**(2011) 01 CAL CK 0109**

**In the Calcutta High Court**

**Case No :** C.R.R No. 1845 of 2009 and C.R.A.N. 2353 of 2010

Anuj Agarwal and Anrs. APPELLANT

Vs

The Central Bureau of Investigation RESPONDENT

**Date of Decision :** 31-01-2011

**Acts Referred:**

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 155, 156, 239, 401, 438
Penal Code, 1860 (IPC) — Section 120B, 409, 420, 467, 468
Prevention of Corruption Act, 1988 — Section 13

**Citation :** (2011) 01 CAL CK 0109

**Hon'ble Judges :** Kanchan Chakraborty, J

**Bench :** Single Bench

**Advocate :** Milon Mukherjee, Saibal Mondal and Subhashis Dasgupta, for the Appellant; Swapan Kumar Mallick, for State, Himangshu De and Mrintunjoy Chatterjee for C.B.I., for the Respondent

## Judgement

Kanchan Chakraborty, J.—An order dated 22.4.2009 passed by the learned Judge-in-charge, 3rd Special Court, Kolkata in Special case No. 14 of 2008 has raised confusion galore the Bar. On the one hand, the correctness, legality and validity of the order has been challenged u/s 401 of Code of Criminal Procedure and on the other hand, the entire proceeding in Special Case No. 14 of 2008 has been asked to be quashed. The question, to be stated preciously, which has been raised is whether this Court by invoking its extraordinary inherent power u/s 482 of the Code can quash a Criminal proceeding wherein a prima facie non-compoundable offence is made out by the Investigating Agency when the actual aggrieved person has intended not to proceed with the criminal action any further.

2. The said question arises on the following factual matrix:

3. On the basis of a source information, a case CBI/SPE/BS & FC/RC BSK 204 dated 17.12.2004 was registered against Mihir kanti Mazumdar, the then Branch Manager, UCO Bank, Beck Bagan Branch, Calcutta (2) An up Mukherjee, the then

Chief Officer(Credit), Regional Office, UCO Bank, Kolkata. 3) Pankaj Shah, 4) Sarat Kobi, 5) Ravi Kataruka, 6) Manoj Todi, 7) Subhasish Ghosh, 8) Anuj Agarwal (Petitioner No. 1)9) Umesh Chandra Agarwal (Petitioner No. 2), 10) Baidyanath Goswami and Ors. Under Sections 420, 467, 468, 471/120B of the IPC read with Section 13(2) and 13(1)(d) of the Prevention of Corruption Act.

4. It was alleged that during the period 2000-2002 Mihir Kanti Mazumder entered into a conspiracy with private person such as Pankaj Shah, Sarat Kobi, Ravi Kataruka, Moanoj Todi, Subhasish Ghosh, Anuj Agarwal, Umesh Chandra Agarwal and other unknown private person and in furtherance of the said conspiracy, they had abused their official positions as public servants and fraudulently/dishonestly sanctioned/disbursed credit facilities in favour of 118 firms/companies which were non existent, under UCO Bank Trader Scheme and dishonestly allowed the above private accused persons to fraudulently divert bank''s funds and misuse the same for their own purpose, thereby caused loss to the bank to the tune of Rs. 19.57 crores and gain themselves wrongfully. The Investigating Agency i.e., CBI on completion of investigation filed charge-sheet No. 14 dated 14.12.2007 after obtaining necessary sanction and after observing all formalities against the above named persons under Sections 420, 467, 468, 471/120B of the IPC read with Section 13(2) and 13(1)(d) of the Prevention of Corruption Act.

5. The present Petitioners Anuj Agarwal and Umesh Chandra Agarwal filed an application before the learned Judge-in-charge, 3rd Special Court, Calcutta on 05.02.2009 praying for their discharge/acquittal from the case.

