(2020) 03 CAL CK 0014

In the Calcutta High Court

Case No : Criminal Revision (CRR) No. 3906 Of 2015

Nikunj Kumar Lohia & Ors APPELLANT

Vs

State Of West Bengal And Anr RESPONDENT

Date of Decision : 06-03-2020

Acts Referred:

Indian Penal Code, 1860 — Section 120B, 415, 405, 406, 420
Code Of Criminal Procedure, 1973 — Section 177, 482
Sick Industrial Companies Act, 1985 — Section 25, 26

Citation : (2020) 03 CAL CK 0014

Hon'ble Judges : Madhumati Mitra, J

Bench : Single Bench

Advocate : Ayan Bhattacharrya, Sreetama Roy, P.S.Mondal, Sabyasachi Banerjee, Pradip Sancheti, Pratim Priya Dasgupta, Arnabi Dutta

Final Decision : Dismissed

Judgement

Madhumati Mitra, J

Petitioners have prayed for quashing of the criminal proceedings being G.R.Case No.4105 of 2011, pending before the Learned Chief Metropolitan

Magistrate, Calcutta.

The background aspects of the matter, so far relevant for the present purpose, may be narrated, in brief, as follows:-

Opposite party no.2, Textile Agency Pvt. Ltd., a company incorporated under the Companies Act being represented by one Bal Krishna Garodia on

22.11.2011 lodged an FIR with Hare Street Police Station, alleging that they were share-holders of M/s. East India Cotton Mfg. Co.Ltd. holding 1000

equity shares of the said company and the said company was employing about 2500 workers in its plant of Faridabad. It was alleged in the said F.I.R.

that the company shut down its operations in 1995 with ulterior motive to defraud the share-holders. It was further alleged that the company had

approached the Board for Financial and Industrial Reconstruction (BIFR) for reducing the loans payable by it to the financial institutions, Haryana

Government, Canara Bank, Oriental Bank, etc. as well as to its creditors in the market. It was also alleged in the said FIR that the company with a

view to cheat everybody concerned disposed off all the current assets including land under the pretext that the said assets had been damaged. In the

said FIR, it was also alleged that the company approached the BIFR with a scheme asking for various concessions from Govt. institutions and share-

holders. The scheme was approved on 10.01.2007, where the Director of the company Harish Gupta assured that the company would restart

production within a few months. Accused sold the entire plant and machinery etc. in 2006 to one Mr. S.L. Pahadia & Co., in collusion with Jyoti

Udyog Ltd., a sister concern of the said EICM. It was further alleged that the entire payment of Rs.186 Lacs was received in cash by one Mr. Jai

Narayan Singh, on behalf of Jyoti Udyog Ltd. The accused sold out the assets of the company prior to submissions of revival scheme and they gave

statement to BIFR on 13.08.2008 that they had not sold any assets of the company.

On the basis of that FIR, Hare Street Police Station Case No. 855 of 2011, dated 24.11.2011 was initiated against the FIR named accused persons for

commission of alleged offences punishable under Section 420/406/120B of the Indian Penal Code. Investigation ended in submission of charge-sheet

against the accused persons for commission of alleged offences punishable under Sections 420/406/120B of the Indian Penal Code.

Case record reveals that on 03.12.2019, the petitioners filed supplementary affidavit to bring certain facts on record. Petitioners have also filed written

notes of argument.

Learned Counsel for the petitioners has elaborately advanced his submissions in favour of quashing of the proceedings pending against the petitioners.

While making his submissions he has laid emphasis on the following grounds:-

The allegations contained in the First Information do not prima facie disclose the commission of alleged offences under Section 420/406 of the Indian

Penal Code. It has been contended by the Learned Counsel for the petitioners that the opposite no.2 initiated the criminal proceedings against the

petitioners after being unsuccessful before the BIFR and AAIFR as his prayer for cancellation of rehabilitation scheme provided to the East India

Group was turned down. Learned Counsel has further submitted that alleged sale of machinery and land in the year 2006 and 2007 are the subject

matter of civil suit pending before the civil court. According to the contention of the Learned Counsel for the petitioners, the grievance of the opposite

party no.2, as it appeared from the averments of the First Information Report that East India Group fraudulently invoked the provisions under SICA.

He has vigorously argued that taking recourse to the provisions of SICA by East India Group cannot be called in question by way of initiating criminal

proceedings.

