(2020) 05 MP CK 0163

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Case No. 10389 Of 2017

Nilesh Ajmera APPELLANT

Vs

State Of M.P. RESPONDENT

Date of Decision : 29-05-2020

Acts Referred:
Code Of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 120B, 420, 463, 464, 467, 468, 471

Citation : (2020) 05 MP CK 0163

Hon'ble Judges : S. K. Awasthi, J

Bench : Single Bench

Advocate : V.K. Jain, Sonali Goyal, Amol Shrivastava, Pramod C. Nair

Judgement

(1) The applicant- Nilesh Ajmera has preferred this petition under Section 482 of Cr.P.C. for seeking quashment of FIR bearing crime No.13/2016 registered at Crime Branch District Indore wherein the present applicant is alleged to have committed offence punishable under Section 420, 467, 468, 471 and 120-B of I.P.C.

(2). From perusal of the FIR dated 25.06.2016 registered by the complainant Usha Jain W/o Surendra Jain indicate that she was aggrieved by the action of the company namely M/s Phoenix Devcon Pvt. Ltd. Indore since despite execution of the sale deed dated 23.09.2009 in favour of the complainant with respect to plot number 1868 and she was not given the possession of the plot, therefore, it was alleged that the action of the directors of the company is fraudulent and criminal action be initiated against them.

(3). It appears from the FIR as well as the investigation report that the present applicant named as an accused solely on the ground that he was the Director of the company and therefore, his involvement in carrying out the fraudulent design which led to misappropriation and embezzlement of the money cannot be ruled out.

(4). While it is viewed on the facts and circumstances of the case that the sale deed was executed in the year 2009 but apparently the possession of the plot No.1868 was not handed over to the complainant, leading to complaint before the police and registration of the FIR on 25.06.2016. However, the facts of the case are to be considered in the context of the present applicant and his involvement in the entire matter.

(5). In order to appreciate the role of the present applicant in the day to day operation of the company and his involvement in the company, it would be appropriate to commence factual narration from the date on which the company named Phoenix Devcons Pvt. Ltd. was incorporated. The record indicates that the company was incorporated on 24.09.2007 with the present applicant and one Smt. Sonali Ajmera being the directors of the company owing Rs. 5,000/- shares each. It is further borne out from the record that the present applicant remained the director of the company from the date of its incorporation till 03.11.2009 and he resigned from the post of director on 03.11.2009.

(6). The company was incorporated to develop residential township and in order to achieve its objective, the company purchased the parcel of lands ad-measuring 58.139 acre and for smooth functioning of the company and implementation of the project, the revenue records were muted in the name of the company and diversion order was passed in its favour by the Sub Divisional Officer on 20.03.2009. The record also reveals that the layout plan of the township was duly approved by the town and country planning department and all other necessary permissions were accorded. In the light of these circumstances, it has been submitted by the learned senior counsel for the applicant that the intention of the company was never to commit fraud or embezzle money, otherwise the exercise under taken above would not have taken place.

(7). The company after having complied with all necessary conditions for commencing development of a township proceeded to advertise the project in order to attract the investors who shall purchase the fully developed plots. By following this mode of operation, the record indicates that large number of people invested in the Phoenix Devcons township project and the company collected amount upto Rs. 32,66,50,128/-.

(8). Until this point, the functioning of the company appears to be unblemished but the record demonstrated that the deviation in functioning of the company initiated after having collected large sum of money from the investors. Therefore, it appears that the company did not fulfill its promise of developing the plot and handing over physical possession of the same. Consequently, there are two categories of investors who are aggrieved by the action of the company and its directors. The first category is of those investors, who made payment of money and were issued allotment letter of plots but no sale deed was executed or registered in their favour. The second category is of those investors who made full and final payment of the money and the sale deed was also executed in their favour although the physical possession of the plot was not handed over to them.

(09). The present case involves the second category of investor. Once the necessary ascertain of facts is done with, it is appropriate to now deal with the role of the present applicant.