6. The learned Special Judge upon hearing of both the parties, petition and affidavit filed on their behalf and considering the judicial pronouncements on the issue as well as materials placed before it, passed the order impugned dated 22.4.2009 whereby and whereunder, such prayers of the Petitioners were rejected. The ordering portion of the learned Civil Court is set out below:

Discharge of the accused persons u/s 239 Code of Criminal Procedure is a Special power of the Magistrate who must hold that the charge is groundless. In view of the elements of criminal ingredients of some Sections of IPC, I can not say that the charge is groundless. The accused persons (A) - (4), (A) - (5) may try their luck u/s 482 of the Code of Criminal Procedure before the Hon''ble Court. The petition is thus disposed of in the negative on the ground that this Court is not competent enough to pass any order of acquittal or release the accused persons from this case simple because the payment has been made by them.

7. The case of the present Petitioners in the learned Court was that Mihir Kanti Mazumder and An up Mukherjee being the public servants as higher officials of UCO Bank entered into Criminal conspiracy with these two Petitioners and defrauded UCO Bank to the tune of Rs. 70.88 lakh which was given to them as loan in the name of five companies, such as, (a) M/S R.G. Holdings Private Limited,(b)IEHT Technology Private Limited, (c) M/S R.L. Trading Private Limited, (d) M/S Fragnance Impex Private Limited and (e) M/S Bagla Adhesive Private

 

Limited. All those companies merged in one as M/S R.G. holding private limited. The entire loan of amount Rs. 70.88 lakh with interest which disbursed to the above named five companies was repaid by the M/S R.G. Holdings private limited because all the above five companies merged into one company M/S R.G. Holdings private limited. The Petitioners were directors of M/S R.G. Holdings private limited and the company is still in existence. It was the case of the Petitioners before the learned Judge that they have paid up the entire loan amount along with interest accrued thereon by two cheques one on 30.5.2005 and another on 24.8.2005. Although the entire loan amount was repaid by 24.8.2005 and CBI had knowledge of that fact, charge-sheet was submitted on 14.12.2007 suppressing the fact of repayment made by this Petitioners. The Senior Manager to UCO Bank Beck Bagan, Branch issued certificate dated 12.9.2005 stating that the cash credit account of M/S R.G. Holdings private limited was closed. "No Due" certificate was also issued by Senior Manager of the said Branch dated 13.10.2005.

8. Before passing the order, the learned Judge Special Court summoned the bank authority to verify the documents filed by the Petitioners who not only admitted the genuineness of those certificates but also issued a fresh certificates regarding "no dues" of the said companies on 10.2.2009.

9. The petition so filed by these two Petitioners in the Court of learned Special Judge was opposed by the CBI. The decision of the Hon''ble Apex Court in Nikhil Merchant v. CBI 2008(3) SCC 858, Duncans Agro Industries Ltd. 1996 C Cr. LR (SC) 320, B.S. Joshi and Others Vs. State of Haryana and Another, Manoj Sharma v. State and Ors. 2008(14) scale were referred to by the parties and those decisions of the Hon''ble Apex Court were taken into consideration by the learned Special Judge who observed - The non-payment of the dues of the Bank is prima facie a civil offence and the present case has some criminal facets. Such Criminal facets have been waved out in view of the judgment of the Apex Court in Nikhil Merchant''s case. There is no allegation against this accused persons for the offence punishable u/s 409 of the IPC. There may be some elements of forgery against them such can be cured on application of the judgment of the Apex Court as cited above:

10. The learned Special Judge observed further -" This being the Court of initial jurisdiction, I can not usurp the jurisdiction of the Hon''ble Court by allowing the petition of the defense even though the Court is prima facie satisfied that as per the decision of the Apex Court, the accused No. 4-5 have reasonable ground to file such a petition".

11. Perhaps the above observations of the learned Special Court prompted the Petitioner who were accused Nos. 4 and 5 in the Court before the learned Special Judge, to take out the present petition u/s 401 as well as 482 of the Criminal Procedure Code.

