
(2012) 11 DEL CK 0148
In the Delhi High Court
Case No : Criminal M.C. 2367 of 2011

Khandelwal Builders Pvt. Ltd.

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 08-11-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 154(3), 156, 156(3), 190

Citation : (2012) 11 DEL CK 0148

Hon'ble Judges : Pratibha Rani, J

Bench : Single Bench

Advocate : Mohit Mathur, Mr. Abhilash Mathur, Mr. Shishir Mathur, Mr. Atul Guleria, Mr. Devendra Dedha, Mr. Tanshif Akhtar, for the Appellant; Rajdipa Behura, APP for State, Mr. Sudhir Nandrajog Instructed by Mr. Ajay Digpaul and Ms. Arti Bansal, Advocates for accused Narender Kumar Mago, for the Respondent

Final Decision : Dismissed

Judgement

Justice Pratibha Rani

1. By this petition filed u/s 482 Cr.P.C., the petitioner has laid a challenge to the order dated 24.05.2011 in CC No. 154/10 whereby the prayer

of the petitioner to direct the police, in exercise of power u/s 156(3) Cr.P.C., to register FIR and investigate the matter, was declined by learned

ACMM, Saket. In brief the case of the petitioner is that in April, 2007 one Narender Kumar Mago approached the petitioner claiming himself to

be a big real estate agent and owner of vast contiguous pieces of land in Karjat (Maharashtra). He also represented himself to be the holder of

power of attorney from various other owners of land holdings in that area authorised to negotiate on their behalf claiming that he was also

negotiating with other owners and was in the process of acquisition and in a position to acquire 1200 acres of contiguous land in that area which

was either agricultural or uncultivated/barren/cultivated with no restriction in the process of acquisition and development of the said land.

2. The petitioner was further informed that Mr. N.K. Mago, who was the power of attorney holder, was in urgent need of money to pay for the

land to be acquired and thus was looking for a financial partner with necessary expertise. He also claimed to be holding of power of attorney on

behalf of Birender Basant Lal Katyal, Surinder Basantlal Katyal, Sumeet Birender Katyal, Mrs. Rita Birender Katyal and Karuna (Prem Lata)

Surinder Katyal, who were owning 300 bighas of land in Karjat (Maharashtra).

3. The petitioner entered into memorandum of understanding (MOU) on 05.07.2007 wherein Narender Kumar Mago was referred to as "Owner"

of first part and Khandelwal Builders Pvt. Ltd. i.e. the petitioner was referred to as "Developers" of the second part. As per the MOU, the owner

represented to the developers that they have already tied up and negotiated and/or are in process of tying or negotiating land of

agriculture/barren/arid/cultivated/uncultivated irrigated or non-irrigated/with or without water resource/plain or mountainous, developed or

undeveloped, outside the controlled area/municipal limit and therefore, are in position to offer around 1200 acres (one acre of 4840 yards) in the

revenue estate of Karjat in the State of Maharashtra. Further it was agreed that owner shall form a company, to be called as "Owner Company",

under which they shall get the land registered and undertaking was given to get the land registered as under :-

4. As per clause 9 of the MOU, it was agreed as under :

9. That the Developers has ensured the Owners that they shall fully abide by their responsibilities stated herein in this Memorandum fully, honestly

and timely and for that they have agreed to give Performance Guarantee by way of a Security Deposit of Rs. 50,00,000/- (fifty lac) in favour of the

"Owners" vide their post-dated (word post has been cut off by pen) Cheque No. 268634 dated 2.5.07 drawn on O.B.C., Sant Nagar, N. Delhi,

and balance cash of Rs. 40,00,000/-. The above security deposit can be encashed once the first lot of land for the First Phase of 600 Acres is

registered with the Owners Company and made available to the Developers for the purposes of Development. The security deposit shall be

interest free and refundable upon successful completion of the Project to the

agreed terms, conditions and specifications with the Owners.

5. In terms of MOU, the petitioner paid a sum of Rs. 50 lacs to N.K. Mago and his associates. The money was deposited by Mr. N.K. Mago

under the joint venture with other accused persons, which the petitioner subsequently realized was only to cheat the petitioner. Subsequently, the

petitioner also came to know that the money received by Mr. N.K. Mago has been siphoned off by converting the same to his own benefit and it

was transferred in his own account which was contrary to the terms of MOU. Various enquiries made by the petitioner regarding the status of the

delivery of the project land to the petitioner was not responded to thereby compelling the petitioner to file a complaint with the Crime Branch with

copy to the EOW Cell, Qutab Institutional Area.

