

(2021) 03 CAL CK 0005

In the Calcutta High Court

Case No : Criminal Revision No. 3058 Of 2019

M/s. Avion Builders Pvt. Ltd. & Ors

APPELLANT

Vs

State Of West Bengal & Anr.

RESPONDENT

Date of Decision : 25-03-2021

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 200, 482
Indian Penal Code, 1860 — Section 120B, 405, 406, 420
Companies Act, 2013 — Section 56(1)
Negotiable Instruments Act, 1881 — Section 138, 141

Citation : (2021) 03 CAL CK 0005

Hon'ble Judges : Suvra Ghosh, J

Bench : Single Bench

Advocate : Ayan Bhattacharya, A. Basu, Pratik Shanu, R.K Ghosal, R. Adhikary, Mrinal Das

Final Decision : Allowed

Judgement

Suvra Ghosh, J

1. In the instant application under section 482 of the Code of Criminal Procedure the petitioners have prayed for quashing of the proceedings of complaint case no. C.S. / 21563 of 2019 under section 406/420/120B of the Penal Code pending before the Learned Metropolitan Magistrate, 19th Court, Calcutta.

2. The contention of the petitioners, in a nutshell, is that opposite party no. 2 filed a complaint before the Learned Chief Metropolitan Magistrate, Calcutta on 28-05-2019 stating, inter alia, that the opposite party is a holder of 27,000 equity shares in the petitioner no. 1 company of which the other petitioners are directors. In 2016 the opposite party noticed that the said share certificates were misplaced and the said fact was intimated to the petitioners vide letter dated 26-08-2016, requesting issuance of duplicate share certificates. No reply being received by the opposite party, another letter was issued on 19-09-2016 to which the petitioners sent a reply vide letter dated 07-10-2016 stating there was no

share holding in the name of the opposite party as on that date. The balance sheet of the petitioner company as on 31-03-2015 reflected that the opposite party was holding 27,000 shares in the company though the name of the opposite party was wrongly typed therein. The opposite party alleged that the petitioners dishonestly misappropriated the amount of share certificates for their own use for making wrongful gain.

3. Learned counsel has further submitted that on or about 20-06-2016 the shares were transferred by the opposite party in favour of the petitioner nos. 2 to 4 following negotiations between the parties which is depicted in the annual returns for the period 2016-2017 and 2017-2018 obtained from the Ministry of Corporate Affairs. The opposite party received a sum of Rs. 2, 70,000/- by way of pay order of HDFC bank towards such transfer. The present directors of the petitioner company were inducted in place of the previous directors on 15-06-2016 whereas the opposite party was holding shares in the company prior to the said date. Therefore it can be inferred that petitioner nos. 2 to 4 were not in a position to induce the opposite party to purchase such equity shares. The advocate's notice was also served after lapse of two years from the alleged incident.

4. Referring to sections 420/405 of the Penal Code, learned counsel has submitted that there was no initial deception on the part of the petitioners in transfer of shares in favour of the opposite party and ingredients of offence under section 420/406 of the Penal Code are not attracted. The dispute is squarely governed by the Companies Act, 2013, section 46 and Rule 6 dealing with issuance of duplicate certificate of shares. The dispute pertains to non issuance of duplicate share certificates which cannot be termed as an offence under section 420/406 of the Penal Code. Learned counsel has placed reliance on the authorities in *Madhavrao Jiwaji Rao Scindia v/s. Sambhajirao Chandojirao Angre* reported in AIR 1988 Supreme Court 709, *Shiv Kumar Jatia v/s. State of NCT of Delhi* reported in AIR 2019 Supreme Court 4463 and *Suresh Kumar Goyal v/s. State of Uttar Pradesh* reported in AIR 2019 Supreme Court 535 in support of his contention. He has also used supplementary affidavit to produce certain documents and has prayed for quashing of the proceedings.