12. As far as the prayer for revision of the order impugned passed by the learned

 

Special Judge by invoking revisional jurisdiction of this Court is concerned, I think that there is no irregularity and illegality in the order necessitating interference in this revision. In fact, this Court finds no scope to interfere with the order passed by the Special Court by exercising its revisional jurisdiction u/s 401 of the Code of Criminal Procedure

13. The main thrust of contention of Mr. Mukherjee, learned Senior Counsel appearing for the Petitioners is that the Hon''ble Apex Court in State of Haryana and others Vs. Ch. Bhajan Lal and others, was pleased to give guidelines regarding exercising of extraordinary power by the High Court under Article 226 or inherent powers u/s 482 Code of Criminal Procedure Mr. Mukherjee has drawn attention to the category No. (7) of the cases where, according to the Hon''ble Apex Court, this Court can exercise its inherent power u/s 482 Code of Criminal Procedure and quash a proceeding. Instance No. (7) says about the cases where a Criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with ulterior motive for wreaking vengeance on the accused and with a view spite him due to private and personal grudge. According to Mr. Mukherjee, the CBI have knowledge that all the dues to the UCO bank was paid up by the Petitioners with interest long before the charge-sheet was filed against them together with other accused persons. The payment was made on 24.8.2005 while the charge-sheet was submitted on 14.12.2007, If so, there is suppression of material fact in the charge-sheet and that has been done with a ulterior motive for were king Vengeance on the Petitioners with a view to spite them due to private and personal grudge.

14. Mr. Mukherjee refers to the decision in B.S. Joshi v. State of Haryana and Ors. (Supra). He submits that where there is almost no change of conviction, the Hon''ble Apex Court observed, it would be improper to decline to exercise power of quashing on the ground that it would be permitting the parties to compound non-compoundable offence.

15. Mr. Mukherjee refers to the decision in CBI v. Duncans Agro Industries Limited (Supra) in support of his contention and submits that where there is materials enough justifying to hold that the case is basically a matter of Civil dispute and when dues have been paid already, High Court can exercise its inherent power u/s 438 Cr.P.C and quash the proceeding.

16. To draw support to his contention, Mr. Mukherjee refers to the decision in Madan Mohan v. State of Pubjab (2008) 2 CLJ (SC) 70. He submits that Hon''ble Court was pleased to observe that as the dispute purely a personal between two contesting parties which arose out of extensive business dealings between them, where no public policy was involved, no useful purpose could be served by continuing the proceeding in the light of compromise when the complainant had passed away. High Court should not be, in such a case, confused a compounding of an offence with quashing of proceeding. The outer Limited for compounding an offence was irrelevant factor in quashing of proceeding.

 

17. In order to strengthen his contention, Mr. Mukherjee refers to the off quoted decision in Nikhil Merchant v. CBI (2009) CLR (19) and submits the Hon''ble Apex Court was pleased to hold that when the dispute has been compromised it will be futile to continue and the Criminal proceeding is liable to be quashed by High Court in exercising of inherent power. Mr. Mukherjee relies on another decision in Rumi Dhar v. State of West Bengal (2009) CLR (SC) 418 and submits that the Hon''ble Apex Court was pleased to held that discharge of accused is not dependant on the result of civil proceeding and High Court, for doing complete justice, can exercise its extraordinary jurisdiction. Another decision in CBI v. Rabisankar Prasad and Ors. (2009) 2 SCC 1063 as already been referred to by Mr. Mukherjee to help this Court in coming to a conclusion as to whether or not in the fitness of facts and circumstances of this case, the power u/s 482 of the Code is to be exercised.

18. Mr. Milon Mukherjee, Senior Advocate for the Petitioners submits that it is true that a charge-sheet against the Petitioners have been filled Sections 420, 467, 468, 471/120B of the IPC read with Section 13(2) and 13(1)(d) of the Prevention of Corruption Act, the UCO Bank, i.e., the person aggrieved has no intention at all to continue the case against the Petitioners because they repaid the entire loan amount together with interest accrued thereon to the bank well before the charge-sheet was filed. Since, the bank, being the aggrieved person, has no grievance against these two Petitioners, continuing this Criminal proceeding against the Petitioners would be amounting to abuse of the process of the Court and is against the principle of "ex debito justitae". He submits further that the learned Special Court, in fact, agreed to the factual position as well as legal position but could not exercise the power u/s 482 Cr.P.C which was not available to it. Therefore, he submits that this Court by invoking its extraordinary inherent power u/s 482 Cr.P.C., can quashed the entire proceeding against these two Petitioners.

