

(2005) 10 GUJ CK 0053

In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 6547 of 2005

Mammadiqbalgulamhussainvalmiya

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 26-10-2005

Acts Referred:

Constitution of India, 1950 — Article 142
Criminal Procedure Code, 1973 (CrPC) — Section 156(1), 482
Penal Code, 1860 (IPC) — Section 109, 114, 120A, 120B, 405
Public Money Act — Section 5

Citation : (2005) 10 GUJ CK 0053

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Bharat T. Rao, for the Appellant; A.D. Oza and Hiren M. Modi, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The petitioner has filed this petition u/s 482 of the Criminal Procedure Code praying for quashing and setting aside the criminal case filed by the Administrator of respondent No. 2 Bank with Visnagar Police Station being C.R. No. 122/2005 for offence punishable under Sections 406, 409, 420, 421, 424, 467, 468, 471, 120B and 114 of Indian Penal Code and Section 5 of Public Money Act qua the present petitioner.

2. It is the case of the petitioner that the petitioner had stood as a guarantor for the loans sanctioned by the respondent No. 2 Bank to Ambika Metal Industries and Nishit Sales Agency. The respondent No. 2 Bank had advanced Rs. 22,01,240/- to Ambika Metal Industries whereas loan of Rs. 21,27,680/- was sanctioned to Nishith Sales Agency for business purpose in the year 1999-2000. The said firms are family concerns of Mr. Haresh Kantilal Kansara, who was one of the Directors of the Bank when the said loans were sanctioned. The principal borrowers as well as the petitioner, who was one of the guarantors, had mortgaged various properties as security.

3. It is also the case of the petitioner that as the principal borrowers failed to repay the loans taken from the Bank, the respondent No. 2 Bank in August 2002 filed Lavad Suits No. 1245/2002 and 1248/2002 against the said borrowers respectively for recovery of outstanding dues with interest at the rate of 21% per annum from the date of disbursement till actual realization. By orders dated 30.08.2003, the Board of Nominees, Mehsana decreed the suits in favour of the Bank for Rs 22,01,240/- and Rs. 21,27,680/- respectively against Ambika Metal Industries and Nishit Sales Agency with interest at the rate of 21% per annum.

4. It is also the case of the petitioner that the petitioner by his reply dated 02.06.2002 to the Manager of the Bank and by his notice and letter dated 21.06.2004 and 15.02.2005 brought to the notice of the Administrator of respondent No. 2 Bank about the disposing of the properties by the principal borrowers during pendency of the suit. However, the Manager and the Administrator of the Bank remained negligent in protecting the interests of the Bank nor any action was taken against the principal borrowers to realize its outstanding dues. Instead of taking action against the principal borrowers, due to political pressure and in connivance with the principal borrowers, the Administrator of the Bank is pressurizing the petitioner to attach his residential properties for recovering the outstanding dues of principal borrowers. Even if the mortgaged properties of principal borrowers are disposed off, substantial portion of dues of respondent No. 2 Bank can be realized.

5. It is also the case of the petitioner that the petitioner has filed Special Civil Application No. 8169/05 before this court against the respondent No. 2 Bank and others and this court vide its order dated 27.05.2005 granted ad interim relief in terms of para 26(D) of this petition and the petitioner was also directed not to dispose of or in any manner encumber the subject property.

6. It is also the case of the petitioner that on 01.05.2005, the Administrator of respondent No. 2 Bank filed Criminal complaint being C.R. No. 122/2005 with Visnagar Police Station for offence punishable under Sections 406, 109, 420, 421, 424, 467, 468, 471, 120B, 114 of the Indian Penal Code and Section 5 of Public Money Act in which the petitioner is shown as one of the accused. The petitioner being aggrieved by the said complaint has approached this court u/s 482 of the Criminal Procedure Code for quashing of the FIR qua the petitioner as no prima facie case is made out against the petitioner in the said FIR.

7. Mr. B.T. Rao, the learned advocate appearing for the petitioner has at the first instance relied on the circular issued by the Registrar of Cooperative Society, Gandhinagar dated 06.09.2005 wherein it is stated that simply because the borrowers and guarantors have failed to pay their outstanding dues and they have not played any fraud with the Bank, criminal proceedings may not be initiated against them. It is however, open for the Bank to initiate such proceedings if any fraud is committed or documents are forged. Mr. Rao has, therefore, submitted that so far as the case of the present petitioner is concerned neither any fraud nor any misrepresentation is alleged by the

complainant and hence the complaint filed is required to be quashed and set aside.