5. Learned counsel appearing for the opposite party has vehemently opposed the contention of the petitioners and has submitted that it shall appear from the financial statement of the petitioner company for the year ended 31st March, 2015 that the equity shares in question stood in the name of the opposite party. It is strange that such shares of the opposite party were suddenly missing from the record of the petitioner company subsequently. It is a fact that some amount was transferred to the account of the opposite party but such transfer was disputed by the opposite party by way of communication with the bank. Drawing the attention of the court to section 56(1) of the Companies Act, 2013, learned counsel has argued that the petitioner company could not have registered transfer of securities of the company unless the proper instrument of transfer

bearing the names of both the parties to the transfer (transferor and transferee) was executed. There are disputed questions of fact involved in the case which should be determined by way of trial. The learned trial court, after recording initial evidence under section 200 of the Code, was satisfied about prima facie case having been made out and issued summons upon the accused/petitioner. Therefore quashing of the proceedings at such initial stage is not warranted. Learned counsel has referred the authorities in *Arpita Mukherjee nee Chatterjee v/s. Deva Prosad Ganguly* reported in (2016) 1 CAL LT 102 (HC), *Rumi Dhar v/s. State of West Bengal* reported in (2009) 2 SCC (Cri)1074 and *Helios and Matheson Information Technology Limited v/s. Rajeev Sawhney* reported in (2012) 1 SCC 699 in support of his contention and has prayed for dismissal of the application.

6. At the outset it should be pointed out that though allegation in the complaint was under section 420/406/120B of the Penal Code, cognizance was taken by the learned Chief Metropolitan Magistrate, Calcutta, of offence under section 138/141 of the Negotiable Instruments Act which has no bearing with the complaint. However, after the case was transferred to the learned Metropolitan Magistrate, 19th Court, Calcutta who examined the complainant under section 200 of the Code of Criminal Procedure, summons was issued by him upon the petitioners for offences punishable under section 420/406/120B of the Penal Code.

7. Learned Chief Metropolitan Magistrate, Calcutta, should be more careful henceforth so as to avoid such error.

8. Turning to merits of the case, the principal allegation made out in the complaint against the petitioners is under section 420/406 of the Penal Code. The grievance of the complainant/opposite party is that though the complainant company holds 27,000 equity shares of the accused company, the accused company has refused to issue duplicate share certificates in its favour despite intimation that the original share certificates were misplaced.

9. The ingredients of offence as envisaged under section 420 of the Penal Code are as follows:-

"(i) there should be fraudulent or dishonest inducement of a person be deceiving him;

(ii)(a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or

the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and in cases covered by (ii)(b), the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property". {*S.W. Palanitkar v. State of Bihar* 2002 SCC (Cri) 129.}

10. Section 406 of the Penal Code deals with punishment for criminal breach of trust, which is defined in section 405 and is set out:-

405. Criminal breach of trust.- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".?

11. It transpires on careful scrutiny of the complaint that the complainant/opposite party purchased 27,000 equity shares from the accused/ petitioners company and was issued share certificates for the same. In 2016 it was detected by the complainant company that the said share certificates were not found/misplaced for which the complainant company requested the accused company to issue duplicate certificates in its favour vide letters dated 26-08-2016, 19-09-2016 and 29-09-2016, to which the accused company replied that there was no share holding in the name of the complainant company in its office record. Further notice was sent to the accused company by the complainant company through its learned advocate demanding issuance of duplicate share certificates which was not heeded to by the accused, following which the complaint was lodged.

12. Referring to the copy of " notes to the financial statements for the year ended 31st March, 2015" of the accused company, learned advocate appearing for the complainant/opposite party has submitted that the name of the complainant company appears as shareholder in respect of 27,000 equity shares of the accused company in this document. Such fact is not disputed by the petitioners who submit that the shares were transferred in their favour by the opposite party subsequently, sometime in 2016. Learned counsel for the petitioners has referred to the annual return of the petitioner company for financial year 2016-2017 which indicates that 27,000 shares were transferred by the opposite party in favour of Padma Poddar (petitioner no. 4). So the shares being demonstrated in the document of 2015 is well explained.

13. The said document further reveals that petitioners no. 2, 3 and 4 were appointed as directors of the company in 2016 whereas the share certificates in question were admittedly issued sometime prior to 2015. The petitioners, therefore, cannot be held responsible for any act by or on behalf of the company prior to their appointment as directors thereof.