19. Mr. Himangshu De, learned Senior Advocate appearing for the CBI submits that the decision referred to above will not come in aid of the Petitioners because - firstly, the factual aspects of the Nikhil Merchant''s case (Supra), B.S. Jhoshi''s case (supra) and Duncans Agro Industries Limited (Supra) are different to that of this case. He draws attention of this Court to one of the important factors involved in this case. He submits that in those cases specially Nikhil Merchant case, Duncans Agro Industries case and Rumi Dhar case, there were civil suits over the same issue. In these cases compromise decree was passed. In B. S. Joshi''s case, the dispute was matrimonial in nature. In other cases, the dispute although commercial but was between the private persons. In the instant, case the UCO Bank is not coming forward and file any application expressing its desire or unwillingness to proceed further against the Petitioners. Mr. De put much emphasise on the decision in State of Haryana v. Bhajan Lal (Supra) and CBI v. Rabisankar Prasad (Supra). Mr. De submits that the factual aspects CBI v. Rabisankar Prasad are to the factual aspect of this case and the principle laid down therein is squarely applicable in the instant case. He further submits that

 

the application of the Petitioners should be rejected.

20. Mr. Swapan Kumar Mallick, learned Counsel appearing for the State submits that when the Trial Court is satisfied that there is a strong prima facie case which is not compoundable in and between the parties even with the leave of Court by the person aggrieved, this Court should not exercise its inherent power u/s 482 Code of Criminal Procedure

21. Before examining the legal position, it appears necessary to recapitulate the averments and materials incorporated in the charge-sheet filed against the Petitioners and others.

During 2001-02 Sh. Majumdar, the then Branch Manager UCO Bank Beckbagan Branch, Sh. An up Mukherjee, the then Chief Officer (Credit) of UCO Bank, RO. Kolkata entered into criminal conspiracy with private persons viz S/Shri Pankaj Shah, Sarat Kabi, Rabi Kataruka, Manoj Todi, Subhasish Ghosh and other unknown persons and in furtherance of conspiracy they had abused their official position and fraudulently and dishonestly sanctioned/disbursed credit facilities under UCO Traders Scheme in favour of 118 Firms/Companies most of which were non-existent and dishonestly allowed the above private accused persons to fraudulently divert Bank''s funds and misused the same thereby causing wrongful loss to the Bank to the tune of Rs. 19.57 Crores.

Investigation brought out the complicity/involvement of S/Shri Neeraj Poddar, Anuj Agarwal, H.V.K. Bajoria, O.P. Agarwal, Malay Pratim Basu along with other associate Directors.

Investigation revealed that although the loans were sanctioned/disbursed to 118 Companies, 109 Companies out of them were found to be non-existent and belonged to 06 different groups and the operations in the Accounts were controlled by 06 different persons. He accused Bank''s officials had illegally and irregular manner merged the 118 companies into 16 Companies and the details as under.

I. Pankaj Shah- 20 Companies mentioned in FIR merged into companies-3. II. Neeraj Poddar - 15 companies merged into companies-3 III. Anuj Agarwal -5 companies merged into company-1 IV. H.V.K. Bajoria - 49 companies merged into companies-5 V. O.P. Agarwal - 19 Companies merged into companies-2 VI. Malay Pratim Baus- 10 Companies merged into companies-2 The 05 companies managed by Sh. Anuj Agarwal/Umesh Ch. Agarwal/Baidya Nath Goswami/R.P. Sharma had availed Cash Credit limits of Rs. 15 lacs each from UCO Bank and above said loans were restructure mater and the total liability increased to Rs. 75 lacs. Subsequently, the 05 companies were shown merged together with M/s R.G. Holdings Pvt Ltd. illegally/falsely by accused Bank''s officials and the total outstanding of M/s R.G. Holdings Pvt. Ltd, was at Rs. 70.88 lacs as on 07.03.2005. The siphoning of funds from different Accounts of above companies was effected with the active help of Sh. Birendra Kr. Jain and Sh. Sachet S Araf on commission basis at the instance of Sh. Anuj Agarwal and funds had flown/

 

gone back to the main conspirator Sh. Anuj Agarwal.

