

(2014) 09 CAL CK 0012
In the Calcutta High Court
Case No : C.R.R. No. 1741 of 2012

Ajay Prasad Khaitan

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 09-09-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 320, 482
Penal Code, 1860 (IPC) — Section 120B, 323, 406, 420

Citation : (2014) 4 CHN 535 : (2014) CriLJ 4772 : (2015) 3 RCR(Criminal) 37

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : S.K. Kapoor, Jaydeep Kar, Sr. Advs., Ravi Kapoor and Kanakendu Chatterjee, Advocate for the Appellant; Asraf Ali and Sankar Banerjee, Advocate for the Respondent

Judgement

Harish Tandon, J.—This revisional application is filed at the instance of one of the co-accused in C.G.R. Case No. 1968 of 1989 under Sections 120B/ 420/ 468/ 471 of the Indian Penal Code, 1860, for quashing. Shorn of unnecessary details, the petitioner was the partner of firm "M/s. Ajay Enterprises" along with his brother Kanti Prasad Khaitan. The petitioner opened an account in the Alipore Branch of M/s. Bank of Baroda for credit facility. The petitioner discounted six bills drawn on M/s. Refractories & Minerals (India), Bombay, aggregating to Rs. 7 lakhs and odd and availed the credit of Rs. 5,43,000/-. At the time of discounting, the aforesaid bills along with the transport receipts issued by Cargo Movers of India was submitted. The bills were presented to the drawee through Dena Bank, Malabar Hill Branch, Bombay, who refused to accept and honour them. The documents were sent back to the bank of Baroda and upon inquiry, it was found that the transport receipts were fabricated. The Bank lodged a complaint with the Superintendent of Police, Central Bureau of Investigation and the case was registered under Sections 420/ 467/ 468/ 471/ 120B of the Indian Penal Code against the partners. In addition to lodging of the complaint, the

bank wrote the said partnership firm and its partners and demanded the reimbursement of the amount so credited in the account on availment of the bill discounting facility and the said partnership firm repaid the entire amount together with the interest. The bank refunded the excess amount paid by the partnership firm through its partners which is undisputed. Though the bank did not proceed further as the money was received back but the criminal proceeding initiated on the basis of the complaint continued and is in the stage of trial.

2. An argument is advanced by Mr. S.K. Kapoor, the learned senior Counsel appearing for the petitioner that the power of the High Court under Section 482 of the Code of Criminal Procedure is wide enough to quash a criminal proceeding registered even on non-compoundable offence despite the embargo created under Section 320 of the Code of Criminal Procedure. He strenuously submits that the offences committed in connection with the commercial transaction is liable to be quashed when both the parties have resolved the disputes and the continuance of the proceeding thereafter shall be in futility. In support of the aforesaid contention, he placed reliance upon the three bench judgment of the Supreme Court in case of *Gian Singh Vs. State of Punjab and Another*, *GHCL Employees Stock Option Trust Vs. India Infoline Ltd.*, and *CBI, ACB, Mumbai Vs. Narendra Lal Jain and Others*, . He audaciously submits that the High Court in exercise of the power under Section 482 of the Code of Criminal Procedure may quash the proceeding to secure the end of justice and the continuance would result an abuse of the process of Court. He would further submit that the entire money is paid to the bank together with the interest and, therefore, the claim of the bank is fully satisfied, meaning thereby, the bank has no subsisting claim against the petitioner and therefore, the continuance of the criminal proceeding shall be in futility. He submits that an extradition proceeding is initiated against the petitioner on the basis of the above stale claim and the petitioner is unnecessarily facing the harassment.

3. The learned Advocate for the CBI submits that the petitioner along with the other partner came before this Court for quashing the said proceeding which was subsequently dismissed. He further submits that the other partner namely Kanti Prasad Khaitan through another application sought for quashing the proceeding which also resulted into the dismissal thereof. He thus submits that the offences which are not compoundable under Section 320 of the Code of Criminal Procedure, the High Court in exercise of inherent power cannot pass an order compounding the offence and placed reliance upon a judgment of the Supreme Court in case of *Central Bureau of Investigation Vs. Jagjit Singh*, . He would further contend that the bank is dealing with the public money and by using the forged document, a money is taken, even if, it is subsequently paid amounts to embezzlement and the offence deemed to have committed. He was very much vocal that the petitioner was allowed to go abroad by an order of the Court which was misused resulting into the declaration of the petitioner as proclaim offender and an extradition proceeding has been initiated. Lastly he submits that the conduct of the petitioner is such that no sympathy and/or lenient approach

should be adopted least the quashing of the proceeding.

4. The point hinges for consideration is whether the Court can quash the proceeding in exercise of power conferred under Section 482 of the Code of Criminal Procedure even when some of the offences are non-compoundable.