6. When, despite a cognizable offence being made out on the basis of complaint, the Police failed to take action on the complaint of the petitioner,

the petitioner filed a complaint before the learned M.M. praying for a direction to the police to get the FIR registered u/s 156(3) Cr.P.C. and

investigation by the police.

7. The learned Magistrate, after considering the submissions made by learned counsel for the petitioner, declined the request, observing that :-

I have gone through the complaint, documents on record and submissions forwarded by counsel for complainant. The facts are very much within

the knowledge of complainant/AR/Director of complainant. The documentary evidence is in their possession or they have access to it. No

requirement of collection of evidence by police. Hence, application U/s. 156(3) Cr.P.C. is hereby dismissed.

8. By invoking the inherent jurisdiction of this Court, the petitioner has prayed for setting aside the order passed by learned MM declining the

prayer of the petitioner for registration of FIR and investigation by police. The prayer made in the petition is for issuance of directions to the police

to investigate the matter as set out in the complaint.

9. I have heard Mr. Mohit Mathur, learned counsel for the petitioner and carefully gone through the record.

10. Learned counsel for the petitioner submitted that the status report was called by the learned M.M. and there is no procedure prescribed in

Cr.P.C. to call for such status report. It is further submitted that in the status

report it was mentioned that no cognizable offence is made out which is legally not correct. Learned counsel for the petitioner submitted that when the averments made in the complaint disclosed commission of a cognizable offence, the Police was duty bound to register FIR as required u/s 154 Cr.P.C. and at that stage it was not for the Police to look into the reliability of the contents of the complaint prior to registration of FIR. Learned counsel of the petitioner has relied upon *Lallan Chaudhary and Others Vs. State of Bihar and Another*, and submitted that criminal law can be set into motion by any person and FIR can be lodged u/s 154 Cr.P.C., if the information disclosed commission of a cognizable offence. At the same time, recourse can also be taken to Section 200 Cr.P.C. if the Police fails to register a FIR and at that stage the learned M.M. is empowered u/s 156(3) Cr.P.C. to order an investigation into the allegations made in the complaint.

11. He has also submitted that in view of the legal position as laid down in *Dharmeshbhai Vasudevabhai and Others Vs. State of Gujarat and Others*, there existed a situation wherein directions should have been given by learned MM u/s 156(3) Cr.P.C. to register FIR.

12. It has been urged on behalf of the petitioner that the accused persons induced the petitioner company to enter into the MOU and part with the

money despite the fact that the land was not even acquired by them. Further, as per MOU, Mr. N.K. Mago was to assign 1200 acres of land for

development on or before 15.11.2007. The status report submitted by the police reveals that the Power of Attorney dated 28.04.2007 in favour

of N.K. Mago was only in respect of 137.5 acres which, at the time of execution of Power of Attorney, was owned by Birender Katyal and his

family members and they further sold this land in 2008. It has been submitted that how N.K. Mago could enter into MOU in respect of 1200 acres

of land when he was not authorized to do so. Further the land was required by the petitioner for development and marketing of various projects in

the nature of townships, farms, residential/commercial industrial/institutional complexes, special economic zones etc. Since for that purpose, it was

the first party who had to contact the farmers/owners to acquire the land and then handover to the second party, it is just not possible for the

petitioner to ascertain as to how much land was owned by the respondent-

accused and there are practical difficulties in such type of agreements wherein the land originally vests in the farmers which was to be acquired by Mr. N.K. Mago for which substantial amount was provided to him, but he failed to hand over the land and converted the money handed over to him to acquire the land to his own benefit. It has been further submitted that if direction for registration of FIR is not given, the petitioner will have to undergo a long drawn process by summoning the witnesses from Maharashtra whereas in case direction is given to the police to register FIR, the Police/Investigating Agency would be able to interrogate the accused persons to ascertain the land owned by them.

13. I have considered the submissions made by learned counsel for the petitioner.

14. The main grievance of the petitioner is that learned MM ought to have given directions u/s 156(3) Cr.P.C. for registration of FIR instead of adjourning the case for pre-summoning evidence.