Investigation also revealed that out of 05 companies, 04 companies did not exist at the given address. Investigation also revealed that Sh. Anuj Agarwal, Sh. Umesh Ch. Agarwal in order to get the Bank Accounts opened in the name of fictitious companies had produced false. Forged documents viz. Form 32, Form 18 and other records to the Bank knowing them to be false. The Registrar of Companies confirmed that the accused persons not really Directors of the above stated defunct companies at the relevant time.

Investigation also revealed that Sh. Umesh Ch. Agarwal and Sh. Baidya Nath Goswami Impersonating as by Baidya Nath Abasthi/R.P. Sharma actively helped Sh. Anuj Agarwal, the main accused by falsely claiming themselves as Directors of the Group Companies and had signed loan applications/loan documents at the behest of Sh. Anuj Agarwal and actively facilitated Anuj Agarwal in fraudulent availment of Bank Loans. Charge-sheet filed on 14.12.2007

22. The averment in the FIR, the charge-sheet basing on the materials collected by the I.O. and the view taken by the learned Judge Special Court altogether leads unmistakably to the fact that huge amount of public money has been siphoned by the accused persons including the Petitioners through different A/Cs in the names of fictitious companies with active help high officials of the UCO bank. The details and particulars regarding respective individual roles of the accused including the Petitioners in receiving pecuniary advantage from the bank officials in a clandestine manner have been enumerated. The averments in the FIR, charge-sheet and the view of the learned Judge, Special Court if taken at their face value, of course and undoubtedly constitute offence under Sections 420, 467, 468, 471/120B of the IPC read with Section 13(2) and 13(1)(d) of the Prevention of Corruption Act.

23. In R.P. Kapur Vs. The State of Punjab, and in Bhajan Lal case (Supra) the Hon''ble Apex Court summarized some categories of cases where inherent power can be exercised to quash proceeding.

1. Whether 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 F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers u/s 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 uncontroverted 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 make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police

 

officer without an order of a Magistrate as contemplated u/s 155(2) of the Code4.

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 ever 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 for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

24. In CBI New Delhi v. Duncans Agro Industries Limited (Supra), the Hon''ble Court observed that for the purpose of quashing the complaint, it is necessary to consider whether the allegations in the complaint have been made out an offence or not. It is not necessary to scrutinize the allegation for the purpose of deciding whether such allegations are likely to be upheld in the trial. Any action by way of quashing the complaint is an action to be taken at the threshold before evidence are laid down in support of the complaint. For quashing the complaint by way of action at the threshold, it is , therefore, necessary to consider whether on the fact of the allegations incorporated in a complaint or FIR, a Criminal offence is constituted or not.

25. The tenor of the judgment indicates that quashing of the complaint would depend on facts of the each case. In B. S. Joshi and Ors. (Supra) the Hon''ble Court reiterated the legal position that the Courts inherent powers have no limit but should be exercised with utmost care and caution. Inherent power must be utilised with the sole purpose to prevent the abuse of the process of the Court or to otherwise secure the ends of justice. In that case, the dispute was matrimonial in nature and a proceeding u/s 498A IPC was allowed to be quashed on the basis of the fact that the parties to the case obtained divorce on mutual consent and expressed their unwillingness to proceed with the pending criminal case.

26. In Nikhil Merchant case (Supra), the Hon''ble Court observed that technicality should not be allowed to stand in the way of quashing of the Criminal proceeding. In Jagdish Chanana and Others Vs. State of Haryana and Another, , the Hon''ble Court observed that the fact that a compromise has indeed been recorded is admitted by all sides and in terms of the compromise the disputes which are purely personal in nature and arise out of criminal transaction have been settled in terms of the compromise with one of the terms of the compromise being that proceeding pending in Court may be withdrawn or compromised or quashed, as the case may be. In the light of the compromise it

 

is unlikely that prosecution will succeed in the matter to continue with the proceeding, therefore, would be a futile exercise.