In support of the above contention, the Learned Counsel has placed reliance on paragraphs 6 and 7 of the decision of Madhavrao Jiwajirao Scindia

and Ors. Vs. Shambhajirao Chandrojirao Angre & Ors. reported in 1988(1) SCC 692.

Learned Counsel for the petitioners has also cited the decision of Thelapalli Raghavaiah Vs. Station House Officer & Ors. reported in 2007(10) SCC

424. He has given emphasis on paragraphs 2,5 and 7.

In addition to the referred above decisions he has also relied on the decision in Suresh Kumar Goyal and Ors. Vs. State of Uttar Pradesh & Anr.

reported in AIR 2019 SC 535.

The next contention of the Learned Counsel for the petitioners are that the proceedings pending against petitioners are liable to be quashed on the

score that there was inordinate delay in lodging the FIR and the said delay in lodging the FIR was not explained anywhere of the First Information

Report.

In this connection, Learned Counsel for the petitioners has cited paragraphs 21 and 22 of the decision of Kishan Singh (dead) through LRs.Vs. Gurpal

Singh & Ors. reported in 2010(8) SCC 775.

He has also placed reliance on the decision of Udai Shankar Awasthi Vs. State of Uttar Pradesh & Anr. reported in 2013(2) SCC 435 and laid

emphasis on paragraph 46 of the said judgment.

Next contention of the petitioners is that the proceedings pending against them are not tenable for suppression of material facts. It has been

specifically argued that the proceedings before the BIFR and AAIFR were totally suppressed by the opposite no.2. It has been submitted by the

Learned Counsel for the petitioners that the opposite party no.2/complainant the Bal Krishna Garodia was a former Director of East India Cotton

Manufacturing Company Ltd. In this connection, reliance has been placed on the decisions of Zandu Pharmaceutical Works Ltd. and Ors. Vs. Mohd.

Sharaful Haque and Anr. reported in (2005)1 SCC 122 and emphasis has been supplied to paragraphs 5 and 13 of the said judgment.

Apart from, the Learned Counsel for the petitioners has relied on the decision of A.K. Khosla and Ors. Vs. T.S. Venkatesan and Anr. reported in

SCC Online 1992 Cri.LJ 1448 and cited paragraphs 39,40,42,50,53,60,61,62 and 63.

Learned Counsel for the petitioners has further submitted that the averments of the First Information Report did not mention anything regarding the

specific role played by the accused persons in the commission of the alleged crime. According to the petitioners, in absence of specific averments in

this regard, a Director of a company cannot be held responsible for the acts of the company. In this connection, he has cited the decisions of

S.K.Alagh Vs. State of Uttar Pradesh and Ors. reported in 2008(5) SCC 662 and laid stress on paragraphs 14,16 and 20 on the said judgment.

Learned Counsel for the petitioner has also referred to the decisions of Asoke Bask Vs. State of Maharashtra and Ors. reported in 2010(10) SCC 660

(paragraph 23 & 24) and Sunil Bharti Mittal Vs. Central Bureau of Investigation reported in 2015(4) SCC 609 (paragraph 12,42 to 44).

Learned Counsel for the petitioners has also contended that from the allegations contained in the FIR, it transpires that the alleged offence was

committed outside the territorial jurisdiction of Learned Chief Metropolitan Magistrate and such Learned Magistrate had no territorial jurisdiction to

take cognizance of the offence in terms of Section 177 Cr.P.C.

In support of his contention, he has placed his reliance on the decision of Y.Abraham Ajith & Ors. Vs. Inspector of Police, Chennai & Anr. reported

in (2004) 8 SCC 100. Learned Counsel for the petitioners has specifically contended that the allegations made in the First Information Report did not

get support from the materials collected by the investigating agency during investigation. He has contended that during investigation only Form

No.23AC of profit and loss account and Form No.20B of 2009 were seized by the investigating agency. It has been forcefully contended that the

contents of the FIR and the materials collected during investigation did not disclose commission of any cognizable offence against the petitioners and

continuance of the criminal proceedings against them would be an abuse of the process of the Court. In support of this contention, the Learned

Counsel for the petitioners has relied on the decisions of R.P. Kapur Vs. State of Punjab reported in AIR 1960 SC 86 6and Sarabjit Singh Vs. State of

Punjab & Ors. reported in (2013) 6 SCC 800.

