
(1998) 10 DEL CK 0014

In the Delhi High Court

Case No : Criminal (M) No's. 1064 of 1998 and 3524 of 1997

K.K. Dhawan

APPELLANT

Vs

State (N.C.T. of Delhi)

RESPONDENT

Date of Decision : 27-10-1998

Acts Referred:

Citation : (1999) 48 DRJ 43

Hon'ble Judges : J.B. Goel, J

Bench : Single Bench

Advocate : Mr. Dinesh Mathur, Mr. D.K. Mathur, Mr. Abhliash and Mr. Mohit Mathur, for the Appellant; Mr. K.K. Sareen, for the Respondent

Judgement

J.B. Goel, J.—By this order, two applications (Crl. M. (M) 1064/98 & Crl. M. (M) 3524/97) both for anticipatory bail u/s 438 of the Code of Criminal Procedure (for short "the Code"), filed by Shri K.K. Dhawan and Smt. Veena Dhawan, former being the husband and latter his wife are being disposed of.

2. Briefly, the facts are that M/s. Hi-Tech Gears Ltd. New Delhi in their complaint dated 22nd April, 1997 addressed to The Deputy Commissioner of Police (Crime & Railway) had lodged a report against the two petitions besides the Company M/s. Yogi Pharmacy Ltd. (for short "YPL") and other persons working in the said Company. On the basis of that complaint, a case FIR No. 994/97 was registered at Police Station, Malviya Nagar, New Delhi u/Sec. 420/468/471/120-B, IPC.

3. The allegation made are that YPL had approached the complainant Company through its Managing Director Mr. K.K. Dhawan for advancing an inter Corporate Deposit (for short "ICD") of Rs. 50.00 lakhs in September, 1995. The complainant company after considering the request had agreed to advance only a sum of Rs. 40.00 lakhs for a period of 90 days as an ICD, subject to YPL furnishing proper security to secure its payment. In consideration thereof Mr. K.K. Dhawan who was the Managing Director of the said Company YPL, and his wife Smt. Veena Dhawan had agreed and given share certificates Nos. 00000233

for 40,000 shares in the name of Shri K.K. Dhawan and share certificates Nos. 0001652, 0001653 and 0001654 comprising of 27,900, 10,000 and 8,000 shares respectively in the name of Mrs. Veena Dhawan which were registered in their names in the Register of the Company against folio Nos. 000011 and 000014 respectively. Shri K.K. Dhawan and Smt. Veena Dhawan in their separate letter dated 19.9.1995 had pledged the aforesaid share/securities as security for the repayment of the aforesaid amount, gave blank transfer forms in respect thereof, duly signed and executed by them, and inter alias further gave separate declarations to the effect that "We hereby declare that the said securities are our absolute property as owner thereof and the same are unencumbered and we hereby agree and undertake that till the entire amount of ICD is paid off in full together with interest etc., we shall not sell and/or encumber the said securities in any manner whatsoever...". Both of them had also executed deed of guarantee dated September 19, 1995 for the repayment of the aforesaid amount. A letter dated September 19, 1995 purported to have been signed by one Ms. Reena Gupta as Company Secretary for YPL was also handed over which was to the following effect:

"1. That share certificate Nos. 00000233 for 233for 40,000 shares in the name of Shri K.K. Dhawan and shear certificate Nos. 0001652, 0001653 and 0001654 for 27,900,10,000 and 8,000 shares respectively in the name of Mrs. Veena Dhawan stand registered in their respective names vide registered folio Nos. 000011 and 000014 respectively.

2. That the said 85,900 shares are neither encumbered/hypothecated/under lien/under any charge nor within any lock-in-period."

4. An amount of Rs. 40 lakhs was paid by the complainant to YPL for which Shri K.K. Dhawan as Managing Director had also executed a receipt dated September 20, 1995 acknowledging the receipt of Rs. 40.00 lakhs and a demand promissory note dated September 20,1995 promising to pay an amount of Rs. 40.00 lakhs on demand after three months.

5. The amount was not repaid on maturity. However, a sum of Rs. 10.00 lakhs was paid on 12.1.1996 by means a cheque and another cheque of Rs. 30.00 lakhs given was dishonoured for lack of adequate funds. Both K.K. Dhawan and Veena Dhawan thereafter on 6.4.1996 had executed further documents, namely, one letter acknowledging the dues of Rs. 30.00 lakhs plus interest @ 27% per annum and undertaking that YPL shall not raise any objection nor refuse to register any transfer made by the complainant to enforce its security; two power of attorneys were executed by both of them separately in favor of M/s. Hi-Tech Gears Ltd. represented by Shri Deep Kapuria, its Managing Director, authorising him to sell, assign, transfer or otherwise dispose of all or any of the said equity shares towards the aforesaid outstanding amount of Rs. 30.00 lakhs plus interest; two under-takings dated 6.4.1996 executed by both of them acknowledging the aforesaid liabilities and further agreeing that the shares shall be sold off by HGL in the event of non-satisfaction of debts by YPL without any

objection from their side and the same shall be converted in marketable lots for sale in the name of the complainant.