27. In Madan Mohan Abbot (Supra) the Hon''ble Court observed, " we need to emphasize that it is perhaps an advisable that in disputes where the question involved is a truly personal nature, the Court should ordinarily accept in terms of the compromise even in Criminal proceeding as keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury which the Courts grossly over burdened as they are, can not afford and that the time so saved can be utilised in decide more effective and meaningful litigation.

28. In Smt. Rumi Dhar v. State of West Bengal (Supra), the Hon''ble Apex Court approved the observation of the learned Special Judge who came to a findings that although the accused therein made a good gesture by paying the dues of the bank but that fact alone can not exonerate the accused from a prima facie charge. The learned Special Judge further observed that in case he allows the prayer, then he has to swallow a case of bribery that accused has paid back the amount to the sufferer is the amount received as bribe.

29. The facts of the instant case are quite akin to Ruma Dhar''s case (Supra). In CBI v. Ravi Sankar Prasad and Ors. (2009) 2 SCC 1063 the Hon''ble Apex Court was pleased to discuss almost all the important decisions passed by it over the issue including Smt. Rumi Dhar (Supra)''s case and observed that the exercise of inherent powers would entirely depend on the facts and circumstances of the each case. The Hon''ble Court further observed that the object of incorporating inherent powers in the code is to prevent abuse of the process of the Court and to secure end of justice when the averments in the FIR and materials in charge-sheet if taken at their face value constitute any offence, the Court should not exercise its inherent power u/s 482 of the Code of Criminal Procedure Courts may, of course, extend it inherent power to put to an end to a litigation which is between private persons, or a matrimonial issue or a commercial prosecution, in order to stop abuse of the process of the Court. But, where there is a strong prima facie case appearing from the materials on record relating to offence like cheating, forgery, mis-representation and wrongful gain in clandestine manner of public money, Court should not and must not extend its inherent power u/s 482 of the Code to quash the proceeding against the accused person. In the instant case, I reiterate, the UCO bank, the person aggrieved, has not come forward and taken out any application in the Court of learned Special Court praying for leave to compromise. There is no civil litigation over the issue pending in any Court. The UCO Bank has not requested in writing to the CBI for exonerating the present Petitioner from the charge or that it has no grievance against the Petitioners. There is a strong prima facie case against this Petitioners who together with others and with the active help of bank officials siphoned huge amount of public money byway of fraud, conspiracy, forgery and imprison fiction. The Hon''ble Court in CBI v. Rabisankar Prasad (Supra) observed that, "Before parting with the case we would like to observe that mere repayment of loan

 

under a statement can not exempt the accused from the criminal proceeding in the facts of this case". In the case in hand, however, there is no settlement also.

30. Mr. Mukherjee submits that in CBI v. Rabisankar Prasad (Supra) 92 witnesses were already examined. Therefore, the factual aspect of that case and that of this case can not be put on same footing. This proposition of Mr. Mukherjee does not appear to be irrefutable. The fact that 92 witnesses were examined is one of the factors considered by the Hon''ble Apex Court. That is not the sole ground basing which the Hon''ble Court has came to the findings mentioned earlier.

31. In view of the discussion above on the factual aspect as well as ratio of the judicial pronouncements, I am constrained to hold that this not a proper case where this Court can exercise its inherent power u/s 482 of Code of Criminal Procedure and quash the pending proceeding against the Petitioners as prayed for.

32. Accordingly the prayer stands rejected. The Criminal revision is disposed of.

33. Stay order, if any, stands vacated.

34. Learned Trial Court is directed to proceed with the Trial in accordance with law.

35. Urgent Photostat certified copy of the judgment, if applied for, be handed over to the parties on compliance of necessary formalities.