8. Mr. Rao has further submitted that on going through the documents attached with the present petition, it is clear that the dispute is purely of civil nature. The Bank has filed Civil suit against the principal borrowers as well as the guarantors and those suits have been decreed. It is open for the Bank to execute the said decrees against the principal borrowers as well as the guarantors and realize its dues. The legal position is well settled that when decree is obtained and properties are mortgaged, the amount can be realized by execution of the said decree. Filing of criminal complaint is not a proper course of action. Mr. Rao has further submitted that no offence has been committed by the petitioner and the offence alleged against the petitioner does not constitute any essential ingredient. He has taken the court through each and every offence explaining that no ingredient of the offence has been found in the charge alleged against the petitioner.

9. Mr. Rao has relied on the decision of the Hon''ble Supreme Court in the case of Zandu Pharmaceutical Works Ltd. and Others Vs. Md. Sharaful Haque and Others, wherein after quoting the passage from the judgement of the Hon''ble Supreme Court in the case of State of Haryana v. Bhajanlal 1992 Supp(1) SCC 335, the Hon''ble Supreme Court has observed that the powers possessed by the High Court u/s 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Based on this observation alongwith the principles laid down by the Hon''ble Supreme Court in Bhajanlal's case, Mr. Rao has submitted that there was no allegation in the First Information Report or 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. He has further submitted that the allegations in the FIR and other materials accompanying the FIR do not disclose a cognizable offence justifying the investigation by Police Officers u/s 156(1) of the Code. He has further submitted that the allegations made in the FIR are so absurd and inherently improbable that on the basis of which no prudent person can reach to a just conclusion that there is sufficient ground for proceeding against the accused. He has, therefore, submitted that the complaint filed against the present petitioner is required to be quashed and set aside.

10. Mr. Rao has further relied on the decision of the Hon''ble Supreme Court in the case of Mohd. Shamim and Others Vs. Smt. Nahid Begum and Another,

wherein pursuant to the settlement arrived at between the parties, an application was filed u/s 482 of the Criminal Procedure Code before the High Court for quashing of the complaint. The respondent, however, instead of complying with the averment made in the agreement as also in her affidavit, filed objections to the application contending that she was not aware of the contents of the agreement and the affidavit which were got signed by her by misrepresentation of facts. In view of the stand taken by the respondent, the High Court took the view that there was no ground to interfere as respondent wanted to continue with her complaint and was not intending to compromise the matter. The Hon''ble Supreme Court has held that denial of execution of the deed of settlement was an afterthought and cannot be accepted in view of the fact that the settlement was arrived at the intervention of a judicial officer of the rank of Addl. Sessions Judge. The court expressly found the settlement to be genuine one and in view of the conduct of the respondent, continuance of the criminal proceedings would be an abuse of the process of court. The Hon''ble Supreme Court while exercising its jurisdiction under Article 142 of the Constitution of India set aside the judgement of the High Court and quashed the FIR. Mr. Rao has therefore submitted that here in the present case, though the petitioner has written several letters to the respondent Bank and though the decree was obtained in favour of the Bank, the same was not executed. The properties of the principal borrowers were disposed off whereby the Bank''s dues could have been realized.

11. Mr. Rao has further relied on the decision of the Hon''ble Supreme Court in the case of Central Bureau of Investigation, SPE, SIU (X), New Delhi Vs. Duncans Agro Industries Ltd., Calcutta, wherein the Hon''ble Supreme Court has held in the context of what constitutes an offence namely breach of trust u/s 405 of the Indian Penal Code and held that the expression Entrusted with property? or Swith any dominion over property? has been used in a wide sense in Section 405 of the Indian Penal Code. Such expression includes all cases in which goods are entrusted, that is, voluntarily handed over for a specific purpose and dishonestly disposed of in violation of law or in violation of contract. The expression "entrusted" appearing in Section 405 IPC is not necessarily a term of law. It has wide and different implications in different contexts. It is, however, necessary that the ownership or beneficial interest in the ownership of the property entrusted in respect of which offence is alleged to have been committed must be in some person or in some way for his benefit. The expression "trust" in Section 405 IPC is a comprehensive expression and has been used to denote various kinds of relationships like the relationship of trustee and beneficiary, bailor and bailee, master and servant, pledger and pledgee. When some goods are hypothecated by a person to another person, the ownership of the goods still remains with the person who has hypothecated such goods. The property in respect of which criminal breach of trust can be committed must necessarily be the property of some person other than the accused or the beneficial interest in or ownership of it must be in the other person and the offender must hold such property in trust for such other person or for his benefit. In a case of pledge, the

