
(2013) 10 AHC CK 0114

In the Allahabad High Court

Case No : Crl Miscellaneous Application No"s. 27257 and 34764 of 2013

Mahipal Singh

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 22-10-2013

Acts Referred:

Citation : (2014) 1 ACR 228 : (2014) 84 ALLCC 462

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Ranjit Saxena and Deepak Saxena, for the Appellant; Y.D. Sharma (Party-in-Person), for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Heard Sri Ranjit Saxena, advocate, appearing for the applicant and Sri Y.D. Sharma, respondent No. 2, who has appeared in person.

2. These applications have come before this Court on assignment by Hon"ble the Acting Chief Justice vide order dated 8.10.2013.

3. This is really unfortunate that the two advocates are in warring terms tussle going to the extent of giving rise to a criminal cases, which have come to this Court also in the form of present application filed u/s 482/483 of Code of Criminal Procedure (hereinafter referred to as "Code").

4. The applicant. Mahipal Singh, is a practising advocate at Civil Court, Bulandshahr while respondent No. 2 is an advocate practising in this Court.

5. The applicant has come to this Court by filing Criminal Misc. Application No. 34764 of 2013 (hereinafter referred to as "first application") invoking its jurisdiction u/s 482 of the Code for quashing charge-sheet dated 25.7.2013 in Criminal Case No. 81 of 2013 under Sections 406, 419, 420 and 506, I.P.C., Police Station -George Town, Allahabad and charge-sheet No. 151/2013 dated 25.7.2013 as also summoning order dated 24.8.2013 passed by Judicial

Magistrate-II, in Criminal Case No. 835/2013 u/s 406, 419, I.P.C. of the same police station.

6. The application No. 27257 of 2013 (hereinafter referred to as "second application") is also u/s 482 of the Code between the same parties and at the instance of Sri Mahipal Singh whereby he has sought for quashing the proceedings of Complaint Case No. 584 of 2013 instituted by Sri Yagya Deo Sharma, respondent No. 2 u/s 138, Negotiable Instruments Act, 1881 (hereinafter referred to as "N.I. Act") and is pending in the court of Judicial Magistrate-II, Allahabad.

7. Since necessary factual backdrop, giving rise to both the cases, as also issues and argument advanced, are common, therefore, I have heard both the matters together and decide by this common judgment.

8. The respondent No. 2 filed a Criminal Complaint Case No. 2587 of 2012 in the court of Additional Chief Judicial Magistrate, Allahabad vide complaint dated 28.12.2012 stating that he advanced a sum of Rs. 70 lakhs to the applicant for purchase of house situated in Shanti Niketan, Bulandshahr measuring constructed area of 400 sq. yards . However, Sri Mahipal Singh failed to perform his promise and the deed of transfer was not executed whereupon respondent No. 2. Sri Yagya Deo Sharma, asked him to return the money advanced. In furtherance thereof. Sri Mahipal Singh issued three cheques bearing No. 766088, 766089 and 766090 for Rs. 25,00,000, 25,00,000 and Rs. 20,00,000 respectively. The account number of Mahipal Singh, wherefrom aforesaid cheques were issued, is A/c. No. 3654000100157060. Punjab National Bank, Moti Bagh. Bulandshahr.

9. Sri Y.D. Sharma presented the above three cheques in his account No. CLSB15 of Corporation Bank, George Town. Allahabad on 21.11.2012. The cheques stood returned with endorsement "funds insufficient in drawer's account" on 22.11.2012. Thereafter, Sri Sharma sent a notice u/s 138, Clause (b) proviso of N.I. Act on 26.11.2012 requiring Sri Mahipal Singh to pay aforesaid amount of 70 lakhs within fifteen days but he failed, hence an offence u/s 138. N.I. Act has been committed and Sri Mahipal Singh has proceeded accordingly. Alongwith the complaint, respondent No. 2 enclosed a copy of notice, courier receipt and photocopies of cheques as also the bank's report.

10. The learned court below finding a prima facie case u/s 138, N.I. Act, passed order on 6.2.2013 for summoning accused. Mahipal Singh, and thereupon accused-applicant has come to this Court for quashing the above proceedings.

11. The case set up by accused-applicant is that a large chunk of land in District Bulandshahr was acquired by State Government since 2008, as a result whereof several land acquisition matters came to the accused-applicant and in regard thereto he forwarded about 300 matters to respondent No. 2. It is in that connection a huge amount was deposited towards professional fees by accused-applicant in the account No. 3654000100110306 of Yagya Deo Sharma between

27.10.2010 to 1.10.2012 and the total amount in 139 transactions, deposited, was Rs. 1,18,47,500.

