every case as it is explainable at the trial. It is submitted that it is not a thumb rule to quash FIR for delayed registration, which can be explained at the trial.

4.4 Now so far as the submission on behalf of the appellants that FIR could not be registered during the pendency of the application under Section 156(3) Cr.P.C. on the same set of allegations, it is submitted that Section 210 Cr.P.C. leaves no doubt that FIR under Section 154 Cr.P.C. can be registered during the pendency of the complaint case on the very same set of facts/allegations. It is submitted that quashing of FIR will lead to demolition of complaint under Section 156(3) Cr.P.C. pending consideration before the learned Magistrate. 4.5 It is further submitted that despite the fact that the FIR discloses commission of offences under Sections 467, 468, 471, 34/120-B IPC also, the police have registered FIR under Sections 420/406 IPC only. It is submitted that the trial Court can add charges under Sections 467, 468, 471, 34/120-B IPC in exercise of powers under Section 216 Cr.P.C. at any time before rendering judgment.

4.6 Now so far as the submission on behalf of the appellants for non- disclosure of the pending application under Section 156(3) Cr.P.C. in the FIR is concerned, it is submitted that it is a settled law that FIR is not an encyclopaedia. It is submitted that even otherwise non-mentioning of the pendency of the complaint under Section 156(3) Cr.P.C. does not prejudice the appellants in any manner. It is submitted that even otherwise as per Section 210 Cr.P.C., the proceedings before the Magistrate during pendency of the investigation by the police in the FIR are required to be stayed by the learned Magistrate. It is submitted that the subsequent registration of FIR on the very same set

of allegations, as in the pending complaint, does not confront any law. 4.7 Now so far as the submission on behalf of the appellants that the company is not joined as an accused in the FIR is concerned, it is submitted that, as such, police ought to have included the company as an accused with the appellants in the FIR. It is submitted that the appellants named in the FIR have not disputed that they are principal functionaries of the company and had been responsible for the operations of complainant's dealership in all respects. It is submitted that the appellants cannot draw any benefit for absence of company as their co-accused. Company can be arrayed as an accused by the police in the chargesheet after collecting evidence. It is submitted that even if by any chance the police omit to do so, the trial Court has powers under Section 319 Cr.P.C. to summon the company to stand trial as co-accused.

4.8 It is further submitted that the accused did not get immunity for the offence committed by them merely because they have made complaint against the complainant under Section 138 NI Act. It is submitted that otherwise all cross criminal cases would be rebuffed if such contention is accepted. 4.9 It is further submitted that as such the appellants have acknowledged through emails as also through duly signed hard copies that Rs. 34,50,418/- is payable to the respondent by way of commission, incentives and discounts etc. This amount was retained by the appellants and the company in trust upon conclusion of the dealership. The company and the appellants have not paid the said amount and thereby have cheated the respondent and also committed breach of trust. It is submitted that the appellants are now speciously disputing the said acknowledgement. It is submitted that merely because the acknowledgements through emails and hard copies are now disputed by the appellants, it will not result in quashing the FIR.

4.10 Making the above submissions and submitted that as the FIR discloses commission of cognizable offences, the same may not be quashed at the threshold in exercise of powers under Article 226 of the Constitution of India. It is submitted that as held by this Court in catena of decisions that the power under Article 226 of the Constitution and/or under Section 482 Cr.P.C. to quash the FIR at the threshold is required to be exercised sparingly. It is submitted that it is not a fit case to exercise the power under Article 226 of the Constitution to quash the FIR when the FIR discloses commission of cognizable offences.

5. We have heard the learned counsel for the respective parties at length.

It is the case on behalf of the appellants that as on the same allegations, the private respondent-complainant has filed an application under Section 156(3) Cr.P.C., which is pending before the learned Magistrate, the impugned FIR with the same allegations and averments would not be maintainable, and therefore, the FIR lodged with the police station Loni Border, District Ghaziabad deserves to be quashed and set aside. The aforesaid cannot be accepted for the simple reason that Code of Criminal Procedure permits such an eventuality of a complaint case and enquiry or trial by the Magistrate in a complaint case and an investigation by the police pursuant to the FIR. At this stage, Section 210 Cr.P.C. is required to be referred to, which reads as under:

> "210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence – (1) When in a case instituted otherwise

> than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject- matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation. (2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report. (3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code." Thus, as per Section 210 Cr.P.C., when in a case instituted otherwise than on a police report, i.e., in a complaint case, during the course of the inquiry or trial held by the Magistrate, it appears to the Magistrate that an investigation by the police is in progress in relation to the offence which is the subject matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation. It also provides that if a report is made by the investigating police officer under Section 173 Cr.P.C. and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report. It also further provides that if the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of Cr.P.C.