pledged article belongs to some other person but the same is kept in trust by the pledgee. Mr. Rao has submitted that none of the ingredients of Section 405 and 406 is present in the petitioner's case and hence invocation of Section 405 and 406 are absolutely irrelevant and the complaint is required to be quashed.

12. Lastly, Mr. Rao has referred to and relied on the decision of the Hon'ble Supreme Court in the case of Hotline Teletubes and components Ltd. and Ors. v. State of Bihar and Anr. 2005(10) SCC 261 wherein in the complaint it has been alleged that the complainant supplied goods to the accused persons but they failed to pay the price thereof. There is no whisper in the complaint that at the very inception of contract between the parties, there was any intention to cheat. The court observed that it appears from a bare perusal of complaint that it is a case of purely civil liability and no criminal offence is disclosed, much less offences either u/s 406 of 420 of the Indian Penal Code. The court has further observed that so far as the High Court is concerned, it has not considered this aspect of the matter, but has refused to quash the prosecution observing that it was a fit case where parties should take steps for settlement. The court further took the view that allowing such prosecution to continue would amount to an abuse of the process of court and to prevent the same, it would be just and expedient to quash the same. Mr. Rao has, therefore, submitted that in the present case also the facts are so eloquent that the court should exercise its power u/s 482 of the Criminal Procedure Code and quash the complaint.

13. Mr. A.D. Oza, the learned Assistant Public Prosecutor appearing for the respondent No. 1 State has submitted that mere reading of the complaint itself makes it clear that the complaint prima facie discloses the offence against the present petitioner. He has invited the court's attention to para 3 and para 6 of the complaint. In para 3 of the complaint, it is specifically mentioned that the principal borrowers as well as the guarantors have offered a property and the value of the property offered by them is much less than the amount borrowed by the principal borrowers. He has further relied on the averments made in para 6 of the complaint which says that the guarantors have also joined hands with the principal borrowers and played a criminal conspiracy against the Bank. He has, therefore, submitted that there is no substance in the submission that the complaint does not disclose any offence against the petitioner.

14. Mr. Oza has relied on the decision of the Hon'ble Supreme Court in the case of Rajesh Bajaj Vs. State NCT of Delhi and Others, wherein it is stated that it is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the complaint, is not the need at the stage of investigation. If factual foundation of the offence has been laid in the complaint the court should not hasten to quash criminal proceedings during

investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence.

15. Mr. Oza has further relied on the decision of the Hon'ble Supreme Court in the case of Ram Narain Poply, Pramod Kumar Manocha, Vinayak Narayan Deosthali and Harshad S. Mehta Vs. Central Bureau of Investigation and Others, wherein the court has observed that the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be passed by the prosecution because in such a situation, criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120B read with the proviso to sub-section (2) of Section 120A, then in that event more proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction u/s 120B and the proof of any overt act by the accused or any one of them would not be necessary. The said decision is in respect of the commercial transactions. Based on the aforesaid arguments and the legal propositions, Mr. Oza has submitted that this is not a fit case where the court should quash the complaint.

16. Mr. Hiren M Modi, the learned advocate appearing for the respondent No. 2 Bank/original complainant has placed reliance on the affidavit in reply filed on behalf of the respondent No. 2 Bank. In the said affidavit in reply, it has been specifically stated that the petitioner stood as a guarantor for Ambika Metal Industries and Nishit Sales Agency for obtaining loan of Rs. 15 lakhs each. On non-payment of the said loan by the principal borrower, the petitioner who stood as guarantor, is liable till the outstanding amount is not recovered from the properties of the principal borrowers. He has further submitted that the petitioner has suppressed material facts and the present petition is nothing but mere dishonesty and that the petitioner has cheated the Bank. He has further submitted that the borrowers as well as present petitioner have worked as one team and obtained loan on various names creating paper concern firms which were not actually in existence. The petitioner has also obtained loan as a principal borrower from the Bank in the name of Noble Institute of Commerce. The said amount has not been paid. The Bank had filed suit and the suit is still pending. He has further submitted that the petitioner and other borrowers had a property valued Rs. 34,55,000/- whereas they have obtained loan much in excess and the outstanding amount towards loan is Rs. 1,46,00,643/-. He has, therefore, submitted that the principal borrowers and guarantors have taken loan without enough security and thereby they have made false representation and induced the Bank to sanction loan in their favour.