12. Despite that, respondent No. 2 raised objection that fees from the client is not coming in time and he did not file some of the cases within time. The accused-applicant, as a security for client fees, issued three cheques to respondent No. 2, in good faith, with understanding that in case there is any delay in deposit of professional fees in the account of respondent No. 2, he (Sri Sharma) may withdraw the amount through the three cheques issued to him. However, in October, 2012 there occurred some dispute between respondent No. 2 and accused-applicant inasmuch as, some clients complained about excess fee being charged by respondent No. 2 and when accused-applicant talked about it with respondent No. 2, he became angry and threatened for dire consequences. He (accused-applicant) denied of having received of Rs. 70 lakhs as advance for transaction of immovable property, i.e., house in dispute and also denied that three cheques given to respondent No. 2 were in lieu of discharge of some obligation or debt etc. It is thus said that proceeding initiated by way of complaint is wholly illegal and amounts to abuse of process of law.

13. The respondent No. 2 thereafter also lodged a first information report being Case Crime No. 81 of 2013 dated 24.2.2013 u/s 406, 419, 420 and 506, I.P.C. alleging the same incident of dishonouring of cheque and non return of money but then further alleges that when respondent No. 2 repeatedly pursued accused-applicant to refund money, he threatened respondent No. 2, and his (accused-applicant) entire attitude shows that he obtained Rs. 70 lakhs from respondent No. 2 by playing fraud and never had any intention to sell out his house and now threatening respondent No. 2 with an intention of not refunding the money and also for non execution of sale deed.

14. The Investigating Officer, after making initial investigation into the matter, submitted a charge-sheet in the court below and hence the second application for quashing the said proceedings.

15. Sri Ranjit Saxena, learned counsel for the accused-applicant urged that respondent No. 2 at no point of time pleaded of having executed any "agreement for sale" and in absence thereof, question of execution of "sale deed" does not arise. The entire story set up by respondent No. 2 is clearly imaginary and fictitious. He contended that respondent No. 2 has not placed on record any contract or agreement between the parties in respect of alleged sale of house and hence story set up by respondent No. 2 that Rs. 70 lakhs were paid towards advance/part consideration for execution of sale deed in respect to house in question, is without any basis. Next he contended that nothing has been placed on record to show as to in what manner Rs. 70 lakhs was paid /transferred to the accused-applicant. Thirdly, it is contended that there was a professional relationship between accused-applicant and respondent No. 2. On account thereof, both, used to pay huge amount to each other and all this amount, was in respect of various court cases of land acquisition, for persuasion whereof litigant

had paid fees, transacted through various deposits in the bank account. There was no debt or obligation of any amount on the part of the accused-applicant, which was legally enforceable and for discharge thereof there could have been any occasion for accused-applicant to issue three cheques and therefore, no offence u/s 138, N.I. Act is made out at all. He further contended that on the one hand frivolous, imaginary and baseless criminal complaint was lodged by respondent No. 2 just to harass the accused-applicant and on the other hand in respect of the same matter, he further lodged a first information report, which is not maintainable and therefore, all these proceedings are wholly illegal and in gross abuse of process of law, hence deserve to be quashed.

16. Sri Y.D. Sharma has filed counter-affidavit and seriously contested the stand taken by accused-applicant. He has reiterated what he has stated before the court below in criminal complaint and also in the first information report. Alongwith counter-affidavit in Misc. Application No. 27257 of 2013 (second case), he has also appended a copy of settlement/agreement between both the parties which is dated 29.5.2013 alleging that this was arrived at between the parties. Therein accused-applicant has accepted his liability and has assured to clear the entire dues very shortly.

17. A copy of the counter-affidavit in second case was served upon accused-applicant's counsel on 17.9.2013 but it has chosen not to file any rejoinder-affidavit till date.

18. In view of above facts and legal submissions advanced on behalf of the parties, this Court has to examine a sole question, "whether both these matters are such where it can be said that proceedings in question amounts to gross abuse of process of law or is otherwise illegal, without jurisdiction etc. so as to justify exercise of jurisdiction by this Court u/s 482 of the Code."

19. In the old Code Criminal Procedure, power of the Court for quashing proceedings in the subordinate courts was recognized vide Section 561A which has now been reiterated in Section 482 of the Code. It says that nothing contained in the Code shall be deemed to limit or affect Inherent powers of the High Court to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of process of any Court or otherwise to secure the ends of Justice. Therefore, Section 482 does not confer any new power upon this Court but simply recognizes inherent power already vested in this Court, to pass any order in the interest of justice or to prevent abuse of process of the Court. Therefore, the extent of power vested in this Court is not in doubt but moot question is. "in what circumstances and when this Court would be justified in invoking its inherent jurisdiction, which is recognized by Section 482 of the Court."