5. Sub-section (1) of Section 320 of the Code of Criminal Procedure postulates the offences made in the table appended thereto to be compounded by the persons named therein. On the other hand, sub-section (2) thereof requires the permission of the Court for compounding of the offence under various sections of the Indian Penal Code as indicated in the table incorporated therein. Sub-section (9) of the said section creates an embargo against the compounding of the offence except as provided in the said section.

6. Section 482 bestowed the High Court with inherent power to make such orders to prevent abuse of the process of any Court or to secure the ends of justice. There have been divergence of views on the inherent powers to be exercised by the High Court in quashing the proceeding where one of the offence is not compoundable within the ambit of Section 320 of the Code of Criminal Procedure. In case of B.S. Joshi and Others Vs. State of Haryana and Another, , the Supreme Court quashed the criminal proceeding initiated by the wife against the husband and other relatives under Sections 498A/ 323 and 406 of the Indian Penal Code after the settlement was arrived between the parties. In the said report, the High Court refused to quash the criminal proceeding as Section 320 of the Code does not include those offences to be compoundable by the party or with the permission of the Court. It was held that Section 320 of the Code does not limit or restrict or abridge the inherent power of the High Court.

7. The ratio laid down in case of B.S. Joshi and Others Vs. State of Haryana and Another, was applied in another case rendered in connection with Nikhil Merchant Vs. Central Bureau of Investigation and Another, where the Company created certain documents to avail the credit facilities beyond the sanctioned limit and subsequently a compromise was affected between the company and the bank in the suit instituted before the Civil Court. Though the criminal proceeding was registered under various sections including Sections 120-B and 471 of the I.P.C., the Apex Court quashed the criminal proceeding on the basis of the compromise and/or settlement between the parties. On the issue of unbridled and inherent power of the High Court under Section 482 of the Code to quash the proceeding where one of the offence is non-compoundable, a doubt was raised in case of Manoj Sharma Vs. State and Others, . Subsequently the Gian Singh Vs. State of Punjab and Another, came up before the bench of the equal quorum which considered the above noted decisions and observed that the matter should be referred to a larger Bench to resolve the controversy over the power of the High Court under Section 482 of the Code or Article 226 of the Constitution to quash the non-compoundable cases on the basis of the settlement/compromise arrived between the parties. The larger Bench in case of Gian Singh (supra) discussed in detail the evolution of law in conferring the inherent powers on the Court in the

mitigating circumstances based on *Ex Debito Justitiae*. In Paragraphs 53 & 54 of the said report, it is held that the section begins with the non-obstante clause having an overriding effect on the other provisions and, therefore, cannot be limited and/or restricted and/or abridged by the other provisions of law in following words:

"53. Section 482 of the Code, as its very language suggests, saves the inherent power of the High Court which it has by virtue of it being a superior court to prevent abuse of the process of any court or otherwise to secure the ends of justice. It begins with the words, "nothing in this Code" which means that the provision is an overriding provision. These words leave no manner of doubt that none of the provisions of the Code limits or restricts the inherent power. The guideline for exercise of such power is provided in Section 482 itself i.e. to prevent abuse of the process of any court or otherwise to secure the ends of justice. As has been repeatedly stated that Section 482 confers no new powers on the High Court; it merely safeguards existing inherent powers possessed by the High Court necessary to prevent abuse of the process of any court or to secure the ends of justice. It is equally well settled that the power is not to be resorted to if there is specific provision in the Code for the redress of the grievance of an aggrieved party. It should be exercised very sparingly and it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

54. In different situations, the inherent power may be exercised in different ways to achieve its ultimate objective. Formation of opinion by the High Court before it exercises inherent power under Section 482 on either of the twin objectives, (i) to prevent abuse of the process of any court, or (ii) to secure the ends of justice, is a *sine qua non*."

8. The Apex Court in Paragraph 57 of the said report, laid down the distinction between a power of the Court in compounding an offence under Section 320 of the Code as distinct and different than the inherent powers of the High Court under Section 482 of the Code. The aforesaid two provisions are not interchangeable or have any nexus in its approach. It would be relevant to quote Paragraph 57 which reads thus:

"57. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate

consequence may be acquittal or dismissal of indictment."

9. After analyzing the judgment in case of B.S. Joshi and Others Vs. State of Haryana and Another, , Nikhil Merchant Vs. Central Bureau of Investigation and Another, and Manoj Sharma, (AIR 2008 SC (Supp) 1171), it is held in Paragraph 61;

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.

10. What could be culled out from the above report that a criminal cases having a pre-dominant civil flavour stands on a different pedestal than the offences which are heinous and serious and have an impact on the society and cannot be said to be private-in-nature for the purpose of quashing the proceeding on the basis of compromise. In the instant case, the partners through the partnership firm have allegedly used the fabricated and forged document to avail the credit from the bank which it would not have get otherwise than the said document, has predominant criminal intend over the civil dispute. By placing reliance upon a judgment of *GHCL Employees Stock Option Trust Vs. India Infoline Ltd.*, , the petitioner tried to convince that the breach of trust or offences like cheating have both the civil and criminal flavours but depends upon the facts and circumstances of the each case whether such an alleged act is pre-dominantly a civil wrong or a criminal offence. According to the petitioner, the money which was availed under the credit facility was immediately repaid together with the interest and the bank thereafter refunded the excess amount which logically infers that there was a compromise and/or settlement between the petitioner and the bank. Much emphasis is made to the said fact to impress upon the Court that the public money had been secured and in fact, there was no loss with the bank suffered for such act.