15. The plea of the petitioner that the documentary evidence that needs to be proved cannot be recovered without the help of the police is without

any merit as while entering into MOU for 1200 acres of land, the details to the extent that the land was required to be handed over by the Owner

(first party) to the developers (second party) was duly specified in the MOU and at that time in the MOU, it was specifically mentioned that the

owners represented to the developers that they have already tied up and negotiated and/or are in process of tying or negotiating land of

agriculture/barren/arid/cultivated/uncultivated irrigated or non-irrigated/with or without water resource/plain or mountainous, developed or

undeveloped, outside the controlled area/municipal limit and therefore, are in position to offer around 1200 acres in the revenue estate of Karjat in

the State of Maharashtra.

16. Only the parties to the agreement are in the knowledge of the details of the land in respect of which MOU was executed and in whom the land

was vested at the time of execution of MOU. The petitioner is in a position to summon the record from the concerned authorities to prove its case.

17. It is necessary to mention here that the case of the petitioner is based on MOU and the GPA which was in favour of N.K. Mago. The GPA

dated 28.04.2007 has been executed in favour of 300 bighas of land or more in Ware & Pohl Village, near Neral, Karjat Tehsil by (1) Birender

Basantlal Katyal, (2) Suriender Basantlal Katyal, (3) Sumeet Birender Katyal, (4) Rita Birender Katyal and (5) Karuna (Premlata) Suriender

Katyal in favour of N.K. Mago. So at the time of execution of MOU, the petitioner was aware about the contents of GPA and the extent that

N.K. Mago was authorized to transact on their behalf.

18. Though at this stage, this Court has to only consider the prayer as to whether it is a case wherein learned MM should have directed the

investigation to be conducted by the police, to consider the legality of the impugned order, this Court has to look into the MOU dated 05.11.2007.

What is surprising in the MOU is that the cheque No. 268634 drawn on Oriental Bank of Commerce, Sant Nagar, New Delhi for a sum of Rs. 10

lacs is dated 02.05.2007 i.e. issued much prior to the execution of MOU dated 05.07.2007. Further clause 9 as extracted above only talks of

agreeing to give performance guarantee by way of security deposit of Rs. 50 lacs in favour of the owners and therein balance amount is mentioned

as 40 lacs. The factum of making these payments are in the personal knowledge of the petitioner which could be proved by them by summoning

the relevant record from their bank or from the bank of first party i.e. the owner as in the petition itself it is mentioned that the cheque was duly

encashed and the money is lying as security deposit with N.K. Mago and was deposited by him under the joint venture with other accused which

the petitioner later learnt that the said deposit was taken only in order to cheat the petitioner company.

19. Reliance placed on Dharmeshbhai's case (Supra) by the petitioner does not advance his case further for the reason that the question that arose

for decision in that case was whether, after giving directions to the police to investigate, the Magistrate has the power to recall that order. In

Dharmeshbhai's case (Supra), the complaint was filed before the Judicial Magistrate praying for directions to the police to register a complaint.

The learned Magistrate, on considering the allegations in the complaint, issued the following directions :

The complaint is hereby ordered to be registered as the Inquiry Case and is ordered to be sent to Rander Police Station u/s 156(3) for the police

investigation. On being investigating the offence the investigating officer has to submit the report of investigation on or before 12.07.2004 before

this Court.

20. When the investigation was in progress, the complainant filed an application before learned MM informing about the compromise entered into

by and between accused and the bank. The learned Magistrate recorded that in view of the compromise Ex. 4, the complainant did not want to

proceed further with the complaint, so he passed order to withdraw the inquiry and information was sent to the concerned Police Station.

21. The legality and the validity of the order withdrawing the enquiry by the Magistrate, once it has been ordered, was questioned before the High

Court on the ground that the learned Magistrate had no jurisdiction to recall the order. The High Court declined to interfere in the order and the

matter came up before the Apex Court, in para 8 of the report, it was held as under :

8. It is well settled that any person may set the criminal law in motion subject of course to the statutory interdicts. When an offence is committed a

first information report can be lodged u/s 154 of the Code of Criminal Procedure (for short, "the Code"). A complaint petition may also be filed in

terms of Section 200 thereof. However, in the event for some reasons or the other, the first information report is not recorded in terms of sub-

section (1) of Section 156 of the Code, the magistrate is empowered under subsection (3) of Section 156 thereof to order an investigation into the

allegations contained in the complaint petition. Thus, power to direct investigation may arise in two different situations-(1) when a first information

report is refused to be lodged; or (2) when the statutory power of investigation for some reason or the other is not conducted.