Argument has been advanced on behalf of the petitioners that the FIR lodged against the present petitioners is the counterblast to the First Information

Report lodged by the East India Group against the representative of the de-facto complainant Bal Krishan Garodia and his nephew Mr. Arun Garodia,

being Dharuhera Police Station, Case No.319 of 2011. He has also urged that the Learned Magistrate took cognizance of the alleged offences

mechanically without application of judicial mind.

On the other hand, the Learned Counsel for the opposite party/complainant has submitted that all the ingredients of the alleged offences are present in

the written complaint lodged by the opposite party/complainant before the police station. Learned Counsel appearing for the opposite

party/complainant has refuted all the submissions made by Learned Counsel for the petitioners in support of quashing of the criminal proceedings. It

has been forcefully argued that while dealing with a prayer for quashing a criminal proceeding pending against the accused in exercise of the power

under Section 482 of the Code of Criminal Procedure, duty of the Court is to see whether the averments in the written complaint prima facie disclose

any cognizable offence or not. Learned Counsel has invited the attention of the Court to the averments of the written complaint and submitted that

there were specific averments, that the shareholders of M/s East India Cotton Manufacturing Company Ltd. were cheated and all the movable and

immovable assets of the company were sold out by the accused persons to defraud the shareholders. He has further contended that though the assets

had been sold prior to submission of revival scheme but they made false statements to the BIFR that they had not sold any assets of the company.

Contradicting the arguments advanced by the petitioners, the Learned Counsel for opposite party has submitted that the grounds taken by the

petitioners for quashing of the criminal proceedings pending against them are not tenable at all. The prayer for quashing of the criminal proceedings

has to be dealt with very cautiously. Learned Counsel of the opposite party/ complainant has also submitted that pendency of the Civil Suit regarding

the sale of immovable assets of the company or the proceeding regarding rehabilitation of the company pending before the BIFR or SICA does not

ipso facto is a good ground to quash the criminal proceedings pending against the accused/petitioners. It has been contended that the delay in lodging

the FIR does not itself make the case of the complainant improbable when there are sufficient reasons in lodging the FIR at a delayed stage. He has

submitted that deliberate delay in lodging the FIR may be fatal but that delay cannot be a sole ground to quash the criminal proceedings pending

against the petitioners. He has further submitted that non-mention of the proceedings pending before the BIFR and AAIFR may not be a ground to

quash the proceedings, the criminal proceedings particularly when the alleged facts prima facie disclose the commission of alleged offences.

According to the contention of the Learned Counsel for the opposite party/ complainant the criminal proceedings pending against the present petitioners

is well maintainable. In refuting the submissions made by Learned Counsel for the petitioners, the Learned Counsel for the opposite party/complainant

has submitted that the cause of action of the present case arose within the territorial jurisdiction of the Learned Magistrate. In this connection, the

Learned Counsel for the opposite party/complainant has pointed out to the contents of the FIR and submitted that in the First Information Report it has

been specifically averred about the commission of alleged offences of fraud cheating and misappropriation of the funds by the director of M/s East

India Cotton Manufacturing Company Ltd. in collusion with director of M/s Jyoti Udyog Ltd. The address of the company has been mentioned as at

18, N.S. Road, Kolkata-700001, i.e. within the territorial jurisdiction of Learned Magistrate. He has contended that the present revisional application

filed by the petitioners for quashing of the proceedings pending against them has no merit at all and same is liable to be dismissed.

In support of his contention the Learned Counsel for the opposite parties has relied on the following decisions:

1. Sanjay Pandey Vs. State of West Bengal reported in (2019) SCC Online Cal 3833;

2. Geeta Mehrotra & Anr. Vs. State of Uttar Pradesh & Anr. reported in (2012) 10 SCC 741;

3. Electrosteel Steel Ltd. & Ors. Vs. STP Ltd. reported in (2019) SCC Online Cal 3835;

4. Kusum Ingots & Alloys Ltd. Vs. Pennar Peterson Securities Ltd & Ors. reported in (2000) 2 SCC 745;

5. BSI Ltd. & Anr. Vs. Gift Holdings Pvt. Ltd & Anr. reported in (2000) 2 SCC 737;

6. Trisuns Chemical Industry vs. Rajesh Agarwal & Ors. reported in (1999) 8 SCC 686;

7. Sri Krishna Agencies Vs. State of Andhra Pradesh and Anr. reported in (2009) 1 SCC 69;

8. State of Bihar and Anr. Vs. P.P. Sharma, IAS and Anr. reported in (1992) Supp (1) SCC 222;

9. State of Maharashtra Vs. Ishwar Piraji Kalpatri & Ors. reported in (1996) 1 SCC 542;

10. Sanjeet Kumar Vs. State of Bihar and Anr. reported in (2009) 12 SCC 136;

11. Sri J.P. Shekar Vs. State reported in 2013 SCC OnLine Kar 3766.

Learned Counsel appearing for the parties took much pain and advanced their eloquent argument and referred a series of decisions to justify their

respective submissions.