6. The amount and the interest having not been paid, the complainant approached ULL Securities Private Limited, a member of National Stock Exchange of India Ltd., for sale of all those shares. The latter in turn approached a Kanpur broker, namely M/s. A.M. & Co. to sell the aforesaid shares. The Kanpur broker informed that the said shares were under lock in period and could not be sold/transferred/hypothecated till 31.3.1999 as per Circular of U.P. Stock Exchange dated 21.1.1994. On coming to know this fact, the complainant wrote a letter to Ms. Reena Gupta who had issued the certificate as Company Secretary on 19.9.1995, confronting her with her said certificate and pointing out that they had discovered that the share were in lock-in-period and could not be transferred and pointed out that she was thereby a party to the fraud committed by YPL. She was called upon to give the reasons for having issued the certificate. Reena Gupta, in her reply dated 14th March, 1997 denied having issued the certificate dated 19.9.1995 nor had knowledge thereof. Then the complaint was filed and the FIR was registered on 10.10.1997. The case of the complainant is that, prima facie, case is made out against both the petitioners that they had cheated the complainant Company of their money and had also forged and given in support the certificate of the Company Secretary for obtaining the money.

7. Learned Counsel for the petitioner has argued at great length on legal plea as well as on merits. He has contended that, (1) this is a Civil liability for which the complainant had already approached the Allahabad High Court for winding up the Company u/s 433 of the Companies Act and an order to this effect has since been passed by that Court; (2) security was not given as a condition for the repayment of the loan when the loan was advanced but was given subsequently; (3) it does not make out a case of cheating u/Secs. 415/420, IPC; (4) when the loan was advanced, the security was of the value of over Rs. 64.00 lakhs and there was no intention to cheat at the time the amount was paid; (5) simply because the shares are in lock-in-period, it cannot be said that the security is not "unencumbered"; the shares could be transferred absolutely with the permission of SEBI; (6) in any case the deliration about transferability had not been signed by Smt. Veen Dhawan and she is not liable if any misrepresentation was made on behalf of the accused Company by someone else and the role of individual is to be seen for determining the criminal liability. Learned Counsel has relied on *Habib Khan Vs. The State* 1996 JCC 500 ; *Mahadeo Prasad Vs. State of West Bengal*, ; *Nageshwar Prasad Singh alias Sinha Vs. Narayan Singh and Another*, ; *Pandurang, Tukia and Bhillia Vs. The State of Hyderabad*, ; *Lala Ram and others Vs. State of U.P.*, ; *Hiralal Mallick Vs. The State of Bihar*, . Whereas, learned Counsel for the respondent State has contended that the amount was advanced on the representation made that the security was unencumbered and transferable instantaneously if enforced, but for misrepresentation made to the complainant to this effect, the amount would not have been advanced. At the time of advancing of the loan, various documents were executed which clearly

show that the amount was paid on such representation by both the accused persons. It is also contended that the petitioner is facing 17 more similar cases; that the parties have also not joined investigation for interrogation; at the time the amount was advanced, the shares which were given as instant enforceable security were not transferable being in lock-in-period and obviously they had not only dishonestly concealed material facts but also by fraudulent means and by use of forged documents had induced the complainant to part with huge money and thereby it has been cheated; that the case is at investigation stage; even otherwise a prima facie case is made out and the offence involve huge amount in cheating and fraud, there is no justification nor proper to admit the accused persons to anticipatory bail in such serious offences of cheating and forgery.

8. It is well established that where a particular act may constitute both civil wrong as well as criminal wrong, merely because a civil action is also pursued or is permissible, it does not render the criminal action impermissible. Thus there is no general principle that a criminal prosecution for criminal offence(s) would not lie if it is based upon a contract for breach of which a civil remedy would also be available. In *Nageshwar Parsad Singh (supra)*, it was held that where at the time that an agreement was executed, there was no dishonest intention, it would not be a case of cheating. There is no dispute about this legal position. In *Mahadeo Prasad (supra)*, it was held on the facts and material that the appellant had no intention whatsoever to pay cash on delivery but had merely promised to pay cash against delivery of goods in order to induce the complainant to part with the goods and thereby he had cheated. He was convicted and conviction was upheld by the Supreme Court. In this case, it was also held that in the bill issued in respect of the goods sold and delivered, there was a stipulation to charge interest @ 12% per annum if he did not make payment in cash against delivery. On this it was held that the stipulation as to payment of interest endorsed on the bill would not militate against an initial agreement that the price of the ingots would be paid in cash against delivery. It would only import a liability in regard to the payment of interest @ 12% per annum. That indeed would be a civil liability in regard to the payment of interest but would certainly not eschew any criminal liability if otherwise criminal liability was made out. This authority is of no help to the petitioner.

9. It is well established principle that what is to be seen at the stage of investigation is whether the complaint and the material available in its support prima facie make out a case of criminal liability. Merits and demerits of the allegations could be gone into when the investigation is completed and if a case is made out, it is the Court who could give a finding of guilt or otherwise. At this stage, no definite opinion on the merits of the case is required.

