(2002) 01 GAU CK 0058

In the Gauhati High Court

Case No : Criminal Revision No. 447 of l998

(Brigadier) Omesh Kr. Sondhi APPELLANT

Vs

Central Bureau of Investigation RESPONDENT

Date of Decision : 21-01-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 227, 228
Penal Code, 1860 (IPC) — Section 120B, 420, 468
Prevention of Corruption Act, 1988 — Section 13(1)(D)

Citation : (2002) 1 GLT 633

Hon'ble Judges : P.G. Agarwal, J

Bench : Single Bench

Advocate : D.K. Mishra, Z. Karnar and D. Rajkhowa, for the Appellant; Dilip Das, Spl. P.P., for the Respondent

Judgement

P.G. Agarwal, J.—Heard Sri D.K. Mishra, learned senior counsel for the Petitioner and Sri Dilip Das, the learned Spl. P.P. for C.B.I. Sri A.B. Gupta, Inspector of C.B.I., now posted at Calcutta, Investigating Officer of this case, is present in the Court with the connected records.

2. On an F.I.R. filed by Shri Suresh Garodia, who complained about a big fraud committed by an employee of the Delhi Development Authority, in short, D.D.A., case No. RC-12(A)/96/SHG dated 6.3.96 was registered and investigated. After detailed investigation C.B.I, submitted charge-sheet against the two persons, namely, I. Brigadier Omesh Kumar Sondhi and (2) Om Prakash Dhakolia. In the Special Case No. 7(C)/97, the learned Special Judge, vide order dated 26.8.1998, framed charges against both the accused persons u/s 120B/420 IPC. A separate charge u/s 468 IPC and u/s 13(1)(D) of the Prevention of Corruption Act was framed against O.P. Dhakolia. The present revision has been preferred by Brigadier O.K. Sondhi against the said order framing charges against him.

3. The facts relevant for the purpose, in brief, are that, a flat at Basant Kunj at New Delhi, constructed by the Delhi Development Authority was allotted in the

name of the Petitioner accused Brigadier O.K. Sondhi. Sri Sondhi made certain payments. In the meantime, the total cost of the flat got increased and Mr. Sondhi failed to pay the balance amount as required under the rules and the name of the Petitioner was delisted from the list of allottees. The Petitioner also filed an application before the DDA, authorities for refund of his deposits. The chain of events which led to the present case, however, started after that, and before the release/refund of the amount by the DDA authorities.

4. The complainant, a resident of Guwahati, was looking for a flat (property) at Delhi and through one of his friend Md. Nawab, he came into contact with the co-accused Om Prakash Dhakolia, who was an employee of DDA. The said Dhakolia offered to get the flat restored in the name of Mr. Sondhi and thereafter, get it transferred in the name of the informant on certain conditions. An agreement was arrived at between the informant and Mr. Dhakolia. Moreover, pursuant to the said agreement, the complainant paid a sum of Rs. 1,97,500/- vide DD. No. 110012053 dated 14.7.1995 and thereafter, an agreement to sell and purchase was made between the informant''s son and Mr. Sondhi duly notarised on 25th July, 1995. The allegation of the informant is that, thereafter, he paid large amount to Mr. O.P. Dhakolia for getting the allotment restored and for getting the said flat at Basant Kunj. The details of the payments made to Mr. O.P. Dhakolia and also in the joint account has been given in the FIR. According to the informant a sum of Rs. 14,75,000/- was cheated from him by the said O.P. Dhakolia.

5. So far as Mr. O.P. Dhakolia is concerned, we are not concerned with the allegations and charge framed against him in this case as he is not before us and he has not challenged the impugned order.