I have carefully examined the submission and counter-submission advanced by the Learned Counsel for the parties and the decisions cited at Bar.

In the case at hand, the petitioners have prayed for quashing of the criminal proceedings pending against them on various grounds. It is well settled

that while exercising jurisdiction under Section 482 of the Code of Criminal Procedure, the High Court should not ordinarily embark upon an enquiry as

to the reliability of the evidence and assume the jurisdiction of Trial Court. The inherent power can be exercised by the High Court to quash criminal

proceedings only where the allegations contained in the written complaint or FIR do not constitute an offence. It is true that while considering the

question whether criminal proceedings deserve to be quashed on the ground of delay, the first thing to be looked into is the reason for such delay as

well as the seriousness of offence. It is well settled that delay itself is not a ground for quashing of criminal proceedings. In the instant case, the

allegations against the petitioners are that the petitioners being the Directors of M/s East India Cotton Manufacture Company Ltd. in collusion with the

Directors of M/s Jyoti Udyog Ltd. committed the alleged offences of cheating, misappropriation of funds with a view to defraud the shareholders of

M/s East India Cotton Manufacture Company Ltd. It was alleged that plots of land were sold before 10.01.2007, i.e. before the date on which the

directors agreed to the Revival Scheme of the Company. From the averments of written complaint/FIR, it appears that the scheme for revival was

approved on January 10, 2007 and the Director of the company Harsh Gupta assured that the company would restart the project within a few months.

If the prosecution fails to explain the delay in lodging the FIR satisfactorily it may adversely affect the prosecution case. It is well-settled that the

delay in lodging the FIR itself cannot be a ground for quashment of the proceedings.

A specific plea has been taken on behalf of the petitioners that, the criminal proceedings pending against them are liable to be quashed for suppression

of material facts. It has been specifically argued the complainant/opposite party being the frustrated litigants lodged the FIR against the present

petitioners suppressing of material facts and on this score alone the criminal proceedings pending against the petitioners are liable to be quashed.

The quashing of proceedings by the High Court can only be done in rare cases. When the allegations contained in the FIR prima facie disclose the

commission of cognizable offence then the Court should not quash the proceedings by appreciating the grounds of suppression of material facts taken

by the accused/petitioners. The reason behind it is that the quashing of prosecution by the High Court in exercise of inherent power by appreciating

the defence case or the evidence is not reasonable and proper when the allegations contained in the FIR disclose prima facie the commission of the

alleged offences.

Another plea has been raised by the petitioners that the First Information Report did not specifically disclose anything regarding the role played by the

petitioners in commission of the alleged offences. In the written complaint/FIR there are specific allegations against the Directors of M/s. East India

Cotton Manufacturing Company Ltd. that they in collusion with the Directors of M/

s Jyoti Udyog Ltd., committed the offences of fraud, cheating and

misappropriation of funds. It was also specifically alleged that one Harsh Gupta was the common Director of both the companies at the relevant point

of time. As such, it cannot be said that there was no specific averment or allegation in the First Information Report against the petitioners. The

allegation against the petitioners in the First Information Report is that they in collusion with each other committed fraud, cheating and misappropriation

of the funds/assets of the company. The contention of the Learned Counsel for the petitioners to quash the proceedings against them due to absence

of specific averment/allegation in the FIR has no foundation.

It has been contended on behalf of the petitioners that the alleged offences were committed outside the territorial jurisdiction of the Learned

Magistrate. In this connection, written complaint or the FIR may be looked into once again. The address of the company has been mentioned in the

petition of complaint. From that address it appears that the office of the company of M/s East India Cotton Manufacturing Company Ltd. is at

Calcutta within the territorial jurisdiction of the Learned Magistrate. More so, in the charge-sheet the investigating officer specifically mentioned that

the alleged incident occurred at 18, N.S. Road, Kolkata â?" 700001. At this stage, I do not find any cogent reason to draw an inference in favour of

the petitioners that the Learned Judicial Magistrate lacks territorial jurisdiction.