Thus, merely because on the same set of facts with the same allegations and averments earlier the complaint is filed, there is no bar to lodge the FIR with the police station with the same allegations and averments.

6. However, at the same time, if it is found that the subsequent FIR is an abuse of process of law and/or the same has been lodged only to harass the accused, the same can be quashed in exercise of powers under Article 226 of the Constitution or in exercise of powers under Section 482 Cr.P.C. In that case, the complaint case will proceed further in accordance with the provisions of the Cr.P.C.

6.1 As observed and held by this Court in catena of decisions, inherent jurisdiction under Section 482 Cr.P.C. and/or under Article 226 of the Constitution is designed to achieve salutary purpose that criminal proceedings ought not to be permitted to degenerate into weapon of harassment. When the Court is satisfied that criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon accused, in exercise of inherent powers, such proceedings can be quashed.

6.2 As held by this Court in the case of Parbatbhai Aahir v. State of Gujarat (2017) 9 SCC 641, Section 482 Cr.P.C. is prefaced with an overriding provision. The statute saves the inherent power of the High Court, as a superior court, to make such orders as are necessary (i) to prevent an abuse of the process of any Court; or (ii) otherwise to secure the ends of justice. Same are the powers with the High Court, when it exercises the powers under Article 226 of the Constitution.

7. Applying the law laid down by this Court, referred to hereinabove, to the facts of the case on hand, subsequent FIR filed by the respondent – original complainant can be said to be an abuse of process of law and the same to be bringing pressure on the accused, which can be demonstrated from the following facts:

> i) cheque no. 038611 was presented for encashment and the same came to be dishonoured by the banker of the complainant due to "insufficient funds";
>
> ii) that the company – VBL served statutory legal notices upon the complainant under the provisions of the Negotiable Instruments Act;
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> iii) that thereafter complaint under Section 138 of the Negotiable Instruments Act has been filed by the company against the respondent-original complainant on 7.11.2014;
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> iv) that thereafter, after a period of three months, respondent no.1 filed an application under Section 156(3) Cr.P.C. seeking registration of FIR against the appellants herein, i.e., in the month of February, 2015;
>
> v) the learned Magistrate declined to order registration of FIR, but decided to inquire into the matter by treating the same as complaint case and granted respondent no.1 – original complainant an opportunity of recording solemn affirmation under Section 200 Cr.P.C. (order dated 23.03.2015). Order dated 23.03.2015 came to be set aside by the learned Sessions Judge vide order dated

8.7.2015 and the matter was remanded to the learned Magistrate with directions to pass a speaking order. The same is pending before the learned Magistrate;

vi) that thereafter after a period of two years, R1 lodged the impugned FIR against the appellants with police station Loni Border, District Ghaziabad with the similar contents and allegations which were levelled in the application under Section 156(3) Cr.P.C. In the FIR, the date of occurrence of the offence has been shown as 26.07.2017;

vii) it appears that R1 is not proceeding further with his application under Section 156(3) Cr.P.C., which is pending before the learned Magistrate since last five years;

viii) in the FIR, neither there is any reference to the application under Section 156(3) Cr.P.C. which is pending before the learned Magistrate, nor there is a reference of the complaint under Section 138

of the NI Act.

Under the circumstances, the impugned FIR is nothing but an abuse of process of law and can be said to be filed with a view to harass the appellants.

8. We are not expressing anything on merits whether, any case is made out against the appellants for the offences alleged in 156(3) Cr.P.C. application as the same is pending before the learned Magistrate and the learned Magistrate is to take call on the same. Therefore, when the impugned FIR is nothing but an abuse of process of law and to harass the appellants-accused, we are of the opinion that the High Court ought to have exercised the powers under Article 226 of the Constitution of India/482 Cr.P.C. and ought to have quashed the impugned FIR to secure the ends of justice.

9. In view of the above and for the reasons stated above, the present appeal is allowed. The impugned criminal proceedings/FIR registered as Case Crime No. 790 of 2017, under Sections 420/406 IPC, with the police station Loni Border, District Ghaziabad are hereby quashed and set aside on the aforesaid grounds. We make it clear that we have not expressed anything on merits on the allegations made by respondent no.1 against the appellants as the proceedings in the form of 156(3) Cr.P.C application are pending before the learned Magistrate. The learned Magistrate shall now proceed further with the said application, in accordance with law and on its own merits. Respondent No.1 may proceed further with the said proceedings, if he so chooses and is advised.

10. With these observations, the present appeal is allowed.

……J.
[Dr. Dhananjaya Y. Chandrachud]

New Delhi;
March 01, 2021.

…….J.
[M.R. Shah]