14. It is pointed out on behalf of the opposite party that an amount of Rs.2,70,000/- was deposited in their bank account by cheque/DD in 2016. Of course, receipt of the said amount was disputed by the opposite party who requested the bank to trace the source of such amount. At the same time, such contemporaneous entry in the bank account of the opposite party prima facie suggests that the amount was in lieu of transfer of the equity shares in question, 27,000 in number, valued at Rs. 10/- per share.

15. Learned advocate for the opposite party has drawn the attention of the court to section 56(1) of the Companies Act, 2013 which states that " A company shall not register a transfer of securities of the company,.....other than the transfer between persons both of whose names are entered as holders of beneficial interest in the records of a depository, unless a proper instrument of transfer, in such form as may be prescribed, duly stamped, dated and executed by or on behalf of the transferor and the transferee has been delivered to the company ". In the present case, as alleged transfer of shares was between a shareholder and one of the directors of the same company, such instrument does not appear to be mandatory.

16. It is trite law that jurisdiction of the court under section 482 of the Code ought to be exercised with extreme care, caution and circumspection and should not be used to stifle or axe down a legitimate prosecution. The test is whether the uncontroverted allegations made in the complaint prima facie establish the case and also whether continuation of such complaint shall amount to abuse of the process of the court. The said principle of law has been discussed by the Hon'ble Supreme Court in Suresh Kumar Goyal and Madhavrao Jivajirao Scindia (supra).

xvii. In the case in hand, the allegations made against the accused-petitioners are bereft of any intention of cheating or misappropriation at the inception of the transaction. The equity shares were admittedly issued against consideration and loss or misplacement of such shares by the opposite party is a subsequent event which was not contemplated by the parties at the time of issuance of the shares. No prima facie case of initial deception has been made out and under no stretch of imagination can it be held that the petitioners acted with criminal intent at the inception on an anticipation that the shares would be misplaced at a subsequent stage. No prima facie case of entrustment with or dominion over property or dishonest misappropriation of property or even ingredient of cheating has found place within the four corners of the complaint. Even if it is held that duplicate share certificates were deliberately not issued in favour of the opposite party with criminal intent, such act was done at a subsequent stage only after the original share certificates were misplaced and no such intent is found at the inception of the transaction.

18 Referring to the authority in Helios and Matheson Information Technology Limited (supra), learned counsel for the opposite party has submitted that the photocopies of documents produced by the petitioners for the first time before this court cannot be a basis for quashing the complaint. In my considered view, even if the documents filed by the petitioners relating to subsequent transfer of the shares are not taken into consideration, a plain reading of the complaint itself is sufficient to hold that no prima facie case under section 420/406 of the Penal Code has been made out against the accused petitioners. The other judicial pronouncements relied upon by the opposite party deals with cases where prima facie case was made out against the accused and as such, are of no assistance to

the opposite party herein.

19 Several provisions of the Companies Act, 2013 have been referred to by the learned counsel for the petitioners which deal with issuance of duplicate share certificates, procedure therefor and remedy for non issuance of the same. These provisions do not require discussion in the present case as the same does not fall within the ambit of application under section 482 of the Code. It is held, even at the cost of reiteration, that mere insertion of sections 420/406 of the Penal Code in the complaint does not by itself make out a prima facie case under the said provisions of law and it is the substance of the complaint which has to be looked into. No prima facie case of criminal intent at the inception having been made out against the petitioners in the complaint, I am inclined to hold that no criminal offence, far less an offence under section 420/406 of the Penal Code is disclosed in the complaint and allowing the proceedings to continue shall amount to abuse of the process of law.

20. In the result, CRR 3058 of 2019 is allowed.

21. Connected application being CAN 1 of 2020 (Old CAN 930/2020) is disposed of.

22. Proceedings of complaint case no. C.S./ 21563 of 2019 under section 406/420/120B of the Penal Code pending before the Learned Metropolitan Magistrate, 19th Court, Calcutta is quashed.

23. There will however be no order as to costs.

24. A copy of this judgment be sent to the learned trial court for information and necessary action.

25. Lower court record be returned.

26. Urgent certified website copies of this judgment, if applied for, be supplied to the parties expeditiously on compliance with usual formalities.