11. In this regard, it is pertinent to record that the petitioner along with the other partner filed the identical application for quashing the criminal proceeding before this Court which gave rise to registration of Criminal Revision No. 1750 of 1989. The said application was dismissed on 8th August, 1995 as the copies of the charge-sheet was not filed and the facts recorded in FIR, prima facie establishes the guilty mind. A further attempt was made in C.R.R. No. 952 of 1998 by the said partners which resulted in disposal by directing the Session Judge to expedite the matter. Subsequently the petitioner filed the instant application alone seeking an identical relief. Amidst pendency of the instant revisional application, the other partner individually filed another revisional application (C.R.R. No. 4138 of 2010) for quashing the proceeding which faced dismissal as the payment of the alleged cheated money does not erase the criminality which is prima facie established. The Court further records the statement of the bank that they are not agreeable to compromise and opposes the application. In the instant case, the Bank is also represented and does not in unequivocal terms conceded that they are not intending to proceed with the criminal case as the learned Advocate simply submits that whatever order that may be passed by this Court shall bind his client. Though the compromise does not mean a compromise in a proceeding as the compromise and settlement can be arrived between the parties at the pre-litigation stage. It is undisputed that if the parties have compromised and/or settled the disputes and decided that they would not pursue the civil proceeding as well as the criminal proceeding and the offence appears to be of commercial-in-nature, the ratio laid down in case of *Gian Singh Vs. State of Punjab and Another*, , *Nikhil Merchant Vs. Central Bureau of Investigation and Another*, & *Manoj Sharma*, (AIR 2008 SC (Supp) 1171)

(supra) has its fullest applicability. In subsequent judgment rendered in case of CBI, ACB, Mumbai Vs. Narendra Lal Jain and Others, , the three judge bench held that if the monetary loss suffered by the bank is made good and there was a mutual settlement between the parties, the proceeding can be quashed under Section 482 of the Code in these words:

"14. In the present case, having regard to the fact that the liability to make good the monetary loss suffered by the Bank had been mutually settled between the parties and the accused had accepted the liability in this regard, the High Court had thought it fit to invoke its power under Section 482, Cr.P.C. We do not see how such exercise of power can be faulted or held to be erroneous. Section 482 of the Code inheres in the High Court the power to make such order as may be considered necessary to, inter alia, prevent the abuse of the process of law or to serve the ends of justice. While it will be wholly unnecessary to revert or refer to the settled position in law with regard to the contours of the power available under Section 482, Cr.P.C. it must be remembered that continuance of a criminal proceeding which is likely to become oppressive or may partake the character of a lame prosecution would be good ground to invoke the extraordinary power under Section 482, Cr.P.C."

12. According to the petitioner, the facts of the CBI, ACB, Mumbai Vs. Narendra Lal Jain and Others, are identical and similar to the fact involved in this case. The payment have been made to the bank who not only receives the principle but also the interest and cannot be said to have suffered any loss. It would be unjust and cause serious harassment if the criminal proceeding is continued. The Apex Court noticed the terms of the compromise which is recorded in paragraph 3 thereof wherein the bank expressed that they would not proceed with the criminal case initiated before the C.B.I. In the instant case, the bank does not say that they have mutually settled not to proceed with the criminal case even, the certified copy of the order-sheet produced before this Court would depict that the witnesses on behalf of the prosecution are produced and they are being cross-examined by the other partner. It cannot be said with certainty that there is a conscious settlement and/or compromise between the bank and the accused that the bank would not proceed with the criminal proceeding. Reliance can be safely placed to a case of the Apex Court in case of Central Bureau of Investigation Vs. Jagjit Singh, where the prayer for quashing the proceeding under Section 482 of the Code was rejected as there was no compromise between the parties. In the said report, a loan was taken on the basis of the forged document and subsequently an amount was recovered through a civil proceeding. It was, at this stage, contended by the accused therein that since the money has been recovered, it would cause unnecessary harassment if the criminal proceeding is pursued. The Court after noticing the larger bench judgment in case of Gian Singh Vs. State of Punjab and Another, declined to quash the criminal proceeding as the recovery of money through a proceeding does not tantamount to compromise.

13. In the instant matter, bank has not come forward conveying that they have settled the dispute and decided not to proceed with the criminal proceeding. In absence of any compromise and/or settlement, mere payment of the amount received by using of forged document from a bank does not invite the quashing of the criminal proceeding.

14. This Court does not find any ground to allow the prayer made in this petition.

15. The revisional application is dismissed. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.