Learned Counsel appearing for the petitioners has specifically contended that the grievance of the opposite party/complainant is that the assets of the

company allegedly sold by the petitioners. He has contended that the maker of the FIR claimed himself to be a shareholder of the company and he

approached before the BIFR and AAIFR for cancellation of the rehabilitation scheme provided to the East India Group. It has been argued that

instead of preferring an appeal under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, the opposite party/complainant

lodged the FIR which is against the scope and spirit of the said Act. It has been vigorously contended by him that the defacto complainant did not take

recourse to the provisions as provided in Section 25 of the said Act and lodged the FIR with mala fide intention to harass the present petitioners. It is

his specific contention, that the present proceedings pending against the petitioner is not maintainable in view of the provisions of Section 25 of the Act and are liable to be quashed. In this connection, it would be reasonable to deal with the said provision i.e. Section 25 of the Act. Section 25 of the Act

runs as under:-

â??25. Appeal.â?"(1) Any person aggrieved by an order of the Board made under this Act may, within forty-five days from the date on which a copy

of the order is issued to him, prefer an appeal to the Appellate Authority:

Provided that the Appellate Authority may entertain any appeal after the said period of forty-five days but not after sixty days from the date aforesaid

if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) On receipt of an appeal under sub-section (1), the Appellate Authority may, after giving an opportunity to the appellant to be heard, if he so

desires, and after making such further inquiry as it deems fit, confirm, modify or set aside the order appealed against 1[or remand the matter to the

Board for fresh consideration].â??

Section 25 lays down that any person aggrieved by an order of the Board made under the Act may prefer an appeal to the appellate authority. This

Section also prescribes the period to prefer an appeal and the time limt to dispose of that appeal. Section 26 of the Act bars the jurisdiction of the Civil

Court. In order to appreciate the matter in its correct perspective, it is essential to deal with the offences alleged in the First Information Report.

Section 415 of the Indian Penal Code defines cheating and requires:

1) Deception of any person;

2(a) Fraudulent or dishonestly inducing that person; (i)To deliver any property to any person, or

(ii)To consent that any person shall retain any property; or (b)Intentionally inducing that person to do or omit to do anything which would not do or omit

if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

On the other hand, Section 405 of the Indian Penal Code runs as under:-â?? 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 willfully suffers any other person so to do, commits â??criminal breach of

trustâ??.â??

A plea has been raised on behalf of the petitioners that the criminal proceedings against the petitioners cannot be allowed to be continued due to the

pendency of the BIFR proceedings in respect of the company. The question as to whether a company is a sick industry or not can be decided by

BIFR and Section 25 of the Sick Industrial Companies Act, 1985 lays down the provision to prefer an appeal challenging the decision of BIFR

regarding determination of the issue of sick industry. Section 26 of the said Act outs the jurisdiction of Civil Court to reopen that issue. This does not

indicate that the Criminal Court has no jurisdiction to entertain proceedings arising out of a written complaint or First Information Report alleging facts

of commission of cognizable offences committed by the Directors of the said company prior to BIFR proceedings. More so, the nature and object of

proceedings before the BIFR and the criminal Court are quite different. As such, I am of the view, the pendency of the proceeding before the BIFR

cannot be a ground to quash the criminal proceedings.

At the cost of repetition I would like to say that in the instant case there are specific allegations against the accused/petitioners that they sold the

assets of the company and misappropriated the fund of the company. The allegations contained in the FIR prima facie indicate the commission of

cognizable offences and the continuance of criminal proceedings pending against the petitioners is not barred by the provisions of Sick Industrial

Companies (Special Provisions) Act, 1985.

The above discussions and findings led me to hold that the continuance of the criminal proceedings pending against the petitioners would not be an

abuse of the process of the Court. As a result the revisional application is devoid of merit and stands dismissed.

Before parting with the case, I would like to clarify that the observations as made in this judgment should not be taken as an expression of any opinion

regarding the merit of the criminal proceedings pending before the Learned Magistrate. The Learned Trial Magistrate shall proceed with the complaint

and dispose of the same in accordance with the law with utmost expedition.

Urgent Photostat certified copy of this order, if applied for, shall be supplied expeditiously after complying with all necessary legal formalities.