20. At the stage when only a complaint has been filed and Magistrate, having satisfied himself prima facie, has simply issued summoning order, the question whether this Court will look into the matter as if sitting in appeal or revision or

conducting a trial itself, particularly when, evidence is yet to be led by the parties is an incidental but integrally connected issue, which also has arisen in these case. Similarly, when an F.I.R. is lodged and Investigating Officer has filed charge-sheet, after investigation should Court examine the matter, as if, it is conducting a trial or it is only the prima facie satisfaction by taking allegations to be correct on the face of it, unless shown ex facie perverse and thus to find out whether commission of an offence is found or not.

21. In *State of Karnataka Vs. M. Devendrappa and Another*, , it was held that while exercising powers u/s 482, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only then such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of Justice. If any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court if it allow any action which would result in injustice and prevent promotion of justice. In exercise of powers, court would be justified to quash any proceeding if it finds that initiation/continuance thereof amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice.

22. The powers possessed by this Court as recognized vide Section 482 of the Code are very wide. The very plenitude of power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. It should not be exercised to stifle a legitimate and genuine prosecution. This Court being the highest court in the province should normally refrain from giving a prima facie decision in a case where facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court. When the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material, of course, the Court would abhor to interfere in the proceedings by invoking its power u/s 482 of the Code.

23. In *Devendra and Others Vs. State of U.P. and Another*, , the Court said that, while dealing with the question whether a pure civil dispute can be subject-matter of a criminal proceeding under Sections 420, 467, 468 and 469, I.P.C., this Court ordinarily would exercise its jurisdiction u/s 482 of the Code if the allegations made in the first information report, if given face value and taken to be correct in their entirety, do not make out any offence. This is what has been reiterated in several earlier and subsequent authorities also, namely; *Sushil Suri Vs. C.B.I. and Another*, ; *Nikhil Merchant Vs. Central Bureau of Investigation and Another*, ; *Manoj Sharma Vs. State and Others*, ; *Madan Mohan Abbot Vs. State of Punjab*, and *Gian Singh Vs. State of Punjab and Another*, .

24. I do not intend to burden this judgment with a very large number of

authorities dealing on this aspect but suffice it to mention that the Court will not allow an application filed u/s 482 of the Code to become a substitute of a regular trial so as to admit evidence on affidavits and thereafter enter into the merits of the matter and find out itself, whether criminal proceedings, which are at nascent stage, must be allowed to continue or not as that by itself, would amount to a serious inroad in the normal criminal administration of justice. A short circuit method for a regular trial in a case where commission of offence prima facie is made out cannot be allowed so as to justify exercise of inherent power u/s 482 of the Code.

25. This Court would be justified in declining interference if it is called upon to appreciate evidence. The power is very wide but the nature of power demands that its exercise must be very sparingly and not a routine and in ordinary course.

26. Now, first of all, I will examine whether a prima facie case of commission of offence u/s 138, N.I. Act has been made out or not, so as to decide whether this Court would be justified in quashing the proceedings of criminal complaint initiated by respondent No. 2.

27. Section 138 of N.I. Act reads as under:

138. Dishonour of cheque for insufficiency, etc., of funds in the account.--Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless:

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque falls to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.--For the purposes of this section," debt or other liability" means a legally enforceable debt or other liability.

28. Manifestly, a bare perusal of Section 138, N.I. Act shows that to constitute an offence thereunder, following ingredients must be satisfied:

(i) A person must have drawn a cheque on an account maintained by him in a bank.

(ii) It must be for payment of certain amount of money to any person out of his account.

(iii) The cheque should have been drawn for discharge of any debt or any liability in whole or in part.

(iv) The cheque has been presented to Bank within a period of six months from the date on which it was drawn or within a period of its validity, whichever is earlier.

(v) The cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the Bank.

(iv) The payee or the holder in due course makes a demand for payment of said amount of money which remained unpaid due to return of cheque by the Bank by giving a notice in writing, to the drawer

(vii) The notice must have been given within thirty days of the receipt of the information from the bank regarding return of the cheque as unpaid.

(viii) The drawer of such cheque fails to make payment of aforesaid money to the payee or the holder within 15 days of the receipt of the said notice.

29. If all these ingredients are satisfied, vide Section 142 of N.I. Act, holder of cheque can make a complaint, which has to be made within one month from the date when the cause of action arises under Clause (c) of proviso to Section 138, N.I. Act.