6. The case of the Petitioner is that while he was awaiting his refund from DDA after cancellation of his allotment the present agreement was executed by him and a sum of Rs. 1,97,500/- was paid to him by the aforementioned draft and he executed documents Nos. 18, 19 & 20, so that the other party can get the flat restored and they may get it transferred to their name. However, after the execution of the documents the DDA sent a cheque of Rs. 1,72,925 to him on 11.8.1995 and they refused to restore back the flat. The Petitioner claims that he is in no way involved in forgery or cheating and the Petitioner is ready to refund the amount received by him by DD dated 14.7.1995. 7. At this stage, we may consider the law laid down by the Apex Court in the matter of framing of charge:

The scope and ambit of the consideration of charge by the trial Court, came up for discussion and decision before the Hon''ble Supreme Court in a number of cases. It has been held that in the State of Bihar Vs. Ramesh Singh,

Reading Ss 227 and 228 together in juxtaposition as they have got to be, it would be clear that as the beginning and the initial stage of the trial, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter u/s 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction.

Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused.

8. The matter came up before the Apex Court again in Union of India (UOI) Vs. Prafulla Kumar Samal and Another, On consideration of the earlier authorities, the Apex Court laid down the following principles:

(1) That the Judge while'' considering the question of framing the charges u/s 227 of the Code has the undoubted power to shift and weigh the evidence of the limited purpose of finding out whether or not a prima facie case against the accused has been made out;

(2) Whether the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction u/s 227 of the Code of the Judge, under the present Code is a senior and experienced Court, cannot act merely as a Post-office or a mouthpiece of the prosecution, but has to consider the broad possibilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting trial.

9. Again Suptd. and Remembrancer of Legal Affairs, Supdt. and Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and Others, The Apex Court observed in paragraph 18 of the judgment as under:

The standard of test, proof and judgment which is to be applied finally before finding, the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged may justify the framing of charge against the accused in respect of the commission of that offence.

10. In Niranjan Singh Karam Singh Punjabi and Others Vs. Jitendra Bhimraj Bijja and others, the Hon''ble Supreme Court considered the above referred decision and observed as below:

It seems well settled that at the Sections 227-228 stage, i.e., stage of framing the charge, the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting alleged offence. The Court may for this limited purpose shift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

11. In the case of State of Maharashtra, Etc. Etc. Vs. Som Nath Thapa, Etc. Etc., the Apex Court observed that framing of charge effects a persons liberty substantially and hence materials on record must satisfy the mind of the Court with the commission of the offence by the accused in question as probably it is no drought even strong suspicion founded upon materials is also sufficient to frame charge and Court is not required to examine the truth, veracity or effect of offence at this stage.

12. In the light of the above decision and guidelines let us examine whether the prosecution has been able to establish a prima facie case warranting framing of charge by the Court below:

13. As stated above, the charge is one u/s 120B and 420 IPC, the question of 120B IPC will arise if a prima facie case u/s 420 IPC is made out against the Petitioner.

14. From the facts stated above, we find that the matter relates to a flat originally allotted to the present Petitioner. On perusal of the documents before us it is seen that this is not a case where the Petitioner having the knowledge that the allotment made in his favour has already been cancelled, has tried to convey to the proposed buyer/purchaser an impression that he still holds his allotment legally. In such a situation the defrauding intention can very well be presumed. In the FIR itself, the complainant has stated categorically that the allotment in the name of Sri O.K. Sondhi was delisted for default of payment to DDA. In Anr. part of the FIR, the Petitioner stated/informed categorically that he agreed to make payment to the co-accused Dhakolia for restoration of the claim to Mr. Sondhi. The learned Counsel for the CBI has however tried to place reliance on document No. 20. A bare perusal of the document will show that this

document was created in favour of the informant''s son for augmenting this claim in case the restoration is allowed by the DDA, as because the various facts mentioned in the documents not correct in respect of both the parties. Para 2 of the terms of agreement reads as follows:

That the first party is given vacant physical possession of the said property into 2nd party, at the spot alongwith the documents related thereto.

15. In view of the admitted case of the complainant which the informant notarised on 25.7.1995 added to execution of document on the date of notarisation of document No. 20 i.e., 25.7.1995. Allotment of O.K. Sondhi stood cancelled and as a matter of fact the Petitioner was awaiting the refund of amount only on the basis of his own letter addressed to the DDA and this fact was very much known to the informant, very well. Thus, basing on document No. 20, it cannot be said that the Petitioner had cheated the complainant or his son.