(10). Learned senior counsel for the applicant submits that the applicant has been falsely implicated in the matter and he has no interference or relation with the company and also considering the facts he had served ties with the company in the year 2009 and is a British citizen having visited India on very few occasions in the relevant period between 2007 to 2009, the proceedings against the present applicant deserves to be quashed. In fact from the perusal of the FIR itself, it is clear that there is no deception made by the present applicant so far as respondent No.2 is concerned.

(11). Per contra learned Public Prosecutor submitted that there is direct relationship between the co-accused persons who are absconding and the present applicant is also a beneficiary of the money raised by the company. Therefore, it would be appropriate to discourage filing of such petitions as the same have direct effect on the progress of the trial.

(12). Learned counsel for the objector has invited attention of this Court to the fact that applicant is one of the director of Phoenix Devcons Private Limited, Indore, who is involved in day to day affairs of the company. During the investigation police recorded the statement of farmers from whom the land has been purchased and according to their statement in the year 2007 an agreement was signed with them and despite the lapse of three years, the balance amount has not been paid to them. The farmers have also deposed that they are still in possession of the aforesaid land and carrying out the agricultural operation on the said land. The aforesaid agriculturists have also stated that for seeking the permission from the TNC office and SDM office their forged signatures are used whereas they have never signed the aforesaid documents. Hence,the accused persons by forged signatures have obtained the permission from the government department. The specimen signature is already sent to hand writing expert for verification of signatures and report is awaited, thus the material collected by the police during the investigation clearly indicates that the participation of the present applicant in said crime, thus he prays for dismissal of the petition.

(13). I have given my anxious consideration to the facts of the present case and the rival contentions raised by the parties.

(14). A perusal of the record, indicates that the present applicant had no interaction with the investors nor he involved in the management of the company. In order to bring home this factual ascertain, the applicant has placed on record copy of the passport, which indicates that the applicant is a British Citizen and had traveled to India on very few occasions over the relevant period of two and half years. The veracity of the said ascertain and the fact that the applicant is a British Citizen has not been controverted by either the prosecution or the complainant.

(15). I have duly perused the record and I am of the considered opinion that the prosecution has not been able to indicate the involvement of the present applicant in day to day management of the company or the manner in which the applicant was part of fraudulent design devised by Ritesh Ajmera and Chirag Shah. In order to rope in the Director of a company, who is not involving in management of the company requires clear involvement of such director whereas a perusal of the FIR and the contents of the case diary falls short of insinuating the present applicant directly or indirectly.

(16). At this juncture, the observation of the Apex Court in the case of K.K. Ahuja vs V.K. Vora 2009 (10) SCC 48 is worth placing reliance on. The Hon'ble Apex Court has held as :

" Section 291 of the Said Act provides that subject to the provisions of that Act, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do. A company though a legal entity can act only through its Board of Directors. The settled position is that a Managing Director is prima facie in charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as other directors are concerned, they can be prosecuted only if they were in charge of and responsible for the conduct of the company's business.

(17). In State of NCT of Delhi through Prosecuting Officer, Insecticides, Government of NCT, Delhi Vs. Rajiv Khurana reported in (2010) 11 Supreme Court Cases 469, it was observed thus at paragraph 17;

"17. The ratio of all these cases is that the complainant is required to state in the complaint how a Director who is sought to be made an accused, was in charge of the business of the company or responsible for the conduct of the company's business. Every Director need not be and is not in charge of the business of the company. If that is the position with regard to a Director, it is needless to emphasise that in the case of non- Director officers, it is all the more necessary to state what were his duties and responsibilities in the conduct of business of the company and how and in what manner he is responsible or liable."

Accordingly, it was held that in absence of such clear averments in respect of the respondent accused being in-charge of and responsible for conduct of business and no role having been specifically attributed to the respondent accused in commission of offence alleged, the accused cannot be compelled to face criminal trial.