30. In the present case, issuance of cheque by the accused-applicant to respondent No. 2, deposit thereof with bank within due time and dishonouring of such cheques due to insufficient funds are certain facts which are not in dispute. Similarly, issuance of notice of demand by respondent No. 2 and non payment even thereafter is also not in dispute. What is contended, is that cheques were not issued to pay any debt or liability or to discharge the same wholly or partly, and therefore, Section 138 is not attracted.

31. The limited scope of investigation in this case would be whether this element/necessary ingredient to attract Section 138, N.I. Act exists in the case in hand or is entirely but patently, absent.

32. The parties admit that there is no written agreement between them in respect of alleged sale or purchase of disputed house. The respondent No. 2, however, has categorically come with a case that in order to purchase the house in question, he paid an advance consideration of Rs. 70 lakhs to the accused-applicant but since he (accused-applicant) committed breach of promise by not executing sale deed, respondent No. 2 demanded his advance consideration, to be returned, and in discharge thereof, three cheques were issued. The case set up by respondent No. 2 is clearly that of discharge of debt/liability on the part of accused-applicant in respect where to he has issued three cheques to respondent No. 2. There is no written agreement between the parties but can it be said that a written agreement to sale is a necessary contaminant for execution of sale deed.

33. Despite repeated query, Sri Saxena, learned counsel appearing for applicant could not produce any provision legal or otherwise which require execution of an agreement for sale as a condition precedent for sale or purchase of an immovable property. The parties if execute an "agreement for sale", it must be in writing. But parties can directly proceed to execute a sale deed without such an agreement being executed. They may directly agree to execute a sale deed. Depending on their relationship. If a part consideration is made by prospective vendee. I am not confronted with any statutory provision or principle of law whereunder such advance payment by prospective vendee is not enforceable in law, for refund of such money if such payment is proved by evidence. Moreover, here though accused-applicant has denied even an oral agreement between the parties, but that would be a matter of evidence. This defence cannot be taken on its face value at the stage when no evidence is led by the parties and proceedings are at initial stage. The Court will have to examine the complaint or F.I.R., as the case may be, and taking the allegations contained therein on the face value to be correct, it has to be seen whether a case has been made out or not. The defence of the accused-applicant is not to be weighted.

34. Moreover, issuance of cheques is not in dispute. Though accused-applicant has tried to co-relate cheques with professional transaction with respondent No. 2 but details of such matters and in what case(s) the money was paid, are wanting. In my view, it may be said that it is not the stage where all these things to be disclosed but if that is so, immediate result would be that here is not a stage where this Court can examine the defence taken by accused-applicant so as to find out whether allegations in the complaint are correct or not. In other words, correctness of allegations is not to be examined at this stage. It is also true that subsequently there appears to be an agreement between the parties that on transfer of some other property criminal case (the one in dispute herein) instituted by respondent No. 2 shall be withdrawn. It is the same criminal case which is under consideration. The amount mentioned in the said agreement, i.e., Annexure-C.A. 2 to the counter-affidavit in second case is much less than Rs. 70 lakhs, i.e., Rs. 57,50,000 but then this is a statement on compromise between the parties and at least this reflects something upon what has been claimed by

the respondent No. 2 that it is not wholly unfounded or baseless.

35. I do not propose to record any final opinion on this aspect since proceedings are still pending before court below and any further observation may cause prejudice to the parties but the fact remains that some debt and obligation has been accepted by accused-applicant in discharge whereof he has executed subsequently a settlement dated 29.5.2013. Annexure-C.A. 2 to the counter-affidavit to second application, that debt/liability, if other than the present one, will have to be examined by court below when the matter shall proceed further and the parties will lead evidence.

36. Taking allegations in the complaint on their face value to be correct, it cannot be said that offence u/s 138 of N.I. Act is not made out. Therefore, it cannot be said that proceedings initiated by respondent No. 2 in lodging the complaint against applicant are without jurisdiction and against process of law so as to warrant interference by this Court at this stage.

37. Similarly, first information report lodged by respondent No. 2 is not for an offence u/s 138, N.I. Act but it alleges certain facts or action, committing offence under certain provisions of I.P.C. Sri Ranjit Saxena, despite repeated query, could not show that ingredients of those provisions are not satisfied, if allegations contained in F.I.R. are taken to be true on its face value. Whether allegations are correct or not is not the scope of judicial review at this stage, particularly when evidence is yet to be led by the parties before the court below.

38. In view of the above, I do not find that there is a patent misuse or abuse of process of law on the part of respondent No. 2 so as to justify this Court's Interference with the proceedings in Criminal Case No. 81/2013 and those which have arisen from first information report, i.e., Criminal Case No. 835 of 2013.

39. in view thereof, I find no merits in both these applications so as to justify interference at this stage.

40. Rejected.