16. Moreover no reliance can be placed on certain statements made in document No. 20 regarding payment made to Mr. Sondhi. As a matter of fact no payment was made on the basis of document No. 20. Further, document No. 19, which is an agreement for sale, the total consideration for sale of the flat was Rs. 1,97,500/- only. The agreement thus, was between the Petitioner and the complainant''s son Ajay Garodia. The receipt of this amount is in no way disputed in the present case. Moreover, we find that document No. 18 is the General Power of Attorney executed by the Petitioner accused and it is submitted that property in Delhi are generally transferred by the General Power of Attorney only. Document No. 18 was also notarised on 25.7.95. In this case, we are riot concerned with the legality of such transfers by General Power of Attorney. Sri Mishra at this stage submits that neither the document Nos. 18, 19 and 20 bears signature of the witnesses, although such signature is obligatory.

17. In the charge-sheet, it has been stated that the Petitioner Mr. Sondhi received Rs. 3,27,000/- and in order to clarify the same, Investigating Officer was asked to be present in the Court today as because according to the Petitioner, they have received a sum of Rs. 1,97,500/-through a third person. As a matter of fact, Petitioner claims that at no point of time he met Mr. Dhakolia or the complainant and the above submissions are supported from the complainant''s own statement in the FIR wherein it is alleged:

Sri Dhakolia failed to keep up his promise....

18. It is learnt that Sri Dhakolia with the help of Sri R.K. Vajpayee set up someone as O.K Sondhi, either real or fake person, and he acted through him for wrongful gain. Sri Mishra submits that after receipt of the amount from DDA, the Petitioner wanted to refund this amount received by him on 14.5.97, but the said third person refused to receive the money back and till now he has not met the third person or Mr. Dhakolia and the money is lying with him.

19. The above statement of the complainant which was made after the entire

incident had occurred goes to show that the complainant at no point of time met Mr. O.K. Sondhi in person.

20. The basic ingredients of the offence of cheating are deceit or dishonest inducement. As stated above, there is no deceit through the Petitioner O.K. Sondhi as the actual fact or actual status of the allotment of DDA flat at Basant Kunj was made known to the complainant through the 3rd person. So far inducement is concerned, the Petitioner at no point of time met the complainant. There is no document also to prove the offence of dishonest inducement. As such, there is no question of inducement caused through documents or letters and nothing has been produced before us.

21. From the documents/materials produced before us, I find that the prosecution has failed to support the allegations in the charge-sheet that the Petitioner Mr. Sondhi received a sum of Rs. 3,27,000/- through the complainant. He had received a sum of Rs. 1,97,500/- on 14.7.95 (Not Rs. 1,95,500/-) as claimed in the charge-sheet.

22. In view of what has been stated above, we find that no prima-facie case of cheating against Mr. Sondhi is made out. There is absolutely no materials to show that the present Petitioner was in league with the co-accused in cheating the complainant or his son. From the statement of the witness it is seen that the allegations are only against the co-accused Mr. Dhakolia. In the result the framing of charge against the Petitioner cannot be sustained. Accordingly the order, so far it relates to Framing of charge against the Petitioner Brigadier Omesh Kr. Sondhi is concerned, stands set aside and Sri OK Sondhi stands discharged.

23. So far, he amount of Rs. 1,97,500/-received by the Petitioner Sri O.K. Sondhi is concerned, the same is the property of the complainant/informant Suresh Garodia and his son Sri Ajay Garodia and must go to them. The learned Counsel for the Petitioner submits that to send back the amount he and Petitioner has made a daft in favour of complainant''s son and it is on way to him. The draft for the above amount shall be deposited before the Special Judge, Assam, Guwahati within two weeks time from today and the said fact shall be recorded in the Court''s order sheet. The information may withdraw the amount.

24. Send down the records immediately so that the matter may proceed before the Special Judge, Assam.