(18). In the case of GHCL Employee Stock Option Trust Vs. Central Bureau of Investigation reported in 2013(4) SCC 505, It has been observed in paragraph 12 as follows--

"12. From a bare perusal of the complaint and the allegations made therein, we do not find in any of the paragraphs that the complainant has made specific allegations against Respondents 2 to 7. In Para 2 of the complaint, it is alleged that Respondents 2 to 6 are looking after the day-to-day affairs of the Company. With whom the complainant or its authorised representative interacted has also not been specified. Although in Para 11 of the complaint it is alleged that the complainant on numerous occasions met Accused 2 to 7 and requested to refund the amount, but again the complainant has not made specific allegation about the date of meeting and whether it was an individual meeting or collective meeting. Similarly, in Para 17 of the complaint, there is no allegation that a particular Director or Managing Director fabricated the debit note. In the entire complaint there are bald and vague allegations against Respondents 2 to 7."

(19). In the case of Sunil Bharti Mittal Vs. Central Bureau of Investigation reported in 2015(4) SCC 609, it has been held that--

"if the person or group of persons who control the affairs of the company commit an offence as well as they are "alter ego" of the company. In the present case, however, this principle is applied in an exactly reverse scenario. Here, company is the accused person and the Special Magistrate has observed in the impugned order that since the appellants represent the directing mind and will of each company, their state of mind is the state of mind of company and, therefore, on this premise, acts of the company are attributed and imputed to the appellants. It is difficult to accept it as the correct principle of law. As demonstrated hereinafter, this proposition would run contrary to the principle of vicarious liability detailing the circumstances under which a Director of a company can be held liable".

Observation as made in paragraph 42 is noteworthy in this context which is as follows--

"42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving means rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so."

(20). It is alleged that accused persons have sold large number of plots which were not in existence or not located on the land belonging to other owners or on government and they have wrongful gain. However, the applicant has not executed any sale deed during the tenure of his directorship in favour of the complainants. He did not sign the document nor he did endorse same as witness. The complaint does not make any averment so as to infer any fraudulent or dishonest inducement having been made by the petitioner pursuant to which the respondent parted with the money. Merely because certain receipts of sell consideration have been said to bear the signature of the present applicant, it cannot be said that the applicant has cheated the complainants. Therefore, no case for prosecution under Section 420 IPC is made out even prima facie.

(21). It is alleged that an amount of 1 crore was withdrawn by the applicant from the account of company by cheque No.988732 dated 22.12.07 of bank of Rajsthan however, the said amount was not withdrawn as a profit but initially the applicant has advanced amount of 1.37 crore from his personal amount to procure the land in the name of the company and thereafter he had taken back the aforesaid amount from the company and this fact is also corroborated by the order passed by Income Tax Appellate Tribunal Bench, Indore in IT (SS) A Nos. 182 to 184/ind/2013, ITA Hridaya Ranjan Pd. Verma and others vs. State of Bihar No. 538/ind/2013 dated 17.05.016 There is nothing on record to show that the bank accounts of the company are being still operated by the present applicant.

(22). Learned counsel for the petitioner has also relied upon the judgment of Hridaya Ranjan Pd. Verma and others vs. State of Bihar & another reported in 2000 Cri.L.J. 2983, whereby the Hon'ble Apex Court has held that if a criminal prosecution was to take place arising out of breach of contract then the dishonest intention was to be shown at the beginning of the transaction i.e. at the time of making the promise. The relevant portion of the judgment reads as under:

"16. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed.

Therefore it is the intention which is the gist of the offence. To prosecute a person of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.

(23). In the case of S.W. Palanitkar And Ors vs State Of Bihar And Anr, AIR 2001 SC 2960, it has been held that in order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be pre-sumed as an act leading to cheating. (24).Now, adverting to the allegation that, the applicant had affixed his signature on the application filed before the office of Town and Country Planning which also contained the signature of the farmers/ landlords, but these farmers have denied affixing their signatures over such application. In this regard, it is observed that, the prosecution cannot be permitted to hing the entire case against the present applicant on such application because the same farmers have later executed the sale deeds in favour of the purchasers of developed plot, further there is no iota of evidence available on record to support these allegations whereas, the charge-sheet has been already filed in the matter. It is also worth to note that in the charge-sheet , there is no allegation that the applicant is the person who forged the signatures of the farmers. These allegations is against the co-accused Nukul Kapasi and police has obtained his specimen signature for comparing the signature made in the application for taking approval of the TNC department.