When an order is passed under sub-section (3) of Section 156 of the Code, an investigation must be carried out. Only when the investigating

officer arrives at a finding that the alleged offence has not been committed by the accused, he may submit a final form; on the other hand, upon

investigation, if it is found that a prima facie case has been made out, a charge-sheet must be filed.

22. It was further held that power of the Magistrate for withdrawal of any investigation which is sought to be carried out is not envisaged in Code

of Criminal Procedure and the Magistrate has no power to recall its order.

23. Here the case of the petitioner is that learned MM directed the petitioner to

lead prosecution evidence instead of getting the matter investigated by the police in exercise of power vested in learned MM u/s 156(3) Cr.P.C.

24. So far as the contention of learned counsel for the petitioner that learned MM could not have called for the status report is concerned, the

same has been obtained by learned MM in terms of guidelines laid down in the decision of Subhkaran Loharuka and Shree Ram Mills Ltd. Vs.

State (Govt. of NCT of Delhi) and Utility Premises Pvt. Ltd., wherein it was specifically mentioned that the Magistrate, when approached with a

complaint u/s 200 Cr.P.C., should invariably proceed under Chapter XV by taking cognizance of the complaint, recording evidence and then

deciding the question of issuance of process to the accused.

25. In the case of Minu Kumari and Another Vs. The State of Bihar and Others, the Supreme Court has dealt with the aspect as to how the

Magistrate can proceed when the police fails to take action on the complaint made. It was observed :

When the information is laid with the Police, but no action in that behalf is taken, the complainant is given power u/s 190 read with Section 200 of

the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire

into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of

issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to

submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint u/s

203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of

the offence and would issue process to the accused. These aspects have been highlighted by this Court in All India Institute of Medical Sciences

Employees' Union (Regd.) through its President Vs. Union of India (UOI) and Others, It was specifically observed that a writ petition in such

cases is not to be entertained.

26. The Supreme Court has deprecated the practice of the High Courts issuing directions for registration of FIR. Reliance can be placed on Sakiri

Vasu Vs. State of U.P. and Others, wherein the Apex court, in paras 26 to 28, has

observed that :

26. If a person has a grievance that his FIR has not been registered by the police station his first remedy is to approach the Superintendent of

Police u/s 154(3) Cr.P.C. or other police officer referred to in Section 36 Cr.P.C. If despite approaching the Superintendent of Police or the

officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate u/s 156(3) Cr.P.C. instead of rushing to the High

Court by way of a writ petition or a petition u/s 482 Cr.P.C. Moreover he has a further remedy of filing a criminal complaint u/s 200 Cr.P.C. Why

then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies?

27. As we have already observed above, the Magistrate has very wide powers to direct registration of an FIR and to ensure a proper

investigation, and for this purpose he can monitor the investigation to ensure that the investigation is done properly (though he cannot investigate

himself). The High Court should discourage the practice of filing a writ petition or petition u/s 482 Cr.P.C. simply because a person has a grievance

that his FIR has not been registered by the police, or after being registered, proper investigation has not been done by the police. For this

grievance, the remedy lies under Sections 36 and 154(3) before the concerned police officers, and if that is of no avail, u/s 156(3) Cr.P.C. before

the Magistrate or by filing a criminal complaint u/s 200 Cr.P.C. and not by filing a writ petition or a petition u/s 482 Cr.P.C.

28. It is true that alternative remedy is not an absolute bar to a writ petition, but it is equally well settled that if there is an alternative remedy the

High Court should not ordinarily interfere.

27. Learned MM in the impugned order has rightly come to the conclusion that all the facts and circumstances of the case are within the

knowledge of the complainant requiring no investigation by the police. In the light of judicial pronouncements as discussed above, it cannot be said

that he has committed any illegality by rejecting the application u/s 156(3) Cr.P.C. filed by the petitioner for registration of the FIR. The revision

petition is hereby dismissed.