10. The case of the complainant is that the accused Company YPL had approached the complainant Company through Shri K.K. Dhawan, its Managing Director, for advance ICD of Rs. 50.00 lakhs. The proposal was considered; they had agreed to advance Rs. 40.00 lakhs for a period of three months subject to

the former furnishing adequate security for its repayment and in consideration thereof, YPL through K.K. Dhawan had agreed to furnish security of 85,900 shares standing in the names of Mr. K.K. Dhawan and his wife, Smt. Veena Dhawan and both of them had executed documents, namely, guarantee, deposited the share certificates in original with blank transfer forms duly signed by both with separate declarations/undertakings that the shares were unencumbered. A certificate of the Company Secretary on behalf of YPL that all the shares are "neither encumbered/hypothecated/under lien/under any charge nor within any lock in period" was also given. This certificate had obviously been given on behalf of Shri K.K. Dhawan and Smt. Veena Dhawan who had deposited the shares with the complainant Company as security. The loan was thus agreed to be advanced for a period of three months with the condition that the security could be enforced if the amount was not repaid on due date, the intention being that the complainant shall be entitled to realise their dues by enforcing the securities, i.e., by sale of the shares forthwith. And, on the basis of this representation, the complainant Company had agreed to and actually advanced the IDC.

11. As per Long man Dictionary of Contemporary English, the meaning of the word "encumber" given is as under:

"encumber-1: to make free action or movement difficult for (someone): He is encumbered with debts 2.

The Chambers 21st Century Dictionary defines the word "encumber" as under:

"encumber-1: to prevent the free and easy movement of someone or something; to hamper or impede. 2. to burden someone or something with a load or debt."

12. In this context, the meaning of the word "unencumbered" obviously would be that the shares are freely transferable without any impediment, hindrance or burden.

13. Section 415 of the IPC defines cheating. The Explanation to this section states that "A dishonest concealment of facts is a deception within the meaning of this Section". Various illustrations illustrate the scope of this provision. In this case, the two accused persons are alleged to have cheated the complainant Company by dishonest in document to part with huge money. This prima facie attracts Section 420, IPC. The accused are also alleged to have given a forged certificate of a Company Secretary in support that the security given was free from any encumbrance etc. This would attract Section 468 and 471. It could be an act of conspiracy which could be found out on investigation also.

14. Learned Counsel for the petitioners has also contended that where there are number of accused persons, the degree of criminality of each of the accused would vary and the guilt of each accused has to be seen in an individual shed manner. He has relied on Pandurang & Others (supra); Lala Ram & Ors. (supra); Hiralal Mallick (supra). There is not dispute on this legal position. However, these

authorities are of no relevance at this stage. As already noticed, the liability of the two accused is not alleged to be a vicarious liability but they are alleged to be prime accused persons as both of them are alleged to have cheated and induced by dishonest representation.

15. Now, the question is whether the accused are entitled to anticipatory bail. It is not disputed that the complainant had parted with an amount of Rs. 40.00 lakhs. In *V. Nandan Vs. DIG of Police (Crime), Hyderabad & Another* 1986 Cri.L.J. 1052, the Kerala High Court has held as under:

"Anticipatory bail is not to be granted as a matter of course in all cases where the applicant has reason to believe that he may be arrested on a accusation of having committed a non-bailable offence. Grant or refusal of such bail must depend upon variety of circumstances. The power u/Sec. 438 has to be exercised sparingly and in exceptional cases using the discretion on the facts of each case. It should not be allowed to circumvent the normal procedure of arrest and investigation or to prejudice the investigation. Ulterior motive of harassment and reasonable possibility of the accused not absconding are only some of the consideration. Some little facts may be necessary on the exercise of the discretion to grant or refuse the prayer. In exercising the judicial discretion to granting anticipatory bail the Court should not be unmanned of the difficulties likely to be faced by the Investigating Agency and also public interest likely to be affected thereby."

16. While granting bail, inter alia, the Court has to take into consideration the nature of the crime, the circumstances under which it was committed and the impact on the society. Anti-social adventure need to be viewed seriously. The white color crime of this type, of late, has shown quite a large increase. The offences of cheating and forgery are committed with cool calculations and deliberate design for gain.

17. The learned Addl. Sessions Judge has considered the circumstances and has not found it a fit case to grant anticipatory bail. The investigation has not yet completed. The petitioner is also alleged to have avoided to join the investigation. The investigation is likely to be hampered.

18. In the facts and circumstances of the case, in my view, it is not just, proper and in the interest of justice and also of society to admit the two accused persons to anticipatory bail.

19. Both the petitions are accordingly dismissed.

20. Interim orders passed on April 23, 1998 and December 26, 1997 in CrI. M. (M) No. 1064/98 and CrI. M.(M) No. 3524/97 respectively are hereby vacated.

Nothing stated hereinabove shall be deemed to be expression of opinion on the merits of the case.