(25). It is admitted that the applicant has not executed any sale deed in favour of the complainant. The term forgery used in under Section 467 is defined under Section 463 of I.P.C. Whoever makes any false document or part of a document, with intent to cause damage or injury to the public or to any person, or to support any claim or title or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery. Section 464 defining "making a false document" is extracted below:

"464. Making a false document.-A person is said to make a false document or false electronic record-

First.-Who dishonestly or fraudulently -

(a) makes, signs, seals or executes a document or part of a document;

(b) makes or transmits any electronic record or part of any electronic record;

(c) affixes any digital signature on any electronic record;

(d) makes any mark denoting the execution of a document or the authenticity of the digital signature, with the intention of causing it to be believed that such document or a part of document, electronic record or digital signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly.-Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with digital signature either by himself or by any other person, whether such person be living or dead at the time of such alternation; or

Thirdly.-Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his digital signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration.

Explanation 1 - A man's signature of his own name may amount to forgery.

Explanation 2 - The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

[Note: The words 'digital signature' wherever it occurs were substituted by the words 'electronic signature' by Amendment Act 10 of 2009].

(26). The condition precedent for an offence under sections 467, 468 and 471 is forgery. The condition precedent for forgery is making a false document . However, This case does not relate to execution of any false document by the present applicant. If any officer bearer of company executed sale deed and registered it and even if it is assumed that it did not belong to company, it cannot be said to have made and executed false documents, in collusion with the other accused. There is no allegation that the applicant dishonestly or fraudulently claiming that he is owner of the land executed a sale deed in favour of the complainant, therefore, prima facie no offence under Section 467, 468, 471 is not attracted against the applicant.

(27). More over in such indicated circumstances, the coordinate bench of this court in a case presented by Sonali Ajmera bearing M.Cr.C. No 4198/2017 had quashed the criminal proceeding by following the aforesaid analogy.

(28). So far as the submission of the learned Public Prosecutor regarding the fact that there is relationship between the co-accused persons who are absconding and the present applicant is concerned, suffice it to observe that the role of each individuals has to be clearly defined to fasten criminal liability. Further the submission that the progress of the trial being effected due to the pendency of such petition, it is to observe that a remedy provided by law cannot be shifted on mere apprehension that the same may have some effect on the progress of the trial.

(29). Learned counsel for the objector has relied upon the judgment passed by the Hon'ble Apex Court in the case of Prabhat Bhai Aahir and others Vs. State of Gujrat and another 2017 (9) SCC 641 in which it is held that where the case is not merely one involving a private dispute over a land transaction between two contesting parties, but involves allegations of extortion, forgery and fabrication of documents, utilization of fabricated documents to effectuate transfers of title before registering authorities and deprivation of complainant of his interest in land on basis of a fabricated power of attorney. If allegations in FIR are construed as they stand, it is evident that they implicate serious offences having a bearing on a vital societal interest in securing probity of titles to or interest in land. Such offences cannot be construed to be merely private or civil disputes but implicate societal interest in prosecuting serious crime. But in the present case prima facie no material available to connect the applicant with the present crime, therefore the aforesaid judgment is not applicable in the facts of the instant case.

(30). Upon commutative consideration of the above, it is apparent without adopting any process of reasoning or analogy that the present applicant was not the managing director of the company and had resigned from the company, way back in the year 2009 and also served himself from the affairs of the company, the prosecution cannot be permitted to make him stand the trial merely because he was one of the director of the company at some point of time. Consequently, criminal proceedings initiated in furtherance to FIR bearing crime No.13/2016 registered at Police Station Crime Branch Indore against the present applicant Nilesh Ajmera is hereby quashed. However, this order shall not influence the trial court so far as with respect to other co-accused persons.