17. Mr. Modi has further submitted that the petitioner has filed Special Civil

Application No. 8169/2005 before this court wherein it is stated that the respondent No. 4 i.e. Nishit Sales Agency is the paper concern which has been created for the purpose of their own benefit from the loan borrowed from respondent No. 2 Bank. It is further stated therein that there is no business activity and only letter pads and rubber stamps were prepared and it is only a paper concern. He has submitted that on the basis of the aforesaid averments in the petition filed by the petitioner himself before this court, it can certainly be presumed that though the petitioner was knowing that the principal borrowers are only paper concerns, still he stood as a guarantor and duped the Bank. He has, therefore, submitted that the present petitioner has also joined hands with the principal borrowers and have committed offence against the Bank u/s 406, 409, 420, 421, 424, 467, 468, 471 and 120B of the Indian Penal Code as alleged in the complaint. He has, therefore, submitted that the petition filed by the petitioner cannot be entertained by this court at this stage by exercising jurisdiction u/s 482 of the Criminal Procedure Code.

18. After having heard the learned advocates appearing for the respective parties and after having gone through the complaint and the relevant statutory provisions and the judicial decisions on the subject, the court is of the view that the complaint prima facie discloses the offence. While looking at the complaint it appears that as many as 40 accused have taken loans in various names and out of them, in three cases, the petitioner is either guarantor or principal borrower. The amount still remains outstanding. The ex-directors of the Bank were also involved and the amounts were taken. It is a big conspiracy hatched against the Bank and thereby crores of rupees of the Bank have been taken away by way of advance. Even if the court ignores this big fraud which was committed against the Bank and considers the case of the petitioner in isolation and individually as contended by Mr. Rao, it appears that the present petitioner stood as guarantor in two concerns. The present petitioner is also principal borrower. If one takes into consideration the total amount borrowed by the Bank by these two concerns as well as the present petitioner in comparison with the value of property offered by way of security, it becomes clear that the same is far less and does not commensurate with the amount taken by way of loan. In such a situation, it is difficult to say that there was no intention of fraud at the time of taking loan from the Bank. The issues which are involved in the present petition requires full fledged trial and unless and until the evidence is led, statements are recorded and detailed inquiry is carried out, the alleged offence of breach of trust, cheating etc by virtue of which crores of rupees of Bank have been fraudulently taken away by several persons connected with this fraud cannot be established and real culprits may not be booked. Hard earned savings of hundreds of depositors and investors were taken away by unscrupulous persons in broad day light. It is not even in public interest to exercise the inherent powers conferred upon the court u/s 482 of the Criminal Procedure Code at this stage.

19. This very complaint has come up for consideration before this Court in criminal Misc. Application No. 7041 of 2005 filed by Bhavsar Vinaben

Ashokkumar and others, being other co-accused and in respect of other loan transactions, and while dismissing the said petition on 06.10.2005, this court has observed as under:

Even otherwise, the complaint prima facie disclosed very serious charges against the present petitioners. The Bank's earlier management is also involved. There seems to be joint conspiracy of Bank's earlier management and various other parties which, inter alia, includes the petitioners. If the further investigation is stayed and the complaint qua the petitioners is quashed, the same would adversely affect and may hamper the proceedings pending before the learned Magistrate. The Court, therefore, does not find any substance or merits in this petition, which warrants the exercise of inherent powers of the court u/s 482 of the Criminal Procedure Code. The petition is accordingly dismissed.

20. Considering the entire facts and circumstances and the events that led to filing of the above complaint and further considering the peculiarity of this case being part of the same complaint and same modus operandi, the court does not think it just and appropriate to quash the complaint at this stage while exercising its inherent powers u/s 482 of the Criminal Procedure Code.

21. The petition is, therefore, summarily dismissed.